DOCKET

(90)

No. 88-605-AFX
Status: GRANTED

Title: William L. Webster, Attorney General of Missouri, et al., Appellants
v.
Reproductive Health Services, et al.

Docketed:
October 11, 1988

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for appellant: Boicourt,Michael L.

Counsel for appellee: Evans,Roger K., Susman,Frank, Connell,Colleen K.

Entry	Date	Note	Proceedings and Orders
1	Oct 11 1988	G	Statement as to jurisdiction filed.
3	Oct 26 1988		Order extending time to file response to jurisdictional statement until December 12, 1988.
115	Nov 3 1988	D	Application (A88-371) to rescind the extension of time granted appellees by the Clerk to file a motion to dismiss or affirm, submitted to Justice Blackmun.
116	Nov 7 1988		Application (A88-371) denied by Justice Blackmun.
6	Nov 10 1988		Brief amicus curiae of United States filed.
7	Nov 10 1988		Lodging received. (10 copies).
9	Dec 12 1988	X	Motion of appellees Reproductive Health Services, et al. to affirm filed.
8	Dec 14 1988		DISTRIBUTED. January 6, 1989
10	Dec 29 1988	X	Supplemental brief of appellees Reproductive Health Svcs., et al. filed.
11	Jan 9 1989		PROBABLE JURISDICTION NOTED.
			**********
12	Feb 13 1989	G	Motion of James Joseph Lynch, Jr., for leave to file a brief as amicus curiae filed.
28	Feb 22 1989		Brief amici curiae of Doctors for Life, et al. filed.
29	Feb 22 1989		Brief amicus curiae of Knights of Columbus filed.
30	Feb 22 1989	G	Motion of National Legal Foundation for leave to file a brief as amicus curiae filed.
36	Feb 22 1989		Brief amicus curiae of Right to Life Advocates, Inc. filed.
13	Feb 23 1989		Brief amicus curiae of Birthright, Inc. filed.
14	Feb 23 1989		Brief amici curiae of Lutheran Church-Missouri Synod, et al. filed.
15	Feb 23 1989		Brief amicus curiae of International Right to Life Federation filed.
16	Feb 23 1989		Brief amicus curiae of United States Catholic Conference filed.
17	Feb 23 1989		Brief amici curiae of Hon. Christopher H. Smith, et al. filed.
18	Feb 23 1989		Brief amicus curiae of Holy Orthodox Church filed.
19	Feb 23 1989		Brief amicus curiae of Catholic Health Association of the United Statee filed.
20	Feb 23 1989		Brief amici curiae of Rutherford Institute, et al. filed.
21	Feb 23 1989		Brief amicus curiae of American Life League, Inc. filed.
22	Feb 23 1989		Brief amicus curiae of 127 Members of the Missouri General Assembly filed.
23	Feb 23 1989		Brief amicus curiae of Missouri Catholic Conference filed.

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Entry	Date	Note	Proceedings and Orders
24	Feb 23 1989		Brief amici curiae of American Collegians for Life, Inc., et al. filed.
25	Feb 23 1989		Brief amici curiae of Center for Judicial Studies and Certain Members of Congress filed.
26	Feb 23 1989		Brief amici curiae of Association for Public Justice and The Value of Life Comm. filed.
27	Feb 23 1989		Brief amicus curiae of Larry Joyce filed.
31	Feb 23 1989		Brief amicus curiae of American Family Association, Inc. filed.
32	Feb 23 1989		Brief amici curiae of Feminists for Life of America, et al. filed.
33	Feb 23 1989		Brief amicus curiae of Certain State Legislators filed.
34	Feb 23 1989		Brief amici curiae of American Assn. of Prolife Obstetricians, et al. filed.
35	Feb 23 1989		Brief amicus curiae of United States filed.
37	Feb 23 1989		Joint appendix filed.
38	Feb 23 1989		Brief of appellants William Webster, et al. filed.
39	Feb 23 1989		Lodging received. (Box).
40	Feb 23 1989		Brief amici curiae of Focus on Family, et al. filed.
41	Feb 23 1989		Brief amicus curiae of Alabama Lawyers for Unborn Children, Inc.'s filed.
42	Feb 23 1989		Brief amici curiae of Covenant House and Good Counsel, Inc. filed.
43	Feb 23 1989		Brief amicus curiae of Christian Advocates Serving Evangelism filed.
44	Feb 23 1989	D	Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed.
45	Feb 23 1989	D	Motion of Alan Ernest for leave to represent children unborn and born alive filed.
46	Feb 23 1989		Brief amici curiae of Louisiana, et al. filed.
47	Feb 23 1989		Brief amici curiae of Certain Members of the General Assembly of PA filed.
48	Feb 23 1989		Brief amici curiae of Catholics United For Life, et al. filed.
49	Feb 23 1989		Brief amicus curiae of Southern Center For Law & Ethics filed.
50	Feb 23 1989		Brief amicus curiae of Catholic Lawyers Guild of the Archdiocese of Boston, Inc. filed.
51	Feb 23 1989		Brief amicus curiae of Free Speech Advocates filed.
53	Feb 23 1989		Brief amicus curiae of American Academy of Medical Ethics filed.
54	Feb 23 1989		Brief amicus curiae of National Right To Life Committee, Inc. filed.
60	Feb 23 1989		Brief amicus curiae of Southwest Life and Law Center, Inc. filed.
61	Feb 23 1989		Brief amicus curiae of New England Christian Action Council, Inc. filed.
62	Feb 23 1989		Brief amicus curiae of Human Life International filed.
63	Feb 23 1989		Brief amicus curiae of Edward Allen filed.
64	Feb 23 1989		Brief amicus curiae of Right to Life League of Southern California, Inc. filed.

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Entry	Date	Note	Proceedings and Orders
65	Feb 23 1989		Brief amici curiae of Austin Vaughn, et al. filed.
66	Feb 23 1989		Brief amicus curiae of Paul Marx filed.
75	Feb 23 1989		Brief amicus curiae of Bernard N. Nathanson, M.D. filed.
55	Feb 28 1989		Lodging received. (2 black binders).
52	Mar 1 1989		Record filed.
		*	Certified copy of C. A. proceedings received.
56	Mar 6 1989		Motion of James Joseph Lynch, Jr., for leave to file a brief as amicus curiae GRANTED.
57	Mar 6 1989		Motion of National Legal Foundation for leave to file a brief as amicus curiae GRANTED.
58	Mar 6 1989		Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED.
59	Mar 6 1989		Motion of Alan Ernest for leave to represent children unborn and born alive DENIED.
68	Mar 6 1989		Record filed.
		*	Certified copy of original transcript of record received.
69	Mar 8 1989		SET FOR ARGUMENT, APRIL 26, 1989. (1st CASE)
71	Mar 10 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
76	Mar 13 1989	D	Motion of Robert Packwood, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
117	Mar 13 1989	G	Application (A88-724) by American Medical Association, et al. to file a brief amicus curiae in excess of page limits, submitted to Justice Blackmun.
118	Mar 16 1989		Application (A88-724) granted by Justice Blackmun, allowing a maximum of 50 pages.
74	Mar 20 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
78	Mar 28 1989		Brief amici curiae of Natl. Council of Negro Women, Inc., et al. filed.
77	Mar 30 1989		Brief amicus curiae of Agudath Israel of America filed.
79	Mar 30 1989		Brief amicus curiae of Seventy-Seven Organizations Committed to Women's Equality filed.
80	Mar 30 1989		Brief amicus curiae of National Organization for Women filed.
81	Mar 30 1989		Brief amici curiae of American Library Assn., et al. filed.
82	Mar 30 1989		Brief amicus curiae of American Psychological Assn. filed.
83	Mar 30 1989		Brief amicus curiae of National Assn. of Public Hospitals filed.
85	Mar 30 1989		Lodging received.
86	Mar 30 1989		Brief amici curiae of Senator Howard Metzenbaum, et al.and *appendix filed.
87	Mar 30 1989		Brief amicus curiae of Committees on Civil Rights, Medicine and Law, et al. filed.
88	Mar 30 1989		Brief amicus curiae of 281 American Historians filed.
89	Mar 30 1989		Brief amici curiae of American Medical Assn., et al. filed.

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Entry	Date	Note	Proceedings and Orders
90	Mar 30 1989		Brief amicus curiae of Americans United For Separation of Church and State filed.
91	Mar 30 1989		Brief amicus curiae of National Family Planning and Reproductive Health Assn. filed.
92	Mar 30 1989		Brief amicus curiae of 167 Distinguished Scientists and Physicians filed.
93	Mar 30 1989		Brief amicus curiae of National Coalition Against Domestic Violence filed.
94	Mar 30 1989		Brief amicus curiae of Americans for Democratic Action, et al. filed.
95	Mar 30 1989		Brief amici curiae of Catholics for A Free Choice, et al. filed.
96	Mar 30 1989		Brief amici curiae of American Jewish Congress, et al. filed.
97	Mar 30 1989		Brief amici curiae of Center for Population Options, et al. filed.
98	Mar 30 1989		Brief amici curiae of American Public Health Association, et al. filed.
99	Mar 30 1989		Brief amici curiae of Attorneys General of California, et al. filed.
100	Mar 30 1989		Brief amicus curiae of Group of American Law Professors filed.
101	Mar 30 1989		Brief of appellees Reproductive Health Svcs., et al. filed.
102	Mar 30 1989		Brief amici curiae of National Association of Women Lawyers, et al. filed.
103	Mar 30 1989		Brief amici curiae of American Civil Liberties Union, et al. filed.
104	Mar 30 1989		Brief amici curiae of Canadian Women's Organizations filed.
105	Mar 30 1989		Brief amici curiae of Population-Environment Balance, et al. filed.
106	Mar 30 1989		Brief amici curiae of American Nurses' Association, et al. filed.
107	Mar 30 1989		Brief amici curiae of International Women's Health Organizations filed.
108	Mar 30 1989		Brief amicus curiae of Bioethicists For Privacy filed.
109	Mar 30 1989		Brief amici curiae of 608 State Legislators from 32 States filed.
110	Mar 30 1989		Brief amici curiae of Women Who Had Abortions and Friends filed.
112	Mar 30 1989	X	Brief amici curiae of California National Organization for Women, et al. filed.
113	Mar 30 1989	X	Brief amicus curiae of Association of Reproductive Health Professionals, et al. filed.
114	Mar 30 1989	G	Motion of Elizabeth Holtzman, District Attorney of Kings County, New York, for leave to join amici curiae brief of Massachusetts, et al. filed.
84	Apr 3 1989		Motion of Robert Packwood, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
111	Apr 3 1989		CIRCULATED.

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Entry	Date	Note	Proceedings and Orders
119	Apr 17 1989		Motion of Elizabeth Holtzman, District Attorney of Kings County, New York, for leave to join amici curiae brief of Massachusetts, et al. GRANTED.
120	Apr 17 1989	G	Application (A88-832) to extend the time to file a reply brief from April 19, 1989 to April 21, 1989 by Appellants, submitted to Justice Blackmun.
121	Apr 17 1989		Application (A88-832) granted by Justice Blackmun extending the time to file until April 21, 1989.
122	Apr 20 1989	X	Reply brief of appellants William Webster, et al. filed.
123	Apr 26 1989		ARGUED.

JURISDICTIONAL

STATEMENT

Supreme Court, U.S.
FILED
SEP 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-605

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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132 pp

QUESTIONS PRESENTED

1. Do physicians or other medical personnel have standing to contest the constitutionality of a state legislative preamble in an abortion statute?

2. Are legislative findings in the preamble to a state abortion bill that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being" facially unconstitutional? See RSMo 1.205.1(1), 1.205.1(2) (1986).

3. Where a statute requiring a determination of fetal viability when a physician "has reason to believe" that the fetus is "of twenty or more weeks gestational age" (LMP) has been held to be constitutional, is it facially unconstitutional to require that, in making this determination, the physician shall cause to be performed such "medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ."? See RSMo 188.029 (1986).

4. Is a state civil statute facially unconstitutional that makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." See RSMo 188.205 (1986).

5. Is a state civil statute facially unconstitutional that makes it "unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother"? See RSMo 188.210 (1986).

6. Is a state civil statute facially unconstitutional that makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not

necessary to save the life of the mother"? See RSMo 188.215 (1986).

7. Whether the *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed should be reconsidered and discarded in favor of a rational basis test.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the State of Missouri was a defendant in the district court and an appellant in the court of appeals; Planned Parenthood of Greater Kansas City, Howard I. Schwartz, M.D., Robert L. Blake, M.D., Carl C. Pearman, M.D., Carroll Metzger, and Mary L. Pemberton were plaintiffs in the district court and appellees in the court of appeals.

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Pa. Cons. Stat. Ann. tit. 18, 3215 (Purdon's 1983) 9
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K. Moore, *The Developing Human: Clinically Oriented Embryology* 1, 13 (3d ed. 1982) 18
W. Prosser, *Handbook on The Law of Torts*, 337 § 55 (4th ed. 1971) 17

OPINIONS BELOW

The June 23, 1987, final judgment of the district court is reported at 662 F. Supp. 407 (W.D. Mo. 1987), *superseding* 655 F. Supp. 1300 (W.D. Mo. 1987), and is reproduced at Appendix A, *infra*. The July 13, 1988, final judgment of the court of appeals is reported at 851 F.2d 1071 (8th Cir. 1988) and is reproduced at Appendix B, *infra*.

JURISDICTION

On July 13, 1988, the United States Court of Appeals for the Eighth Circuit entered a final judgment, holding unconstitutional on their face the Missouri statutes challenged. On September 29, 1988, appellants filed a notice of appeal from the court's final judgment of July 13, 1988 (App. B, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III, § 2.
U.S. Const., Amend. I.
U.S. Const., Amend. XIV, § 1.
§ 1.140, RSMo 1986.
§ 1.205, RSMo 1986.
§ 188.010, RSMo 1986.
§ 188.029, RSMo 1986.
§ 188.200, RSMo 1986.
§ 188.205, RSMo 1986.
§ 188.210, RSMo 1986.
§ 188.215, RSMo 1986.
§ 188.220, RSMo 1986.

The pertinent text of each constitutional provision and statute is set forth in Appendix D pursuant to Rule 15(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

On June 26, 1986, the Governor of the State of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596. The effective date was to be August 13, 1986.

Appellees, Reproductive Health Services, et al. (hereinafter "plaintiffs"), filed this facial challenge on July 14, 1986, pursuant to 42 U.S.C. § 1983 (1982) and 42 U.S.C. § 1988 (1982). Jurisdiction was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiffs challenged §§ 1.205.1 (1), 188.025, 188.029, 188.039, 188.205, 188.210, and 188.215, RSMo, as unconstitutional on their face because they allegedly violate the First, Fourth, Fifth, Ninth, and Fourteenth Amendments (Complaint, ¶¶ 2, 19, 30-35).

Plaintiffs alleged that plaintiff Howard Schwartz, M.D., was employed as a "public employee," as the term is defined in § 188.200(1), and was employed at Truman Medical Center, a public facility as that term is defined in § 188.200(2), that he "has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions," and that "[o]n said occasions, Dr. Schwartz is paid for such services by 'public funds' as that term is defined by § 188.200(3) of the Act." (Complaint, ¶ 7). Virtually identical allegations were made by all individual plaintiffs and incorporated into the district court's opinion (A10).

On October 24, 1986, the plaintiffs requested leave to file a first amended complaint by interlineation in order to challenge the constitutionality of § 1.205.1(2). The Court addressed the constitutionality of this section in its final Order.

The trial was conducted in the District Court on December 15 to December 18, 1986. Just prior to the trial

the District Court granted plaintiffs' motion in limine prohibiting the defendants from presenting any testimony or evidence regarding the constitutionality of §§ 1.205.1(1) or (2).

Medical experts for both plaintiffs and defendants concurred that it is standard medical practice to determine gestational age by ultrasound examination and fetal skull measures whenever it appears that a woman is at least twenty weeks pregnant. Witnesses agreed that no tests other than the ultrasound measurements provide information necessary to determine viability prior to thirty weeks gestational age.

The Missouri Attorney General maintained that the statutory language in §§ 188.205 through 188.215 which forbids public funds, public employees, and public facilities from being used to "encourage or counsel a woman to have an abortion not necessary to save her life" is designed only to forbid the funding and affirmative advocacy of conduct contrary to the State's policy of not promoting abortions not necessary to save the life of the mother. These statutes have no criminal penalties. They can be enforced by an injunctive action. See § 188.220, RSMo.

With regard to §§ 1.205.1(1) and (2), the court cited *Roe v. Wade*, 410 U.S. 113 (1973), and concluded that "a state may not adopt one theory of when life begins to justify abortion regulation" and that it was "inappropriate for this Court to conduct an inquiry into such a difficult and philosophical question." Accordingly, the court held that the legislature's pronouncement conflicts with the essence of *Roe v. Wade*, and that it is "invalid as a matter of law." (A15).

The district court invalidated § 188.025, which required that abortions at and after 16 weeks gestation (LMP) be performed in a hospital. The court concluded that the state did not carry its burden of proving that

the requirement was reasonably related to preserving maternal health (A30-A31).

The district court upheld as constitutional the first sentence of § 188.029 which requires a physician to determine whether a fetus is viable when the physician "has reason to believe" that the woman is twenty or more weeks pregnant (LMP), relying on *Colautti v. Franklin,* 439 U.S. 379 (1979), and *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976). However, the court proceeded to invalidate on its face the second sentence of § 188.029. The Court found that "tests to determine fetal weight are not only unreliable and inaccurate, but also add $125.00 to $250.00 to the cost of abortion." (A36). The court also found that "the only method to evaluate lung maturity is by amniocentesis, an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks gestation." (A36). Since the state failed to demonstrate that this provision was "narrowly tailored" to protect the state's interest in fetal life, the court severed the second sentence, and declared it invalid, relying on *Colautti.*

The district court also declared §§ 188.205, 188.210, and 188.215 unconstitutional. The court initially concluded that the "encouraging and counseling" language in each section "abut[s] upon First Amendment freedoms." (A45-A46). Applying the "appropriate rigid standard," the court held that all three sections were "sufficiently vague to render them unconstitutional," reasoning that this court "disapproved of similar terms such as 'counsel,' 'advocate' and 'advise' in the loyalty oath cases of the 1960's because the language was 'not susceptible of objective measurement' and threatened to restrict free speech" (A45-A46).

Besides holding that these three sections were void

for vagueness, the court also held that sections 188.205, 188.210, and 188.215 violated the right of privacy under the Fourteenth Amendment. First, the court held that the "encouraging and counseling" language in sections 188.205, 188.210, and 188.215 "impose[d] a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice." This would result in a situation where "[p]atients who fully pay for their services would be denied access to medical information . . . ." (A49-A50). Second, the court held that the prohibition in § 188.215 on the use of public facilities was unconstitutional under *Nyberg v. City of Virginia,* 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, 462 U.S. 1125 (1983), and that *Poelker v. Doe,* 432 U.S. 519 (1977), was not controlling "where there is no indication that 'public funds' would be expended." (A50-A51).

Finally, the court held that the "performing or assisting" language, as applied to public funds or public employees, violated "the Eighth Amendment rights of Missouri inmates to receive medical care," relying on *Monmouth County Correctional Institution Inmates v. Lanzaro,* 643 F. Supp. 1217 (D. N.J. 1986), aff'd in part, modified in part, 843 F.2d 326 (3d Cir. 1987), cert. denied, 108 S.Ct. 1731 (1988). However, the court rejected plaintiffs' claims that these provisions violated "academic freedom" by affecting instruction in abortion procedure at state medical schools.

On March 25, 1987, plaintiffs filed a motion to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. That motion was granted by the court on April 30, 1987. Defendants' notice of appeal was filed May 15, 1987.

Appellants appealed from all aspects of the district

court's decision, except from the injunction against § 188.039, relating to informed consent. No cross appeal was taken to the district court's approval of the first sentence of § 188.029.

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed the invalidation of § 188.025, regarding the performance of abortions in a hospital at sixteen weeks gestation. The court also affirmed the invalidation of the second sentence of § 188.029, regarding tests to determine viability, relying on this Court's statement in *Colautti v. Franklin*, 439 U.S. 379 (1979), that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." (A59). The court rejected the State's argument that the statute did not require any particular tests but only those "necessary medical examinations so as to determine viability," concluding that the statute "plainly declares that in determining viability, doctors must perform tests to find gestational age, and fetal weight and lung maturity." (A60, n. 5).

The court also affirmed the invalidation of the preamble findings of § 1.205.1. The court held that the plaintiffs had standing because the preamble did "exactly what the Supreme Court has declared it may not do: espouse a theory of when life begins as the foundation of the state's regulation of abortion" and "[n]o persons are better situated to attack the constitutionality of this endeavor than those parties who are directly affected by the state's abortion laws—laws that allegedly are based on and reflective of an impermissible theory of life." (A63). The court invalidated the preamble as "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." (A64).

The court also affirmed the invalidation of §§ 188.205 (in part), 188.210, and 188.215 because the "encourage or counsel" language was "void for vagueness and violative of the right to privacy." Even though these provisions carry no criminal penalties, the court held that a "strict scrutiny" standard applied in evaluating the vagueness challenge because the provisions "implicate[d] both first and fourteenth amendment rights of both physicians and their patients: the right to disseminate and receive information about abortion, and the right to knowingly and intelligently choose an abortion after consulting a physician." (A67). Rejecting the State's limiting construction that the "encouraging and counseling" language banned only "affirmative advocacy," the court concluded that the language was "much broader than the interpretation offered by the state" and was "vague because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." *Id.* Finally, the court agreed that the "encouraging and counseling" language of §§ 188.205, 188.210, and 188.215 constituted "an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (A70).

The appellate court affirmed the district court decision that the "performing or assisting" language of § 188.215 (public facilities) was contrary to *Nyberg v. City of Virginia, supra*. The court also decided that the "performing or assisting" language of § 188.210 (public employees) was equally invalid. However, the court of appeals reversed the lower court's order regarding the "performing or assisting" language of § 188.205 because it was inconsistent with *Poelker v. Doe, supra*. The court of appeals also rejected the district court's construction of the "performing or assisting" language and

stated that the Eighth Amendment was not implicated.

Overall, the court of appeals affirmed the permanent injunction against all provisions appealed, except for the "performing or assisting" language of § 188.205 which was severed and declared facially constitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Beginning with *Roe v. Wade*, 410 U.S. 113 (1973), this Court and the states have been engaged in a very difficult and complex venture in substantive due process. In *Roe*, this Court held that the states have an "important and legitimate interest in protecting the potentiality of human life . . . ." 410 U.S. at 162. Many states have quite legitimately acted upon this explicit constitutional authority, this invitation, to protect the life and health of unborn human life.

In *Roe*, this Court held that restrictive abortion statutes were not justified *merely because* the state "adopt[ed] one theory of life." 410 U.S. at 162. But it never intimated that states may not expound a philosophy about human life in seeking to protect human life. Plainly, all homicide statutes are based on a philosophy about human life. Yet, this court of appeals broadly expanded this dictum in *Roe* in an extreme and unsettling fashion to hold that states may not even make a finding in a legislative preamble that "the life of each human being begins at conception." Under this holding, state legislators are not allowed to even *think* that human life begins at conception. Judge Arnold, concurring in part and dissenting in part, took this error to its logical extreme by suggesting "that while a governmental declaration about when human life begins insofar as it is used to justify abortion is unconstitutional . . . I do not see why [it] should not be upheld insofar as it relates

to subjects other than abortion." (A83). He would have held the preamble "only invalid as applied to the subject of abortion."

Likewise, in *Roe v. Wade*, the Court described the constitutional right to abortion as the right of the woman in concert with her attending physician to decide to have an abortion. In *Maher v. Roe*, the Court characterized the right as "a constitutionally protected interest 'in making certain kinds of important decisions *free of governmental compulsion.*'" *Maher v. Roe*, 432 U.S. 464, 473 (1977) (emphasis added), quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 and nn. 24, 26 (1977). From this premise, this Court held in *Poelker v. Doe*, 432 U.S. 519 (1977), that a municipal government may ban the performance of abortions at *all* public hospitals, whether or not physicians were willing or able to provide abortions and whether or not patients were willing to pay for those services. Subsequently, this Court upheld federal and state restrictions on the use of public funds to pay for abortion services unless the life of the mother was threatened if the pregnancy was carried to term. *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

In reliance upon this Court's decisions in *Poelker*, *Harris* and *Maher*, other states, like Missouri, have determined to restrict public subsidization for abortion services. See, e.g., N.D. Cen. Code 14-02.3-02 through 14-02.3-04 (1981) ("performs, refers, or encourages abortion"); Pa. Cons. Stat. Ann. tit. 18, sec. 3215 (Purdon's 1983). The federal government has also recently sought to restrict funding for any abortion services, including abortion counseling, while funding childbirth. 53 Fed. Reg. 2922 (Feb. 2, 1988).

Disregarding the facts, language, and principles of *Poelker*, *Harris*, and *Maher*, the court of appeals relied instead on a 1982 Eighth Circuit decision which held that

a municipality *must* allow the performance of abortions in a public hospital if physicians are willing to perform such abortions and patients are willing to pay for such abortions, to hold unconstitutional on their face three Missouri provisions which prohibited the use of public funds, public facilities, or public employees to "perform or assist" or "encourage or counsel" a woman "to have an abortion not necessary to save her life." *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, *City of Virginia v. Nyberg*, 462 U.S. 1125 (1983).

The *Nyberg* decision has created considerable confusion in the law since 1983. It directly conflicts with the facts and language of *Poelker*. See *Nyberg v. City of Virginia*, 667 F.2d at 759-60 (Heaney, J., dissenting). It contributes to a recent trend by federal courts to ignore the holding of *Poelker* and, to force public hospitals and public programs to support abortion services. See, e.g., *Commonwealth of Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (permanently enjoining federal regulations at 53 Fed. Reg. 2922 (Feb. 2, 1988) that preclude federally funded projects from providing abortion counseling or referral); *Planned Parenthood v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (same); *Roe v. City of Owensboro and Daviess County*, No. 88-0097 (W.D. Ky. June 22, 1988) (temporary restraining order entered against enforcement of Ky. Rev. Stat. 311.800(1), prohibiting use of public facilities to perform abortions). See, contra, *New York v. Bowen*, No. 88-0701 (S.D. N.Y. June 30, 1988) (upholding regulations at 53 Fed. Reg. 2922); *County Executive of Prince George County v. Doe*, 300 Md. 445, 479 A.2d 352 (1984) (challenge to order prohibiting abortions in public hospitals did not raise substantial federal claim).

Likewise, this Court has held that the states have a compelling interest in preserving the life of viable unborn

children. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). In *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), this Court upheld Missouri's second physician requirement, stating that "the State's compelling interest in protecting a viable fetus justifies the second-physician requirement . . . ." *Id.* at 485, n. 7. The Court explained:

> Preserving the life of a viable fetus that is aborted may not often be possible, but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur.

462 U.S. at 485-86.

Section 188.029 provides a similar "safeguard" in protecting the life of a viable unborn child by ensuring that a physician makes a determination of viability and records his findings.

Other states, like Missouri, have sought to protect the life and health of the viable fetus to the fullest extent possible by requiring the physician to determine, according to his best medical judgment, whether the fetus is viable. See, e.g., Pa. Act No. 1988-31, sec. 3211(a), Pa. Legis. Serv. No. 2 (Purdon's May, 1988) (presumption at 19 weeks).

The decisions of the courts below provide compelling evidence that the lower federal courts do not apply normal principles of constitutional adjudication to abortion cases. The Eighth Circuit's analysis expands this Court's precedents in favor of abortion on demand, further contracts the State's compelling interest in the life of viable unborn children, and disregards this Court's holdings that abortion is a private matter which government need in no way subsidize. Consequently, if Missouri's carefully drafted statutory provisions are unconstitutional under *Roe v. Wade* and its progeny as the Court below maintains, appellants submit that *Roe v. Wade* should itself be reconsidered.

I. The Court of Appeals Erred in Applying an Erroneous Standard of Review in This Facial Challenge to the Constitutionality of Missouri's Abortion Statutes.

Because this is a facial challenge to the constitutionality of a state statute, plaintiffs were required to prove that the challenged provisions were unconstitutional in all of their applications or that the statute could not be constitutionally applied to any set of facts. The facial nature of this challenge was emphasized by the appellants in both the trial court and the court of appeals. Although the court of appeals, and Judge Arnold concurring, recognized the facial nature of the challenge, the court ignored the importance of this and completely failed to apply the proper standard of review.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. (Citations omitted.)

United States v. Salerno, ... U.S. ....., 107 S.Ct. 2095, 2100 (1987). Facial challenges have rarely been upheld outside the context of the First Amendment. This past term, in the context of a facial First Amendment challenge, this Court reiterated this standard:

> Although such facial challenges are sometimes permissible and often have been entertained, especially when speech protected by the First Amendment is at stake, to prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties." (Citations omitted.)

New York State Club Association, Inc. v. City of New York, ... U.S. ....., 108 S.Ct. 2225, 2233 (1988).

In the same manner, this Court rejected a facial First Amendment challenge to a municipal ban on residential picketing. *Frisby v. Schultz*, ... U.S. ....., 108 S.Ct. 2495 (1988). In so doing, the Court rejected contentions that the law was invalid because it did not specify how it would be applied in particular hypothetical circumstances. *Frisby*, 108 S.Ct. at 2504.

This Court rejected such a hypothetical attack in the context of abortion statutes in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). In *Ashcroft*, the Court upheld a Missouri statute requiring that a second physician be present during post-viable abortions because it "reasonably further[ed] the State's compelling interest" in preserving life. 462 U.S. at 483. The Court upheld this requirement even for abortions performed by the dilatation and evacuation (D&E) method when there was no possibility of fetal survival and rejected the application of a "narrowly drawn" standard for such legislation. *Id.* at 483, n. 7. Statutes designed to further compelling state interests need not be drafted so as to "accommodate every conceivable contingency." *Id.*

The court of appeals' failure here to apply a proper standard of review to the facial challenge leveled by the plaintiffs is not a discrete instance of error. Rather, it is an example of a pattern that has developed in the

federal courts' approach to abortion statutes.[1] Thus, the court of appeals' standard of review presents a substantial question.

II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being" Pursuant to a Public Policy of Protecting the Life and Health of Unborn Children to the Fullest Extent Possible in Tort, Criminal, Property, and Abortion Law.

The court below held that subsections 1.205.1(1) and (2), RSMo 1986, were invalid because they conflicted with *Roe v. Wade*, 410 U.S. 113, 162 (1973), wherein the United States Supreme Court declared that a state could not adopt one theory of when life begins to justify abortion regulation.

Initially, one must note that the two subsections declared invalid are preamble statements of fact and principle enacted in order to provide guidance in interpreting the operative language of § 1.205. Neither subsection does anything substantively.

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1. See, e.g., *Akron Center for Reproductive Health v. Rosen*, ... F.2d ..... (6th Cir., No. 86-3664, Aug. 12, 1988) (affirming permanent injunction in facial challenge to parental notice statute); *Planned Parenthood v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction entered in facial challenge to amendments to abortion statute passed in response to *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Harris*, No. 88-1159 (N.D. Ga., July 11, 1988) (*Harris II*) (entering preliminary injunction in facial challenge to amendments to parental notice law passed in response to previous invalidation, *Planned Parenthood v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987)), appeal docketed, No. ..... (11th Cir. .....); *Planned Parenthood v. Bowen*, 687 F. Supp. 1465 (D. Colo. 1988) (permanent injunction in facial challenge to federal regulations on public funding for abortion counseling, superseding 680 F. Supp. 1465 (D. Colo. 1988)); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (same).

It is well established in other circuit courts of appeal that "preambles to statutes do not impose substantive rights, duties or obligations." *National Wildlife Federation v. Marsh*, 721 F.2d 767 (11th Cir. 1983). See *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander v. HUD*, 555 F.2d 166, 171 (7th Cir. 1977). By declaring the Missouri General Assembly's findings to be in violation of the plaintiff class's right to privacy, the Court had to decide that the preamble *did something* which is directly contrary to decisions in other circuits that preambles have no operative effect. *Association of American Railroads v. Costle, supra.*

Other states, like Missouri, have sought to persuade citizens, through legislation, "that the unborn child is a human being from the time of conception." Ill. Rev. Stat. ch. 38, ¶ 81.21 (1987). *Cf.* Conn. Gen. Stat. Ann. 53-31a (1985); Neb. Rev. Stat. 28-325 (1985). The court of appeals' holding also conflicts in spirit with decisions of the Seventh Circuit, which has held that such a preamble cannot be the basis for striking provisions of a bill regulating abortion. *Charles v. Carey*, 627 F.2d 772, 778-79 (7th Cir. 1980); *Wynn v. Scott*, 449 F. Supp. 1302, 1314-15 & n. 9 (N.D. Ill. 1978) (3-judge court).

The substantive language of § 1.205, which was unchallenged, expands existing state tort, property, and criminal law protection for unborn children. Prior to the statute, Missouri law provided different degrees of protection for unborn children. This statute updates Missouri law in these areas and provides for consistent treatment of unborn children. However, § 1.205 specifically excludes abortion from its ambit by providing unborn children only those rights, privileges, and immunities permitted by "the Constitution of the United States and decisional interpretations thereof by the United

States Supreme Court." § 1.205.2, RSMo. The statute also specifically provides that it does not create any cause of action against pregnant women with respect to the care of their unborn children. Section 1.205.4, RSMo.

A. Legislative Findings Without Operative Effect Cannot Threaten Injury So As to Create a "Case or Controversy".

The statute was not intended to affect, and does not in any way affect, any woman's constitutional right to choose abortion over childbirth. It simply defines the point at which unborn children are entitled to the protections of Missouri law in circumstances other than those involved in abortion. The court's decision to strike the challenged preamble provisions of the statute does not diminish the statute's impact on state law.

Since § 1.205 cannot infringe upon any judicially established right of any plaintiff class member who desires to obtain an abortion or perform an abortion, the plaintiffs in this action lack standing to challenge any provision of § 1.205, RSMo. The doctrine of standing requires that a plaintiff allege personal injury fairly traceable to a defendant's alleged unlawful conduct. Without standing, a litigant cannot meet the Article III "case and controversy" requirement of federal judicial power. *Allen v. Wright*, 468 U.S. 737, 754-758 (1984). If a person cannot be injured by the operation of a statute, that person cannot allege a case in controversy such that a federal court can exercise its jurisdiction to declare the statute invalid. So long as *Roe v. Wade* and its progeny remain the law, § 1.205 does not affect any right of a woman to have an abortion or the conduct of her physician. Therefore, plaintiffs cannot meet the case and controversy requirements of Article III of the United States Constitution.

B. The Court of Appeals Erred in Invalidating in a Facial Challenge Legislative Findings Which Have No Substantive Effect on Abortion.

The court's decision on the merits was also incorrect both factually and legally, because (1) the Supreme Court has never placed any limitation on state legislative authority to determine when human life begins in a non-abortion context; and (2) since the statute is abortion-neutral, it is in no way inconsistent with *Roe v. Wade*.

State legislatures have always determined the point at which unborn children are entitled to the protections of state law. For example, most states provide children a cause of action in tort for prenatal injuries inflicted by a person other than the child's mother. See W. Prosser, *Handbook on The Law of Torts*, 337 § 55 (4th ed. 1971) ("when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick").

Many states also provide a cause of action to the parents for the wrongful death of their unborn children. For example, the Rhode Island Supreme Court held in *Presley v. Newport Hospital*, 117 R.I. 179, 365 A.2d 748 (1976) that the word "person" as used in the Rhode Island Wrongful Death Act includes unborn children. 117 R.I. at 188, 365 A.2d at 754. As recently as 1983, the Missouri Supreme Court held that the term "person" as used in Missouri's Wrongful Death Statute "includes the human fetus *en ventre sa mere*" stating that its conclusion was "supported by a strong positive trend among other jurisdictions holding that a fetus is a 'person,' 'minor' or 'minor child' within the meaning of their particular wrongful death statutes." *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. banc 1983).

Most states recognize in unborn children certain

rights under property law and many states provide criminal sanctions for the intentional or criminally negligent killing of an unborn child. For example, a number of states impose criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child. See, e.g., Cal. Penal Code § 187 (1970); Fla. Stat. Ann. § 782.09 (West Supp. 1983); Mich. Comp. Laws Ann. § 750-322 (West Supp. 1983). In fact, prior to the enactment of § 1.205, Missouri also had such a law. See Section 565.024.1(3), RSMo 1978 (amended by L. 1986, H.B. No. 1596, § A).

The foregoing examples demonstrate that the matters dealt with in Section 1.205 have long been recognized as within the proper purview of state regulation and proper subjects for legislative enactments. Moreover, it is clear that, as stated in § 1.205.1(2), "[u]nborn children have [and always have had] protectable interests in life, health and well being." In this respect, the Statute is merely a proper exercise of legislative authority which recognizes what is now and has long been a fact. Given the states' traditional role in this area, the challenged statutory provisions are entitled to a strong presumption of validity. *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983).

The General Assembly's findings have been based on what would seem to be indisputable biological and medical understanding that the life of every human being begins at conception. See, e.g., E. Blechschmidt, *The Beginning of Human Life* 16-17 (1977); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1, 13 (3d ed. 1982). The court's holding imposes on states' legislatures a philosophical nihilism that conflicts with modern medical understanding and practice. Even if medical authorities were "sharply divided," the court of appeals should have deferred to the legislature on this point of medical understanding. *Traynor v. Turnage*, 108 S.Ct. 1372, 1383 (1988).

The court below declared invalid provisions of Missouri law with no operative effect intended only to aid in the understanding of substantive provisions which were not challenged. If the substantive provisions of a statute fail to violate anyone's indviidual constitutional rights, the preamble of that statute cannot facially violate such rights.

Finally, if *Roe v. Wade* constitutes authority for the decision of the Eighth Circuit, then appellants submit that *Roe* should be carefully reviewed because its conclusions are inconsistent with the strong factual support for the findings and policy judgments which led to the adoption of the preamble provisions in question.

III. The States May Require a Physician Who Is About to Perform an Abortion to Make a Determination Whether the Unborn Child Is Viable, and in So Doing, to Cause to Be Performed Such Tests As Are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child.

The district court and court of appeals were correct in upholding the first sentence of section 188.029, which requires that before performing an abortion on a woman "he has reason to believe is carrying an unborn child of twenty or more weeks gestational age," the physician "shall first determine if the unborn child is viable . . . ." This holding was based on medical evidence by the plaintiffs' own witness, Dr. Maulik, and others, that showed that the twenty-week designation was reasonably related to viability because there may be a four-week or greater error in estimating gestational age.

Despite this conclusion, the court of appeals facially invalidated the second sentence of 188.029. The court below, relying on dictum in *Colautti v. Franklin*, 439 U.S. 379 (1978), that legislatures could not "proclaim one of the elements entering into the ascertainment of viability,"

concluded that "this is precisely what the Missouri legislature has attempted to proclaim." (A59). The court of appeals also adopted the findings of the district court that the lung maturity provision required the use of amniocentesis, which was expensive and not rationally related to the determination of viability at twenty weeks (A60, n. 5).

The court of appeals' reliance on *Colautti* is misplaced. *Colautti* dealt with a state statute which subjected a physician to potential criminal liability if he failed to use a certain procedure "when the fetus 'is viable' or when there is 'sufficient reason to believe that the fetus may be viable.'" 439 U.S. at 381. There the Court stated, "[b]ecause this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." *Id.* at 389. The court struck down this provision concluding that the term "may be viable" was unconstitutionally vague when stated in conjunction with the phrase "is viable" and because a "scienter requirement with respect to the finding of viability" was absent. *Id.* at 390.

Despite the fact that the court of appeals relied on the *Colautti* dictum that the legislature could not "proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant," that dictum is plainly not applicable to § 188.029. First, the General Assembly has not emphasized any "single factor," but instead has specified *three* factors—consistent with medical science—for which a finding must be made. Second, the legislature has not prejudged what those findings must be. Finally, the legislature has not made all or any of these factors "determinant" of viability. The

determination of viability is left to the medical judgment of the attending physician. Although three objective factors medically consistent with a determination of viability are identified, none of these factors is made determinant and the physician may consider any other factors. For these reasons, *Colautti* does not apply to strike § 188.029.

The court's invalidation of the second sentence of § 188.029 because of the fetal weight and lung maturity language is indicative of the pattern by federal courts to ignore normal principles of constitutional adjudication in a facial challenge. The court of appeals misread the plain language of 188.029 as a matter of law. The plain language provides that the physician shall cause to be performed such tests "as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ." The court read this language as saying that "doctors *must* perform tests to find gestational age, and fetal weight and lung maturity." (A60, n. 5). But there is a significant difference between a requirement to perform "tests to find" and one to perform "such . . . tests as are necessary to make a finding."

The court read into the plain language specific tests which are not required by the statute on its face. The statutory language allows for the distinct possibility that no finding can be made, or that a finding can be made by a single test, thereby making *unnecessary* the use of another test, or that a finding can be derived without an intrusive test. The statutory language provides flexibility that the court's jaundiced construction excises.

This allowance for flexibility in obtaining a finding is directly relevant to the "lung maturity" language. The district court and the court of appeals would read the plain language as specifically requiring amniocentesis,

despite the fact that the plain language specifies no tests, but refers more generally to "such . . . tests as are necessary to make a finding." The evidence provided by the medical experts at trial was that amniocentesis could make "no finding" of lung maturity at twenty weeks. Within the plain language of the statute, an amniocentesis test *cannot* be a "necessary" test to "make a finding" if it can provide no information.

The court of appeals' analysis was erroneous as a matter of law. It was based on a misreading of the plain language and it employed an erroneously high standard of review. The court thus erred in facially invalidating the second sentence of 188.029.

Even if the court of appeals was correct in invalidating the "lung maturity" language of 188.029, it erred by failing to sever the "lung maturity" language from 188.029 and upholding the remainder of the section. Such severance of a discrete "finding" would allow the implementation of the provisions for the other required findings. This would further the State's purpose in requiring that necessary findings be made and recorded by a physician determining viability. The court of appeals' decision presents a substantial federal question deserving review. On plenary consideration by this Court, that decision should be reversed.

IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.

A. The State Is Not Required to Subsidize With Public Funds the Exercise of a Constitutional Right.

The court below reversed the district court's decision

declaring § 188.205 to be unconstitutional in part on the basis of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1988), which held that a government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. Thus, the court felt bound to uphold the provision of § 188.205 which forbids the expenditure of public funds for the purpose of performing or assisting an abortion, not necessary to save the life of the mother. However, the court declared the remainder of § 188.205 to be facially invalid because the phrase "encouraging or counseling a woman to have an abortion not necessary to save her life" was unconstitutionally vague and because the ban constituted an obstacle to a woman's exercise of her right to privacy. Each rationale expressed by the court below should be reviewed because it is inconsistent with decisions rendered by this court regarding the subsidizing of constitutional rights and the standard for reviewing facial challenges to state statutes on the basis of vagueness.

As recently as March, 1988, this Court held that a government is not required to furnish funds in order for a person to maximize the exercise of a constitutional right. The court stated in *Lyng v. International Union, UAW*, ... U.S. ....., 108 S.Ct. 1184, 1190 (1988), that "'we have held in several contexts [including the first amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)." Clearly, with regard to § 188.205, the State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counseling services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe, Harris v. McRae*, and

Poelker v. Doe, 432 U.S. 519 (1977), conclusively establish that § 188.205, which is concerned with the expenditure of public funds, does not constitute an obstacle in violation of a woman's right to privacy.

B. The Phrase "Encouraging or Counseling a Woman to Have an Abortion . . ." Is Not Vague.

In its eagerness to declare the encouraging and counseling language used by the General Assembly of the State of Missouri to be vague, the court of appeals ignored not only the appropriate standard for review but also the "well-established principle that statutes will be interpreted to avoid constitutional difficulties" [citations omitted]. *Frisby v. Schultz*, ... U.S. ....., 108 S.Ct. 2495, 2501 (1988). In reaching its decision regarding the second half of § 188.205, the court below decided that the language implicated First Amendment rights, rejected a narrow reading and construction offered by the Missouri Attorney General's Office, and ignored the most accepted definitions of the words it declared vague. Finally, the court disregarded a conflicting decision rendered by the Ninth Circuit Court of Appeals which had concluded that the term "counseling for abortion procedures" was not so vague that a reasonable person would not understand what abortion-related activities the State of Arizona had legislatively decided not to fund. See *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983), appealed after remand 789 F.2d 1348 (9th Cir. 1986), aff'd, *Babbitt v. Planned Parenthood*, ... U.S. ....., 107 S.Ct. 391 (1986).

Initially, this Court should note that § 188.205 does not implicate the First Amendment rights of any person. Section 188.205 merely directs officials not to expend public funds under their control for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion not necessary to save her life. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties, and does not forbid anyone from discussing the subject of abortion.

When one examines the language declared vague by the district court and the court of appeals in its proper context, it is clear that the restriction is not so vague that a person of common intelligence must guess at its meaning. As the Attorney General of Missouri has stated in both the lower courts, the language in question should be construed as much narrower and specific than suggested by either of the courts' opinions. The restriction in § 188.205 is designed to prohibit the expenditure of public funds for the sole purpose of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life. The statute does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy. Section 188.205 refers to "encouraging" and "counseling" for a particular line of conduct. The purpose of the statute is one which may not be desired by the plaintiffs. There is nothing vague about it, and it provides a reasonable person fair notice of the conduct which will not be subsidized by the state.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), despite the fact that First Amendment freedoms were "implicated" in the context of a statute imposing criminal penalties, the court stated:

Condemned to the use of words, we can never expect

> mathematical certainty from our language. The words of the *Rockford* ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity" [cit. omit.], but we think it is clear what the ordinance as a whole prohibits.

Id. at 110. Likewise, in *Broderick v. Oklahoma*, 413 U.S. 601 (1973), First Amendment freedoms were "implicated" by an Oklahoma statute which restricted the political activity of public employees. Noting that "there may be disputes over the meaning of such terms in [section] 818 as 'partisan,' or 'take part in,' or 'affairs of' political parties," *id.* at 608, the court rejected the claim that these statutes were constitutionally vague. The court held that the statute was "not so vague that 'men of common intelligence must *necessarily* guess at its meaning.'" *Id.* at 607 (emphasis added). In doing so, it stated:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice of the public interest.

Id. at 608.

In declaring the latter half of § 188.205 to be unconstitutionally vague, the court below ignored and ridiculed the reasonable construction offered by the Missouri Attorney General as well as every other principle this Court has set forth regarding a facial determination of the constitutionality of a state statute. Thus, the court of appeals' decision presents a substantial federal question which this Court should review.

V. The State of Missouri Can Forbid Public Employees From Performing or Assisting an Abortion Not Necessary to Save the Life of the Mother and Declare It Unlawful for Any Public Facility to Be Used for the Purpose of Performing or Assisting an Abortion Not Necessary to Save the Life of the Mother.

A. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy Because This Court Has Previously Held in Poelker v. Doe, 432 U.S. 519 (1977) That a Public Hospital Need Not Provide Abortion Services.

In §§ 188.220 and 188.215, the State of Missouri provided in part that it should be unlawful for any public employee within the scope of his employment to perform or assist in abortion not necessary to save the life of the mother or for any public facility to be used for the purpose of performing or assisting in abortion not necessary to save the life of the mother. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia (Nyberg II)*, 667 F.2d 754 (8th Cir. 1982), a two-to-one decision of the Eighth Circuit Court of Appeals in which the court refused to remove an injunction previously issued against a municipality entered because of an ordinance prohibiting the performance of abortion in a community hospital. The Eighth Circuit's decision to rely upon *Nyberg* and declare the performing or assisting language in each of these two statutes to be unconstitutional is directly contrary to the superior authority of *Poelker v. Doe*, 432 U.S. 519 (1977), wherein this Court upheld a mayor's "directive," *id.* at 550, applicable to both of the two city-owned hospitals in St. Louis, *id.* at 519, which

totally "prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. The court also upheld a staffing practice whereby one city hospital used doctors only from "a Jesuit-operated institution opposed to abortion." *Id.*

The court of appeals' decision is also in conflict with several decisions of this Court which have broadly held that government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. In *Maher v. Roe*, 432 U.S. 464 (1977), this Court upheld a Connecticut administrative regulation which limited benefits for abortions "to those that are medically necessary," *id.* at 466, because it placed "no obstacle—absolute or otherwise—in the pregnant woman's path . . . she continues as before to be dependent on private sources for the service she desires." *Id.* at 474. It "imposed no restriction on access to abortions that was not already there" (i.e., the dependency on private sources). *Id.* The court held that the policy was constitutional, even if it made it "impossible" for a woman to have an abortion that was not "medically necessary." *Id.* at 466, 474.

Most recently, in *Harris v. McRae*, 448 U.S. 297 (1980), this Court upheld "the most restrictive version of the Hyde Amendment," *id.* at 325, n. 27, which withheld funds for abortion "except where the life of the mother would be endangered if the fetus were carried to term." *Id.* at 325, n. 27. The court viewed the Hyde Amendment as representing "a refusal to subsidize abortion." *Id.* at 317. It upheld the Hyde Amendment not on the narrow ground that it restricted "funding," but on the broader principle that it simply created no unconstitutional burden on the right to abortion because a woman who desires an abortion suffers no disadvantage from the amendment—she

continues as before to be dependent on private sources for the services she desires." *Id.* at 314. Citing *Maher*, the Court held that the most restrictive Hyde Amendment was constitutional even if it made it "impossible" for a woman to obtain an abortion in a case where "the life of the mother would [not] be endangered if the fetus were carried to term." *Id.* at 315-316, n. 27.

In applying these controlling precedents, the courts below erroneously limited their broad principle to mean merely that the government is not obligated to *fund* abortions. They found *Poelker* uncontrolling where no public funds would be expended. This is a clear misconstruction. The directive upheld in *Poelker* was not a narrow restriction on "funding" abortions but broadly prohibited "the *performance* of abortions in the city hospitals." 432 U.S. at 520 (emphasis added). As the dissent emphasized, the directive made no exceptions for "paid" abortions, for doctors who "would willingly perform them," or for small communities "where the public hospital is the only health care facility." *Id.* at 523-524 (Brennan, J., dissenting). The court did not require such exceptions, but broadly held that St. Louis could elect "as a policy choice, to provide *publicly financed hospital services* for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521 (emphasis added).

The district court's application of *Poelker* was particularly egregious because *Poelker* was an as-applied challenge, while plaintiffs' is merely a facial challenge. *Poelker*, rather than *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), cert. denied, 462 U.S. 1125 (1983), should control the result regarding the performing/assisting language in the statutes.

If the "encouraging or counseling" language of §§ 188.210 and 188.215 is unconstitutionally overbroad,

this language should have been severed from the "performing or assisting" language in each statute and the "performing or assisting" language should have been independently upheld. Federal courts are obligated to separate constitutional provisions from unconstitutional provisions in a statute "and to maintain the act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Missouri has a general severability clause in its statutes. § 1.140, RSMo 1986. The district court relied on this severability clause to sever and uphold the first sentence of § 188.029 and the court of appeals severed and upheld the first sentence of § 188.205. The court of appeals should have likewise severed and upheld the "performing or assisting" language of §§ 188.210 and 188.215.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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October 10, 1988

APPENDIX

APPENDIX A

REPRODUCTIVE HEALTH SERVICES, et al.,
Plaintiffs,
v.
William L. WEBSTER, et al.,
Defendants.

No. 86-4478-CV-C-5.

United States District Court,
W.D. Missouri, C.D.

March 17, 1987.
As Amended April 30, 1987.

Class action was brought seeking declaratory and injunctive relief, which challenged constitutionality of several sections of state act relating to regulation of abortion. The District Court, Scott O. Wright, Chief Judge, held that: (1) class certification of action was appropriate; (2) section of statute which stated that life of each human being began at conception and that unborn children have protectable interests in life, health and well being were invalid as matter of law; (3) section which required all 16-week abortions to be performed in

hospital did not reasonably relate to state's interest in maternal health, and thus was invalid; (4) state could not dictate either tests or findings which enter into physician's decision as to whether or not fetus is viable; and (5) section which prohibited expenditure of public funds, actions of public employees, and use of public facilities for purpose of performing or assisting abortions and encouraging or counseling woman to have abortions, if unnecessary to save her life, was invalid.

Ordered accordingly.

Superseding 655 F.Supp. 1300.

1. Federal Civil Procedure (Key) 181

Numerosity requirement for certification of class action was met in challenge to state's abortion statutes, as number of health care providers, facilities, and pregnant females in state made trying individual actions inconvenient. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; V.A.M.S. §§ 1.205, subd. 1(1, 2), 188.025, 188.029, 188.039, 188.205, 188.210, 188.215.

2. Federal Civil Procedure (Key) 181

Claims of representative parties in challenge to state's abortion statutes were typical of those of class, sufficient for certification of class action, in that statutes would prohibit or mandate certain actions of all health professionals who were public employees dealing with pregnant women, and all women seeking abortions after specified gestational period would be confronted with other provisions of the statute. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; V.A.M.S. §§ 1.205, subd. 1(1, 2), 188.025, 188.029, 188.039, 188.205, 188.210, 188.215.

3. Federal Civil Procedure (Key) 181

Health care providers had standing to bring class action to challenge portions of abortion statutes, despite fact that plaintiffs failed to name any pregnant females seeking abortion services or counseling in action, in that plaintiff physicians had standing to assert rights of his or her patients, including those seeking abortions. Fed. Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.; V.A.M.S. §§ 1.205, subd. 1(1, 2), 188.025, 188.029, 188.039, 188.205, 188.210, 188.215.

4. Federal Civil Procedure (Key) 181

In cases which involve sensitive and highly personal matters, such as abortion, reasons for certification of class action become more substantial; class action not only assures anonymity and prevents chilling effect associated with public exposure concerning abortions, but also provides fluid membership which guarantees case or controversy. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

5. Federal Civil Procedure (Key) 181

In civil rights cases, court is not required to consider necessity of class action certification; thus, class certification may be granted even though only relief sought is declaratory and injunctive in nature. Fed.Rules Civ. Proc.Rules 23(a), (b)(2, 3), 23 note, 28 U.S.C.A.

6. Federal Civil Procedure (Key) 173

While district court generally should not hold evidentiary hearing before certifying class, this is not man-

datory where court has sufficient material before it to determine nature of allegations and whether requirements of class certification rule have been met. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

7. Abortion and Birth Control (Key) 1.30

Section of state abortion statute which stated that life of each human being began at conception and that unborn children had protectable interest in life, health, and well being was unconstitutional as a matter of law. V.A.M.S. § 1.205, subd. 1(1, 2); U.S.C.A. Const.Amend. 14.

8. Abortion and Birth Control (Key) 1.30

Statutory requirement that physicians certify in writing that he or she has apprised pregnant woman of certain facts before abortion could be performed was invalid as matter of law, in that statute did not permit attending physician to delegate to another qualified individual responsibility to convey information needed for informed consent. V.A.M.S. § 188.039.

9. Abortion and Birth Control (Key) 1.30

Constitutional Law (Key) 274(5)

Statute which required, without exception, physician to inform patient of pregnancy status prior to abortion constituted impermissible intrusion into privacy of doctor-patient relationship, which deprived woman seeking abortion of right to consult with physician and rely on his discretion and professional judgment in violation of Fourteenth Amendment. V.A.M.S. § 188.039; U.S.C.A. Const. Amend. 14.

10. Statutes (Key) 64(2)

Entire statute requiring physicians to impart specific information to pregnant women who sought abortions was invalid as a unit, in that provisions were inextricably woven together such that valid provisions standing alone were incomplete and did not accurately reflect legislative intent. V.A.M.S. §§ 1.140, 188.039; U.S.C.A. Const. Amend. 14.

11. Abortion and Birth Control (Key) 1.30

In attempt to defend constitutionality of challenged statute which required that all post 16-week abortions be performed only in hospital, state must demonstrate that regulations were legitimately related to objective state sought to accomplish, and must make reasonable effort to limit regulation to that specific time during and after second trimester when health interest would be furthered; state has burden of proving health justification. V.A.M.S. § 188.025.

12. Abortion and Birth Control (Key) 1.30

Statute which required that all abortions performed after 16 weeks gestation be performed in hospitals was invalid in that statute significantly impacted on woman's access to abortion, and state failed to prove that hospitalization requirement was reasonably related to its interest in maternal health. V.A.M.S. § 188.025.

13. Abortion and Birth Control (Key) .50

State's interest in potentiality of human life becomes compelling only at viability, which is point at which fetus has capability of meaningful life outside woman's body;

at this point, state may regulate or even proscribe abortions, except where necessary to preserve life or health of woman seeking abortion, but state may only regulate in such context if it narrowly tailors its regulations to precise state interest at stake. U.S.C.A. Const.Amend. 14.

14. Abortion and Birth Control (Key) 1.30

State legislature did not impermissibly usurp physician's function in determining whether particular fetus is viable by obligating physician to exercise that degree of skill and care commonly used by ordinarily skillful, careful and prudent physician engaged in similar practice in making such determination, at point in pregnancy when reasonable possibility exists that fetus might be viable. V.A.M.S. § 188.029.

15. Abortion and Birth Control (Key) 1.30

Statute which would impose criminal liability against physician for failure to use and exercise that degree of care, skill, and proficiency commonly exercised by ordinary skillful, careful, and prudent physician engaged in similar practice under same or similar circumstances in determining whether fetus was viable or woman was at least 20 weeks pregnant was neither vague nor otherwise unconstitutional, in that physician's good faith assessment would be conclusive defense and state would be required to prove culpability for each element of statute. V.A.M.S. § 188.029.

16. Abortion and Birth Control (Key) 1.30

Statutes (Key) 64(2)

Portion of abortion statute which required physicians to perform certain tests and make certain findings re-

garding gestational age and fetal viability constituted impermissible legislative intrusion upon matter of medical skill and judgment and thus was invalid; however, remainder of statute which was not unconstitutional could stand after unconstitutional language was stricken. V.A.M.S. §§ 1.140, 188.029.

17. Constitutional Law (Key) 90.1(1)

First Amendment freedom of expression is clearly involved where statute places restriction on encouraging or counseling women to have abortions; consequently, strict judicial scrutiny is warranted in evaluating vagueness challenge to such statute.

18. Abortion and Birth Control (Key) 1.30

Statutes which prohibited facilities which used public funds or employed public employees from performing, assisting, encouraging, or counseling women to have abortions were sufficiently vague so as to render them unconstitutional. V.A.M.S. §§ 188.205, 188.210, 188.215; U.S.C.A. Const.Amend. 1.

19. Constitutional Law (Key) 251.4

If men of common intelligence must speculate on statute's meaning and differ as to its application, then law is so vague that it violates due process. U.S.C.A. Const.Amend. 14.

20. Abortion and Birth Control (Key) 1.30

Constitutional Law (Key) 90.1(1)

Statutes which prohibited facilities which received public funds or employed public employees from encouraging and counseling women regarding abortions con-

stituted impermissible prohibitions on speech which imposed significant barrier to woman's right to consult with her physician and exercise her freedom of choice, and thus was unconstitutional. V.A.M.S. §§ 188.205, 188.210, 188.215; U.S.C.A. Const.Amends. 1, 14.

21. Abortion and Birth Control (Key) 1.30

Statutes which made it unlawful for any public facility to be used for performing or assisting or encouraging or counseling women to have abortions was unconstitutional, where no public expenditure was involved in provision of abortion services which were provided only to paying patients. V.A.M.S. § 188.215.

22. Criminal Law (Key) 1213.10(3)

Statute which prohibited public facilities from assisting women in obtaining abortions violated prisoners' Eighth Amendment rights, where prisoners would pay for abortion procedures but statute would make it unlawful for state employees to assist with arranging for transportation of inmates from correctional facility to clinic. V.A.M.S. § 188.215; U.S.C.A. Const.Amend. 8.

23. Abortion and Birth Control (Key) 1.30

Constitutional Law (Key) 85

Abortion statutes which made it unlawful for public facilities and public employees to counsel or assist women to have abortions when their lives were not in danger, did not impermissibly impinge upon academic freedom, as there was conflicting evidence presented at trial as to necessity of providing clinical instruction in abortion procedures in order for medical curriculum to be complete. V.A.M.S. § 188.215; U.S.C.A. Const.Amend. 1.

Frank Susman, Thomas M. Blumenthal, Susman, Schermer, Rimmel & Parker, St. Louis, Mo., Roger K. Evans, Planned Parenthood Federation of America, New York City, for plaintiffs.

Michael Boicourt, Jerry E. Short, William L. Webster, Office of Atty. Gen., Jefferson City, Mo., for defendants.

Andrew F. Puzder, St. Louis, Mo., for amicus curiae.

ORDER

SCOTT O. WRIGHT, Chief Judge.

This is a class action for declaratory and injunctive relief in which plaintiffs challenge the constitutionality of several sections of the 1986 Missouri act relating to the regulation of abortions ("the Act").[1] This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and § 1343(3).

The named plaintiffs include Reproductive Health Services, a not-for-profit Missouri corporation operating an outpatient clinic in St. Louis, Missouri, which offers gynecological medical services to the public, including abortion services up to 22 weeks "gestational age."[2]

1. Missouri Senate Committee Substitute for House Bill No. 1596, 83rd General assembly, 2nd Reg.Sess. (1986).

2. The term "gestational age" as used in this opinion and defined by Mo.Rev.Stat. § 188.015(4) refers to the length of pregnancy as measured from the first day of the woman's last menstrual period (LMP). This is approximately 2 weeks greater than fetal age.

The L.M.P. concept results in a 40-week gestational period. The trimester system by L.M.P. would be divided as follows:

1st trimester—0-13⅓ weeks;

2nd trimester—13⅓-26⅔ weeks;

3rd trimester—26⅔-40 weeks.

Planned Parenthood of Kansas City is a not-for-profit Missouri corporation which provides pregnancy-related counseling and services, including abortions up to 14 weeks gestational age.

Plaintiff physicians are Howard I. Schwartz, M.D., Robert L. Blake, Jr., M.D., and Carl C. Pearman, M.D. These physicians are licensed to practice medicine in the State of Missouri and are associated with the University of Missouri Schools of Medicine, public facilities as defined in § 1(2) of the Act.[3] As such, they are "public employees" as defined in § 1(1), and are paid for the services they render by "public funds" as defined by § 1(3) of the Act. In the scope of that employment, these plaintiffs are consulted by pregnant female patients and, where medically indicated, have occasion to encourage or counsel such women to terminate their pregnancies. As part of their medical practice, Drs. Schwartz and Pearman also perform or assist with abortions, although not necessary to actually save their patients' lives.

Plaintiffs Carroll Metzger, R.N.C., C.M.A., and Mary L. Pemberton, B.S.W., are other health care providers, a registered nurse and social worker, respectively. Both are licensed in Missouri and employed at Truman Medical Center in Kansas City, Missouri, a "public facility." Both are "public employees" who, within the capacity of their employment, occasionally encourage or counsel certain patients to have abortions, even though the pregnancy is not life-threatening. Their services are paid for by "public funds."

These named plaintiffs bring this case on their own behalf and also as representatives of the entire class consisting of facilities, Missouri licensed physicians, or other health care professionals offering abortion counseling and services, and pregnant females.

3. § 1 of the Act is codified at Mo.Rev.Stat. § 188.200.

Defendant William L. Webster is Attorney General of the State of Missouri. The State of Missouri has waived its 11th Amendment immunity from suit in federal court for this action only.

The Act was passed by the Missouri General Assembly on April 23, 1986, signed into law by Governor Ashcroft on June 26, 1986, and was to become effective on August 13, 1986. This action was filed on July 14, 1986. On July 31, 1986, this Court temporarily restrained enforcement of §§ 1.205.1(1), 188.025, 188.029, 188.039, 2, 3, and 4 of the Act. A full trial on the merits was heard on December 15-18, 1986.

I. Class Certification

Prior to trial, the Court certified the plaintiff class pursuant to Rule 23 of the Federal Rues of Civil Procedure, after concluding that all prerequisites set forth in Rule 23(a) had been met.[4]

[1] In evaluating whether the numerosity requirement is met, the Court considers the number of persons in a proposed class, the nature of the action and the in-

4. Rule 23(a) sets out the prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

convenience of trying individual suits. The Court finds that the number of health care providers, facilities and pregnant females in the State is sufficiently numerous. No arbitrary rules regarding the necessary size of classes have been established. *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559 (8th Cir.1982).

The commonality requisite set forth in Rule 23(a) does not demand that every question of law or fact be common to every member of the class. *Id.* at 561. Rather, the issues are sufficiently common "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Id.*

[2] Similarly, the claims of the representative parties are typical of those of the class if they emanate from the same legal theory, remedial theory or offense" as those they represent. *U.S. Fidelity & Guaranty v. Lord*, 585 F.2d 860, 870 (8th Cir.1978). Here, the necessary commonality and typicality exist where the statute would prohibit or mandate certain actions of all health professionals who are public employees dealing with pregnant women. Additionally, all women seeking abortions after a specified gestational period would be confronted with other provisions of the Act.

[3] The fourth component of Rule 23(a) focuses on whether the class representatives have common interests with the class members and would vigorously prosecute the interests of the class through qualified counsel. *Paxton*, 688 F.2d at 562-63. Here, there are no apparent conflicts with the interests of the named plaintiffs and the rest of the class. Plaintiffs' counsel is well-established in this genre of litigation. However,

in opposing class certification, the defendant contends that the failure to name as plaintiff a pregnant female seeking abortion services or counseling renders the proposed class description broader than the named plaintiffs' interest. This argument must fail. It is clear that a plaintiff physician has standing to assert the rights of his/her patients, including those seeking abortions. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 2873-76, 49 L.Ed.2d 826 (1976).

[4] Further, this is the type of case appropriate for a 23(b)(2) class since the defendant has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief would be the appropriate remedy.[5] In cases which involve sensitive and highly personal matters, the reasons for certification become more substantial. A class action not only assures anonymity and prevents the chilling effect associated with public exposure concerning abortions, but also provides a fluid membership which guarantees a case or controversy. *Singleton*, 428 U.S. at 117, 96 S.Ct. at 2875.

[5] The Court disagrees with the defendant's argument that class certification should be denied where the only relief sought is declaratory and injunctive in nature and would automatically inure to the benefit of those similarly situated with the plaintiff. There is no language in Rule 23(b)(2), as there is in Rule 23(b)(3),

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5. **Rule 23(b)(2) provides:**

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

that requires the Court to consider the *necessity* for a class action. Rule 23(b)(2) was specifically designed to allow for the class action mechanism in civil rights cases. *See* Advisory Committee's Note to 1966 Amendment to Rule 23, 39 F.R.D. 98, 102 (1966). Accordingly, the requirements of the rule are given a liberal construction in civil rights suits. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir.1980). If the requirements of Rule 23(a) are met, a district court's discretion to deny certification on the basis of Rule 23(b)(2) is limited.

[6] While a district court generally should hold an evidentiary hearing before certifying a class, this is not mandatory where the Court has sufficient material before it to determine the nature of the allegations and whether the requirements of Rule 23(a) have been met. *See Walker v. World Tire Corp., Inc.*, 563 F.2d 918, 921 (8th Cir.1977). Here, in the interest of judicial economy and considering the nature of the case, the Court determined that the class certification was proper on the basis of pleadings, affidavits and the law.

II. § 1.205 When Human Life Begins

Section 1.205.1 provides in part:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being.

[7] Prior to trial, the Court granted plaintiff's motion in limine to exclude any evidence relating to this provision. In *Roe v. Wade*, 410 U.S. 113, 162, 93 S.Ct. 705, 731, 35 L.Ed.2d 147 (1973), the United States Supreme Court declared that a state may not adopt one theory of when life begins to justify abortion regulation. The general principles laid down in *Roe*, reaffirmed in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), and *Thornburgh v. American College of Obstetricians,* ..... U.S. ....., 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), remain true today. It is inappropriate for this Court to conduct an inquiry into such a difficult and philosophical question:

> "When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus [when life begins] the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

Roe, 410 U.S. at 158, 93 S.Ct. at 729.

Similarly, "the word 'person', as used in the Fourteenth Amendment does not include the unborn." *Id.*

This legislative pronouncement by the Missouri General Assembly clearly conflicts with the essence of *Roe v. Wade*. Consequently, §§ 1.205.1(1) and (2) are invalid as a matter of law.

III. Summary Judgment

Prior to trial, the plaintiffs moved for summary judgment, urging that Mo.Rev.Stat. §§ 188.025, 188.029, 188.039, 2, 3, and 4 be declared unconstitutional as a matter of law. The standard for determining the propriety of summary judgment under Rule 56(a) is well-settled. Summary judgment should be entered only when it is clear

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The Supreme Court has recently acknowledged the power of district courts to enter summary judgments *sua sponte*. *Celotex Corp. v. Catrett*, ... U.S. ....., 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

In making this determination, the evidence submitted to the Court "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir.1984). Moreover, the moving party must demonstrate its right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances. *Keys v. Lutheran Family and Children's Services of Missouri*, 668 F.2d 356 (8th Cir.1981). "[E]ven if the district court 'is convinced that the moving party is entitled to [summary] judgment, the exercise of sound judicial discretion may dictate that the motion should be *denied*, and the case fully developed.'" *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir.1985), *quoting McLain v. Meier*, 612 F.2d 349, 356 (8th Cir.1979).

Employing the above standard, the Court indicated at the pretrial conference that Section 188.039.1 was facially unconstitutional as a matter of law, and that plaintiff's motion for summary judgment would be sustained on this section. However, the Court determined that a factual inquiry was necessary, thus precluding summary judgment on the constitutionality of §§ 188.025, 188.029, 2, 3, and 4.

IV. § 188.039—"Informed Consent"

Mo.Rev.Stat. § 188.039[6] requires that "the attending physician" certify in writing that he or she has apprised the pregnant woman of certain facts before an abortion can be performed. The required information includes a statement "whether she is or is not pregnant" according to the best medical judgment of that physician.

The constitutionality of the requirement that "the attending physician" impart the information was settled in *City of Akron*, 462 U.S. 416, 103 S.Ct. at 2501-2502.

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6. **Mo.Rev.Stat. § 188.039 provides:**

188.039. Consent, form, content—coercion prohibited—woman to be informed of certain facts, when

1. No physician shall perform an abortion unless, prior to such abortion, the physician certifies in writing that the woman gave her informed consent, freely and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section and shall further certify in writing the pregnant woman's age based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman unless she has signed a consent form that shall be supplied by the state department of health acknowledging that she has been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician whether she is or is not pregnant;

(2) The particular risks associated with the abortion technique to be used;

(3) Alternatives to abortion shall be given by the attending physician.

3. The physician may inform the women of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

In *City of Akron,* the Supreme Court invalidated a similar provision, holding that there was no state interest in requiring that "the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request." *Id.,* 462 U.S. at 448, 103 S.Ct. at 2502.

[8] This Court is unaware of any limiting construction of this statute by Missouri courts. Hence, the Court cannot assume, as defendant suggests, that the Missouri General Assembly possesses a familiarity with hospital practices that renders the clear language of § 188.039 capable of a much broader interpretation.[7] The statute simply does not permit the attending physician to delegate to another qualified individual the responsibility to convey the information needed for informed consent. Thus, this provision is invalid as a matter of law.

Plaintiffs' remaining objection to Section 188.039 concerns the requirement that, prior to having an abortion performed, the woman must be informed "according to the best medical judgment of her attending physician *whether she is or is not pregnant.*"

This regulation also must be considered in light of *City of Akron,* in which the Supreme Court stated that

> "[T]he validity of an informed consent requirement rests on the State's interest in protecting the health of the pregnant woman. . . . (citation omitted)
>
> [T]hus the state legitimately may seek to ensure that it has been made 'in the light of all attendant circumstances—*psychological and emotional as well as physical—that might be relevant to the well-being of the patient.*'" (quoting *Colautti v. Franklin,* 439 U.S. 379, 394, 99 S.Ct. 675, 685 [58 L.Ed.2d 596] (1979).) This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains *primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances.*" (Emphasis added). *City of Akron,* 462 U.S. at 443, 103 S.Ct. at 2499.

7. The Court also notes that there is no procedure to certify questions for prompt resolution to the Missouri Supreme Court. *See* MO. CONSTITUTION, art. v. (Missouri Supreme Court may exercise appellate jurisdiction only).

In *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft,* 655 F.2d 848 (8th Cir.1981), the Eighth Circuit held that the predecessor to § 188.039 was unconstitutional. This former provision required as part of informed consent that a pregnant woman be told "[t]hat according to the best medical judgment of her attending physician *she is* pregnant." The *Ashcroft* court found that the statutory language mandating an affirmation of pregnancy effectively proscribed menstrual extractions, an early and safe abortion procedure normally performed prior to a positive pregnancy test,[8] because it would be impossible to be certain that the woman is pregnant. Such prohibition was unconstitutional.

Defendants claim that the amended version cures the constitutional defect because it does not forbid menstrual

8. The District Court in *Ashcroft* noted that there was no record of existing reliable tests at the very "early stage" of pregnancy. *Planned Parenthood Ass'n of Kansas City v. Ashcroft,* 483 F.Supp. 679, 698, n. 37 (W.D.Mo.1980). Although the exact parameters of the "early stage" are unclear, the court implied the time to be approximately up to ten days after the menstrual period was due. *Id.,* at 697, n. 36.

extractions so long as the woman is informed of the physician's evaluation of whether she is or is not pregnant. In addition, the record reveals that pregnancy tests are now available which can accurately detect pregnancy as early as six days after implantation, or three days before the first missed menstrual period.[9] Hence, defendants also assert that advances in medical technology render the factual basis for the *Ashcroft* decision obsolete. The Court accepts this narrow interpretation of the *Ashcroft* holding and rejects plaintiff's counterargument that § 188.039 is essentially identical to the former statute and, thus, unconstitutional under principles of *res judicata*.

It is also clear that there are situations where the physician cannot, with certainty, determine whether or not a woman is pregnant.[10] The statute necessitates disclosure of the physicians "best medical judgment" of her pregnancy status. It is broad enough to encompass a diagnosis that the physician does not *know* whether a woman is pregnant.

However, this provision is constitutionally flawed in other respects. The statute mandates what the physician must present to each and every patient, regardless of the medical advisability of presenting such information in any particular case. While plaintiffs do not object as a *general matter* to telling a woman whether she is pregnant or not,

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9. Testimony of Dr. Daniel J. Martin; Robert A. Hatcher, M.D., et al., CONTRACEPTIVE TECHNOLOGY 1986-1987 2547 (1986).

10. A woman in the process of spontaneous abortion (miscarriage) may have a positive pregnancy test but the physician cannot determine whether or not the embryo has been expelled. Testimony of Dr. Robert Crist. Further, even the most current of the readily available pregnancy tests are not accurate until 6 days after implantation. Testimony of Dr. Daniel Martin; Hatcher, CONTRACEPTIVE TECHNOLOGY 1986-87 at 257.

it is clear that some physicians believe that it is in the best health interest of many patients seeking abortions not to be told definite results of pregnancy tests.[11] These are women who suspect they are pregnant and choose to abort, but cannot emotionally deal with the specific issue of being pregnant. Some physicians, in the exercise of their best medical judgment, would choose to respect the woman's evaluation of her emotional status and not foist on her specific information which she does not wish to hear.

[9] Physicians disagree on how to approach patients seeking abortions. The physician's or other health professional's personal philosophy on abortions will certainly influence that approach.[12] It is not the province of this Court to approve one view or another. This Court must uphold the principles enunciated in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and its progeny: that the right to privacy, the conception of personal liberty, encompasses a woman's right to terminate her pregnancy. From the testimony at trial, the Court concludes that the rule which, *without exception,* requires a physician to inform a patient of her pregnancy status constitutes an impermissible intrusion into the privacy of the doctor-patient relationship. The requirement deprives the woman seeking an abortion of the right to consult with her physician

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11. Testimony of Dr. Robert Crist. Dr. Daniel Martin testified to the contrary.

12. Plaintiffs' witnesses, Dr. Crist, Dr. Warren Hern, and Ms. Judith Widdicombe, R.N., are members of the National Abortion Federation, which seeks to "improve access to safe abortion services for women." Testimony of Dr. Hern.

Defendants' witnesses, Dr. Daniel Martin and Dr. William Keenan, are members of Missouri Citizens for Life, an anti-abortion organization. Dr. Keenan also admitted that for the past two years he has been a signatory to an annual newspaper ad which laments the *Roe v. Wade* decision.

and rely on his discretion and professional judgment. *See Roe v. Wade,* 410 U.S. at 165, 93 S.Ct. at 733.

[10] The Court finds that the portions of § 188.039 so declared as unconstitutional are not severable from the remainder of the statute. Because the term "attending physician" is repeated in every subsection, the entire statute must fall as a unit. The provisions are inextricably woven together such that the valid provisions standing alone are incomplete and do not accurately reflect the legislative intent. See Mo.Rev.Stat. § 1.140 (1978). Hence, the requirement to impart specific information is invalid on this ground, as well.

V. § 188.025—Post-Sixteen-Week Abortions to be Performed Only in a Hospital

Section 188.025 provides that every abortion performed at or subsequent to the first sixteen weeks gestational age shall be performed in a hospital.[13] The standard for evaluating the constitutionality of laws which regulate the performance of abortions after the first trimester is well-settled. In *City of Akron,* 462 U.S. at 430-31, 103 S.Ct. at 2493, the Supreme Court held that a state regulation which significantly impacts on a woman's access to abortion prior to viability of the fetus,[14] will be upheld only "to the extent that the regulation reasonably relates to the preservation

13. See *supra* note 2. The 16-week L.M.P. stage would correspond with approximately 14 weeks fetal age. As previously noted, by the L.M.P. method, the 2nd trimester includes the time from 13⅓ through 26⅔ weeks after the last menstrual period.

4. "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Colautti v. Franklin,* 439 U.S. 379, 388, 99 S.Ct. 675, 682 (1979). *Accord* Mo.Rev.Stat. § 188.015(7) (Supp.1986).

and protection of maternal health." *Id., quoting Roe v. Wade,* 410 U.S. at 163, 93 S.Ct. at 731.

[11] Thus, this Court's first inquest focuses on whether or not § 188.025 "significantly impacts" on abortion rights. If so, then the "reasonableness" of the regulation must be resolved. However, the State may not "adopt abortion regulations that depart from accepted medical practice." *Id.* at 431, 103 S.Ct. at 2493. The health regulations imposed by the State must be "legitimately related to the objective the state seeks to accomplish." *Id.* Further, the State must make a reasonable effort to limit the regulation to that specific time during and after the second trimester when the health interest will be furthered. *Id.* at 434, 103 S.Ct. at 2495. The State has the burden of proving a health-justification. *Id.* at 430, 103 S.Ct. 2492-93; *Planned Parenthood Ass'n of Kansas City v. Ashcroft,* 664 F.2d 687, 689 (8th Cir.1981).

In *City of Akron,* 462 U.S. 416, 103 S.Ct. 2481, and *Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, the Supreme Court held that a hospitalization requirement for all second-trimester abortions was unconstitutional because such a requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion." *City of Akron,* 462 U.S. at 439, 103 S.Ct. at 2497; *Ashcroft,* 462 U.S. at 482, 103 S.Ct. at 2520. However, the Court did not draw a bright line to indicate at what point in the second trimester a state may require that abortions be performed in a hospital setting. This determination will depend on the impact of the regulation and its reasonableness, that is, whether it departs from accepted medical practice.

A hospitalization requirement clearly "places a significant obstacle in the path of women seeking an abortion." *City of Akron,* 462 U.S. at 434, 103 S.Ct. at 2495.

The *Akron* court determined that the increased cost[15] of hospitalization and the fact that second-trimester abortions were rarely performed in area hospitals combined to significantly limit a woman's ability to obtain an abortion. If forced to travel to find available facilities, a woman incurs not only financial expense, but also additional health risks. *Id.*

It is evident that hospitalization significantly increases the cost of an abortion.[16] Moreover, the availability of hospital services for abortions is limited in Missouri. In 1985, only 22% of all abortions at 16 weeks or greater were performed in hospital facilities.[17] Of these relatively few hospital-performed abortions, 97% took place at Truman Medical Center, a public hospital in Kansas City.[18] Thus, the Court finds that, as in *City of Akron*, the scarcity of

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15. In *City of Akron*, in-hospital abortion cost was cited as $850-900, compared to $350-400 for a dilation and evacuation (D & E) abortion performed in a clinic. *Id.* 462 U.S. at 435, 103 at 2495.

16. Dr. Crist testified that the cost of an abortion in a Missouri hospital, other than Truman Medical Center which maintains a specialized outpatient abortion service, is in excess of $2500 for a sixteen-week or greater abortion. This compares with $350-650 in an outpatient facility. The Court notes, however, that 97% of the hospital-based abortions were performed at Truman Medical Center in 1985.

On the national level, Dr. Stanley K. Henshaw provided statistics from 1981 and 1982 comparing the cost of a sixteen-week or greater D & E procedure. In 1981, the average clinic cost for a D & E was $358-364. In 1982, the average hospital charge for the same procedure was $740.00.

Dr. Warren Hern also related that hospitalization "invariably" costs more. He estimated that, in the Boulder, Colorado area, the cost is $1000 greater for an abortion in the hospital than in an outpatient facility.

17. In 1984, 28% of such abortions were performed in the hospital setting.

18. In 1984, 98% of the hospital-based 16-week abortions were performed at Truman Medical Center.

hospital-based abortion facilities restricts access to abortion services, and would necessitate travel by many across the state, which may result in delay and increased health risks to the patient seeking abortion services.[19] There is no evidence that hospitals in other parts of the state would offer abortion services if the hospitalization requirement were implemented.[20]

Accordingly, the Court concludes that the increased financial burden and restricted availability of hospital-based[21] abortion services creates a substantial interference with and imposes a direct burden on a woman's decision to have an abortion.

Having concluded that § 188.025 significantly impacts on abortion rights, the State must show that the sixteen-

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19. Testimony of Dr. Crist; stipulation of facts.

20. On the contrary, Dr. Stanley Henshaw testified that a 1982 survey (prior to the *City of Akron* ruling) showed that 27% of hospitals performed abortions in those states with a hospitalization requirement for second-trimester abortions. In the states without mandatory hospitalization rule, 39% of hospitals provided second-trimester services.

Similarly, in Missouri, the number of second-trimester abortions increased from 540 in 1979 to 700 in 1980 after the prohibition on non-hospital second-trimester abortions was lifted. Significant also is the increase in the total number of second-trimester abortions performed in Missouri in 1980. The number rose from 540 in 1979 to 1390 in 1980. This indicates that the hospitalization requirement resulted in the performance of fewer procedures than if the requirement was not in effect. *See Planned Parenthood of Kansas City, Missouri, Inc. v. Ashcroft*, slip op. *on remand*, No. 79-4142-CV-C-H, slip op. at 8-10 and n. 12 (W.D.Mo. October 2, 1981), 664 F.2d 687, 689 n. 5 (8th Cir.1981).

21. Truman Medical Center, as a public facility, would be barred from providing *any* abortions not necessary to save the woman's life if Section 4 of the Act (§ 188.215) were to become effective. *See supra* note 18. If upheld, the effect of this hospitalization requirement in conjunction with the "public facility" rule would effectively eliminate access to abortions in Missouri past 16 weeks gestation.

week hospitalization requirement reasonably relates to the State's interest in maternal health. In order to meet this burden, the State must show that non-hospitalized abortions of 16 weeks or greater gestational age can reasonably be considered more dangerous than hospitalized abortion procedures at an identical stage of pregnancy.

In *City of Akron,* the Supreme Court was impressed by current standards of the medical profession which indicated that abortions could be "performed safely 'in a hospital-based or in a free-standing ambulatory surgical facility, or in an out-patient clinic meeting the criteria required for a free-standing surgical facility' until 18 weeks of pregnancy." *Id.* 462 U.S. at 437, 103 S.Ct. at 2496, *citing* American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982). This data remains current.[22]

Plaintiff Reproductive Health Services (RHS), which currently provides abortion services up to 22 weeks gestational age, would rely on ACOG guidelines as a "free-standing ambulatory surgical facility." The Court rejects the State's contention that RHS must be classified as a doctor's office or outpatient clinic because it is not licensed under Missouri's "Ambulatory Surgical Center Licensing Law."[23] The ACOG standards are convincing evidence that as a general rule, D & E[24] abortions may be safely performed

22. *ACOG,* Standards for Obstetric-Gynecologic Services (6th ed. 1985).

23. Mo.Rev.Stat. § 197.200, *et seq.* the Missouri Ambulatory Surgical Center Licensing Law, was only recently amended to cover abortion facilities. Regulations to implement these amendments have not yet been promulgated. Up to this time, Missouri has never licensed an abortion facility.

24. D & E is the only type of abortion sought to be performed at 16 weeks or greater in the non-hospital setting. The

(Continued on following page)

in free-standing surgical facilities, such as RHS, through 18 weeks of gestation.

[12] Additional evidence further demonstrates that the performance of abortions at qualified free-standing outpatient facilities does not necessarily render the procedure more dangerous than if performed in the hospital setting. It is undisputed that the primary factor in determining the safety of a D & E procedure at 16 weeks or greater is the skill and experience of the physician-operator.[25] There was also testimony that the most experienced physicians are more likely to be found practicing in high volume abortion facilities than in hospitals.[26]

Defendants failed to establish that the potential for uterine bleeding necessitates that abortions be performed in a hospital. This complication evidently is best controlled by contraction of the uterine musculature with

Footnote continued—

procedure involves dilatation of the cervix and then evacuation of the contents from the uterus. Dilatation may be achieved atraumatically by insertion of laminaria, synthetic water-absorbent dilators, placed in the cervix 1-2 days prior to the abortion procedure. Testimony of Dr. Warren Hern. The evidence of the safety of the D & E method over other procedures at this stage has been well-established. *City of Akron,* 462 U.S. at 435, 103 S.Ct. at 2495-96; Testimony of Drs. Robert Crist, Warren Hern, Carl Pearman, and Judith Widdicombe, R.N. Peterson, Berry, Grace and Gulbranson, "Second-Trimester Abortion by Dilatation and Evacuation: An Analysis of 11,747 Cases," 62 *Obstetrics & Gynecology* 185, 190 (1983).

25. Testimony of Dr. Robert Crist; Testimony of Judith Widdicombe, R.N.; *see also* G. Schaefer, M.D. and E. Graber, M.D.; *Complications in Obstetric and Gynecologic Surgery* 86 (1981): R. Hatcher, M.D., *Contraceptive Technology, supra* note 7 at 274.

26. Dr. Crist testified that most hospitals have very restrictive policies regarding abortions. Consequently, physicians functioning primarily through hospitals are relatively inexperienced in abortion procedures.

drugs and vigorous uterine massage.[27] The data presented at trial suggests that it rarely becomes necessary to transfer the patient to a hospital for treatment.[28]

Nor was there proof that the incidence of infection is diminished when post-sixteen-week abortions are performed in the hospital rather than in a free-standing clinic. Infection, if it occurs, does not usually manifest itself until at least a few days after the procedure, by which time the patient will have been discharged from either a hospital or an outpatient facility.[29] Moreover, there was evidence that nosocomial infections, those acquired in a hospital setting, tend to be more resistant to antibiotic therapy.[30]

Plaintiffs have also cited the lack of specialized equipment, administrative delays, unsympathetic attitudes or inexperience of hospital personnel and the loss of patient confidentiality as factors which disfavor abortions in hospitals.[31] Plaintiffs emphasize that non-hospital D & Es constitute the prevailing practice of post-sixteen-week abor-

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27. Testimony of Dr. Crist; R. Hatcher, *Contraceptive Technology* 1986-1987, *supra* note 7 at 275.

28. Testimony of Dr. Warren Hern. However, Dr. Hern recommends that outpatient D & Es in gestations of 17 weeks or greater L.M.P. should occur within 20 minutes of a full-service hospital. Hern, "Serial Multiple Laminaria and Adjunctive Urea in Late Outpatient Dilation and Evacuation Abortion," 63 *Obstetrics and Gynecology* 548 (1984).

In Dr. Hern's review of D & E abortions performed between 17 and 25 weeks gestation, only 3 patients out of 1000 were hospitalized for bleeding. Only two required transfusions. Also, one of these hemorrhages did not occur until 4 weeks after the procedure. *Id.*

29. Testimony of Dr. Crist; Testimony of Dr. Hern.

30. Testimony of Dr. Crist; Testimony of Dr. Hern.

31. Testimony of Dr. Hern.

tions in Missouri and other states.[32] Yet, plaintiffs do concede that abortions on certain high-risk patients should be performed in the hospital setting. They insist, however, that the decision should be made at the physician's discretion, rather than by an arbitrary state law.

Defendants provided evidence that the mortality rate for D & E abortions increases significantly after 16 weeks gestation.[33] However, there is no indication that hospitalization would result in a lower morbidity or mortality rate. More specifically, the State has relied on cross-examination testimony of Judith Widdicombe, R.N., who cited a complication rate for post-16-week abortions, reflected in RHS' data, which appears to be twice as high at RHS than for such procedures performed elsewhere in the state. Ms. Widdicombe explained that the statistics are misleading because the state data, in contrast to the RHS data, reflects primarily only those complications

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32. Dr. Stanley Henshaw testified that data from 6 other states including Missouri in 1983 revealed that 77.9% of D & Es at 16 weeks or later were non-hospital procedures. The parties stipulated as to the statistics in Missouri.

33. Annual Summary for 1981, Centers for Disease Control, Abortion Surveillance 43, Dept. of Health & Human Services (issued 1985). The table upon which defendants rely refers to abortions for the years 1977-1981. The death rate for D & Es at 16-20 weeks gestation is 7.6 per 100,000 abortions. However, it is not clear whether the gestation time is L.M.P. or actual time since conception.

Defendants' witness, Dr. D. Martin, cited a study by Dr. William Peterson in August, 1983, as revealing a "total percent" complication rate of 5.5% ("one in twenty") for second trimester abortions. However, this testimony is grossly misleading and inaccurate because Dr. Martin added all complications together, apparently assuming that the individual complications or symptoms do not accompany each other. *See* Peterson, *supra* note 24, 62 *Obstetrics & Gynecology*, at 189-90.

which occur within the first three days.[34] Finally, defendants point to a lack of agreement within the medical community regarding hospitalization for abortions as evidence of the reasonableness of § 188.025.[35]

The Court has carefully considered the wealth of expert evidence presented by the parties in light of the appropriate standard of review, which places the burden of justifying the hospitalization requirement on the State. The Court concludes that the requirements of § 188.025 are overbroad. The State did not prove that a D & E abortion at 16-18 weeks gestation can reasonably be considered

34. Defendants refute this and note that State law, § 188.052, requires only that abortion complications be reported within 45 days from the date of post-abortion care. Ms. Widdicombe's testimony also revealed that State prisoners have received abortions at more than 16 weeks gestation at RHS, having been transported and escorted by prison employees. The Court assumes that the State's interest in maternal health applies to these women as well.

35. A 1983 article, cited by defendants, suggests that D & E is appropriate in free-standing clinics "through fifteen and perhaps seventeen weeks if strict standards are carefully established and monitored on an ongoing basis." Peterson, et al., "Second Trimester Abortion by Dilation and Evacuation: An Analysis of 11,747 Cases," 62 *Obstetrics and Gynecology* 189 (1983).

In 1981, Willard Cates, M.D., and David A. Grimes, M.D., published that 16 weeks gestation would be the outer limit for non-hospital abortions "at the present time." Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities," 58 *Obstetrics and Gynecology* 401, 407 (1981). However, in response to a letter to the editor by Dr. Hern criticizing this 16-week threshold, the authors stated that they had not included all data and had intended only a general guideline in order to challenge regulations requiring hospitalization for *all* second trimester procedures. They concluded: "Proposed changes should be based on scientific evidence gathered through ongoing surveillance, . . . rather than on unsubstantiated opinions. Dr. Hern's experience is testimony to this principle." 60 *Obstetrics & Gynecology* at 667-68 (1982). Accordingly, the Court cannot accept Cates' and Grimes' 1981 16-week criteria as convincing evidence to support this regulation.

more dangerous when performed in a qualified free-standing outpatient facility rather than in a hospital. In fact, the evidence suggests that the prevailing medical practice is for such procedures to be performed outside the hospital setting. Because § 188.025 significantly impacts on a woman's access to abortion, and the State has failed to prove that the 16-week hospitalization requirement reasonably relates to the State's interest in maternal health, this provision is invalid.

VI. § 188.029—Required Tests to Determine Gestational Age and Viability

Section 188.029[36] prescribes that a physician must determine whether the fetus is viable before performing an abortion on a woman who the physician has reason to believe is twenty or more weeks pregnant. The statute further dictates that the physician accomplish "such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity" of the fetus. The findings must be recorded in the woman's medical record.

36. 188.029 reads:

Physician, determination of viability, duties

Before a physician performs an abortion on a woman he has *reason to believe* is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother. (L.1986, H.B. No. 1596, § A.)

[13] Obviously, the purpose of this law is to protect the potential life of the fetus, rather than to safeguard maternal health. A state's interest in the potentiality of human life becomes compelling only at viability, the point at which the fetus "has the capability of meaningful life outside the mother's womb." *City of Akron,* 462 U.S. at 428, 103 S.Ct. at 2491, *quoting Roe v. Wade,* 410 U.S. at 163, 93 S.Ct. at 731. At this point, the state may regulate or even proscribe abortions, except where necessary to preserve the life or health of the woman seeking the abortion. *City of Akron,* 462 U.S. at 428, 103 S.Ct. at 2491; *Roe,* 410 U.S. at 164, 93 S.Ct. at 732. However, the State may only regulate in such context if it narrowly tailors its regulations to the precise State interest at stake. *Roe,* 410 U.S. at 165, 93 S.Ct. at 732.

Plaintiffs assert that the section is unconstitutional because it burdens abortion in the interest of fetal life prior to viability, suffers from vague language which does not protect a physician's good faith medical judgment, requires unnecessary tests which may put the woman's health in jeopardy, and does not provide a medical-emergency exception where the woman's life or health is in danger.

The statute's requirement that the physician make a specific viability determination whenever "he has reason to believe" that a woman is carrying a fetus of 20 weeks or more gestational age is said to be constitutionally overbroad because the medical evidence is uncontradicted that a 20-week fetus is *not* viable. Testimony by medical experts for both plaintiffs and defendants, in addition to recent medical literature, provides clear evidence that 23½

to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists.[37]

Defendants, in opposition, assert that the 20-week requirement is reasonable because it does not restrict abortions prior to viability, but merely states a point when the physician is required to *determine* viability. The State insists that if a physician initially has reason to believe a woman is 20 weeks pregnant, further examination may well reveal that she is actually 24 weeks pregnant, and thus carrying a potentially viable fetus. In support of this argument, defendants cite to the fact that a woman's related history of the time of her last menstrual period, which is often the first indicator to the physician of gestational age, is also the least reliable. The evidence revealed that inaccuracies of up to four weeks are not uncommon.[38]

[14] The law is well-settled that a decision on fetal viability is properly within the discretion of a physician's professional judgment. *Colautti,* 439 U.S. at 388-89, 99 S.Ct. at 462; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 64, 96 S.Ct. 2831, 2839, 49 L.Ed.2d 788 (1976). The Court is satisfied that the legislature has not attempted to usurp this function by obligating a physician to exercise that judgment at a point in pregnancy when a reasonable possibility exists that the fetus may be

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37. Testimony of Drs. Debabrata Maulik, William J. Keenan, and Carl C. Pearman; Gerdes, Abbasi, Bhutani and Bowen, *Improved Survival and Short-term Outcome of Inborn "Micropremies",* 25 Clinical Pediatrics 391, 393 (1986); Pleasure, Dhand and Kaur, *What is the Lower Limit of Viability?,* 138 American Journal of Diseases of Children 783 (1984); Buckwald, Zorn and Egan, *Mortality and Follow-up Data for Neonates Weighing 500-800 g at Birth;* 38 American Journal of Diseases of Children 779 (1984).

38. Testimony of Drs. Debabrata Maulik, Robert Crist and William J. Keenan.

viable. If the menstrual history *or* other signs and symptoms do not initially indicate a gestation of at least 20 weeks, then obviously the fetus is not viable. Further tests to determine viability are unnecessary and not required by law.

In assessing viability, Section 188.029 mandates that the physician "us[e] and exercis[e] that degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions." The Act's penalty section provides that

> "[A]ny person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs . . . any abortion or knowingly fails to perform any action required [these] sections . . . shall be guilty of a class A misdemeanor." Mo.Rev.Stat. § 188.075 (1983)

Plaintiffs argue that the objective standard of care set forth in Section 188.029, in conjunction with the imposition of criminal liability, is unconstitutional because a physician's erroneous, but good faith assessment of viability is not a defense. Consequently, without a subjective culpability requirement incorporated in Section 188.029, it is claimed that the fear of criminal penalties would exert a chilling effect. Plaintiffs contend that physicians will be unwilling to perform abortions close but prior to that critical time of viability, even if the physician's medical judgment is that the fetus could not sustain life outside the womb. This result, plaintiffs insist, would constitute an impermissible obstacle to a woman's access to abortion services.

Furthermore, plaintiffs contend that the phrase "reason to believe" renders the statute unconstitutionally vague

because it does not describe the standard to govern the physician's assessment whether the fetus is 20 weeks gestation age. The State counters that Section 188.075 sets forth a scienter requirement which must be proved beyond a reasonable doubt before criminal liability can be imposed.

The culpability provision in Section 188.075 was previously interpreted in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848 (1981), *aff'd in part and rev'd in part on other grounds* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). In *Ashcroft*, the Eighth Circuit Court of Appeals held that Section 188.075 requires *knowledge* as a mental state in order to violate one of the sections to which that statute refers. "A good faith determination of nonviability would be a defense." *Id.*, 103 S.Ct. at 862. The Appellate Court further elaborated on the definition of "knowledge" as contemplated by the legislature:

> "In this case, Section 188.075 prescribes 'knowingly' as the mental state; and Missouri statutes further define 'knowingly':
>
> A person *'acts knowingly'* or with knowledge,
>
> (1) with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
>
> (2) with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result."
>
> Mo.Rev.Stat. § 562.016.3, *quoted in Ashcroft*, 655 F.2d at 862.

[15] Accordingly, the Court concludes that the Missouri statutes would require the State to prove culpability

for each element of Section 188.029. Hence, a physician's good faith assessment of viability or whether the woman is at least 20 weeks pregnant would be conclusive. The statute is neither vague nor otherwise unconstitutional in this respect.

Plaintiffs' next attack on Section 188.029 centers on the obligation that, in determining viability, "the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity" of the fetus.

Dr. Robert Crist testified that tests to determine fetal weight are not only unreliable and inaccurate, but also add $125 to $250 to the cost of abortion. He stated that this type of test would be appropriate only at a point "much later" in pregnancy. No evidence is cited which rebuts this. It was also clearly established that the only method to evaluate lung maturity is by amniocentesis,[39] an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks of gestation.[40]

The State has failed to demonstrate that either of these requisites are narrowly tailored to further the State's interest in either maternal health or the life of the fetus when imposed at a point when the woman is only 20-24 weeks

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39. The amniocentesis procedure involves the withdrawal of amniotic fluid from the uterus via needle puncture through the woman's abdomen. The fluid is then analyzed to measure the level of certain chemicals which indicate lung maturity. The procedure must be performed in conjunction with sonography. Testimony of Dr. Debabrata Maulik.

40. Testimony of Drs. D. Maulik, Carl Pearman, Robert Crist, and William Keenan. Dr. Maulik also estimated that the cost of the procedure at Truman Medical Center was $200-250.

pregnant. Moreover, amniocentesis imposes additional significant health risks for both the pregnant woman and the fetus.[41] Even where the state exercises its compelling interest in a viable fetus, it may not require action that imposes an increased risk to the woman's health. *Thornburgh v. American College of Obstetricians,* ..... U.S. ....., 106 S.Ct. 2169, 2184, 90 L.Ed.2d 779 (1986).

Medical experts for both plaintiffs and defendants concurred that it is standard medical practice to determine "gestational age" by ultrasound examination[42] and fetal skull measurements whenever it appears that a woman is at least twenty weeks pregnant.[43] Defendants have further acknowledged that no tests other than the ultrasound measurements provide information necessary to determine viability prior to at least 30 weeks gestational age.[44] Despite such concessions, the State defends this statutory language and maintains that the section demands only those exami-

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41. The risk of infection to the woman was specifically cited. There is also the possibility of "fetal-waste" or actual loss of the fetus from amniocentesis. Testimony of Drs. Debabrata Maulik, Robert Crist and Carl Pearman. Further, there is normally a delay of approximately two weeks in scheduling a nonemergency amniocentesis. Testimony of Dr. D. Maulik. The parties have stipulated that delay increases the risk of an abortion.

42. The "ultrasound' or "sonogram" examination is a noninvasive procedure which utilizes high frequency sound waves to visualize the fetus. Measurements can then be taken of the fetal skull or biparietal diameter (BPD). The BPD measurement is considered the most accurate method of determining gestational age. Testimony of Dr. Debabrata Maulik.

43. Testimony of Drs. Debabrata Maulik, Robert Crist, Carl Pearman, Warren Hern and William Keenan. Judith Widdicombe, R.N., further testified that this examination to determine gestational age is performed on every woman seeking a second trimester abortion at RHS.

44. Defendants' post-trial brief *citing* the testimony of Drs. William Keenan, Debabrata Maulik and Robert Crist.

nations which are "necessary" to make the required findings. Thus, defendants insist that there is no duty to perform an amniocentesis for lung maturity or even a fetal weight determination if these tests would be futile. However, the ultrasound exam would be mandatory.

This evidence must be evaluated in light of the Supreme Court's declaration that the point of viability, which may differ with each pregnancy, is a matter of medical judgment, and that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." *Colautti v. Franklin,* 439 U.S. at 388, 99 S.Ct. at 682.

[16] Given this deference to a physician's clinical judgment, first expressed in *Roe,* 410 U.S. at 163, 93 S.Ct. at 731, the Court concludes that the final sentence of Section 188.029 is an impermissible legislative intrusion upon a matter of medical skill and judgment. Even though the standard medical practice is to establish gestational age, a correspondent to viability,[45] whenever it appears that the last menstrual period was at least 20 weeks before,[46] the State may not dictate that a physician make a "finding" of gestational age in order to determine viability. Consequently, the Court also rejects defendants' interpretation that only those tests which are "necessary" to do so must be performed. The State may not dictate either the tests *or* the findings which enter into a decision whether or not a fetus is viable.

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45. Testimony of Dr. Debabrata Maulik.

46. Testimony of Drs. Debabrata Maulik, Robert Crist, Warren Hern, Carl Pearman, William Keenan, and Judith Widdicombe, R.N.

Finally, plaintiffs allege that Section 188.029 must be declared unconstitutional because it does not provide an exception for the situation where the health of the mother is endangered. In support, plaintiffs rely on *Thornburgh v. American College of Obstetricians,* 106 S.Ct. at 2184. In *Thornburgh,* the Supreme Court invalidated a Pennsylvania statute which set forth a second-physician requirement without a medical emergency clause, concluding that the omission was intentional.

However, this Court is convinced that the Missouri legislature did not intend to impose liability on the physician who fails to make a determination of viability prior to performing an emergency abortion where the woman's life or health is endangered. Such an interpretation would conflict with a previously enacted section which provides, in accordance with Supreme Court mandate, that a post-viability abortion is not proscribed where necessary to preserve the life or health of a woman. Mo.Rev. Stat. § 188.030 (Supp.1984); *Planned Parenthood v. Ashcroft,* 103 S.Ct. at 2521.

It is an established rule of statutory construction in Missouri that an interpreting court should seek to ascertain and give effect to the legislative intent if possible. *State v. Kraus,* 530 S.W.2d 684 (Mo.1975) (en banc). Statutes which relate to the same subject matter should be harmonized if possible so that all provisions are meaningful. *State ex rel. Lebeau v. Kelly,* 697 S.W.2d 312, 315 (Mo.Ct.App.1985). Accordingly, the initial sentence of § 188.029 which directs when a physician must make a judgment on viability must be harmonized with Section 188.030, which includes a medical emergency exception.

The Court finds that the final sentence of Section 188.029 is not "essentially and inseparably connected with, and . . . dependent upon" the valid requirements initially set forth. *See* Mo.Rev.Stat. § 1.140. Thus, it is presumed that the legislature would have enacted the portion declared constitutional independently from the latter void provisions. *Id.* Accordingly, the last sentence of the section will be severed and stricken, allowing the remainder of the statute to stand. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 2801, 86 L.Ed. 2d 394 (1985).

VII. § 188.205, 188.210, 188.215 (Sections 2, 3, 4 of "the Act"): Use of Public Funds, Public Employees and Public Facilities to Perform/Assist or Encourage/Counsel to have an Abortion

Plaintiffs' final challenges to the 1986 Missouri Act are directed at the provisions which prohibit the expenditure of public funds, actions of public employees and use of public facilities "for the purpose of 'performing or assisting an abortion' and 'encouraging or counseling a woman to have an abortion' if it is not necessary to save her life." Mo.Rev.Stat. §§ 188.205, 188.210, 188.215.[47]

47. Sections 2, 3, and 4 of "the Act" have been codified at Mo.Rev.Stat. §§ 188.205, 188.210, and 188.215, respectively. Hereinafter, these sections will be identified by the statutory section number as codified. The text is as follows:

§ 188.205. Use of public funds prohibited, when

It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

(L.1986, H.B. 1596, § A (§2).)

(Continued on following page)

Plaintiffs assert that all three of these sections are constitutionally flawed.

First, it is claimed that the phrase "encouraging or counseling" is impermissibly vague. Plaintiffs further contend that even if not vague, the restrictions on "encouraging and counseling" infringe on the woman's First

Footnote continued—

188.210. Public employees, activities prohibited, when

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

(L.1986, H.B. No. 1596, § A (§ 3).)

188.215. Use of public facilities prohibited, when

It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

(L.1986, H.B. No. 1596, § A (§ 4).)

Definitional language is set forth in Mo.Rev.Stat. § 188.200 (previously Section 1 of "the Act"), which provides:

§ 188.200. Definitions

As used in sections 188.200 to 188.220, the following terms mean:

(1) "Public employee," any person employed by this state or any agency or political subdivision thereof;

(2) "Public facility," any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof;

(3) "Public funds," any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

and Fourteenth Amendment rights, and on the physician's freedom of speech. Next, plaintiffs claim that the limitations on the use of "public facilities" imposed by Section 188.215 unconstitutionally restrict access to abortions. Moreover, the proscriptions on the use of public funds and activities of public employees allegedly results in the denial of medical care to prisoners seeking abortions, an Eighth Amendment violation. Finally, the plaintiffs insist that the three sections together intrude on academic freedom by effectively removing clinical instruction of abortion procedures from the state medical school curriculum.

On cross-motions for summary judgment, both parties originally requested that the validity of these sections be determined as a matter of law. However, the Court determined in the interest of justice that both motions should be denied in order that the case and record be fully developed. *See McLain v. Meier*, 612 F.2d 349, 356 (8th Cir.1979).

A. *Vagueness*

Plaintiffs maintain that Sections 188.205, 188.210 and 188.215 are unconstitutional because the statutory language, "encouraging or counseling," only vaguely describes the proscribed conduct. Hence, it it argued that these laws impermissibly threaten to inhibit the exercise of free speech.

The Supreme Court enunciated the dangers of vague laws in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between

> lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (footnotes omitted)

The standard for evaluating the degree of clarity that the Constitution demands depends on the type of legislative Act. Here, defendants focus on the civil nature of these sections,[48] noting that the Supreme Court has expressed greater tolerance of imprecision in such laws. *Village of Hoffman Estates v. Flipside, Hoffman Est.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). However, the *Flipside* court concluded that "perhaps the most important factor" in determining the re-

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48. Although it is clear that these sections do not impose criminal penalties, it is uncertain what punishment attaches to the "unlawful" acts. Section 188.220 sets forth taxpayer standing to bring suit:

> "Any taxpayer of this state or its political subdivisions shall have standing to bring suit in a circuit court of proper venue to enforce the provisions of sections 188.200 to 188.215."

quired precision is whether the law "threatens to inhibit the exercise of constitutionally protected rights." *Id.* A more stringent vagueness test applies if the challenged law may exert a chilling effect on free speech. *Id.*

[17] The right to disseminate even commercial abortion information was recognized in *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). First Amendment freedoms of expression are clearly involved where the statute places restrictions on "encouraging or counseling" women to have abortions. *See Young Women's Christian Ass'n of Princeton, New Jersey v. Kugler*, 342 F.Supp. 1048, 1063 (D.N.J.1972). Consequently, strict judicial scrutiny is warranted in evaluating this vagueness challenge.

Noting the subjective nature of the words "encourage or counsel," plaintiffs insist that physicians and other health professionals will "steer far wider [than] the unlawful zone" and avoid any discussion of abortion with their patients in order to avoid violating the law. *See Grayned*, 408 U.S. at 109, 92 S.Ct. at 2299. There was evidence that all staff and resident physicians at Truman Medical Center were instructed by the Executive Director not to make "any . . . comment relative to abortion" which is "not necessary to save the life of the mother."[49] A

49. Memo from James J. Mongan, M.D., Executive Director of Truman Medical Center, dated July 11, 1986. (Plaintiffs' Exhibit 12). The memo sets forth the provisions of § 188.215 and concludes that:

> [A]ll personnel . . . *MUST* [emphasis in original] discontinue all abortion related activity not necessary to save the life of the mother. Since this, of course, includes counseling about abortions and referring patients for abortions to other facilities, there is no alternative but to respond to inquiries about abortion to the effect that Missouri Law prohibits TMC from performing abortions and further prohibits coun-

(Continued on following page)

memorandum by Department of Health Director, R. Harmon, M.D., revealed his belief that "[p]ublic facilities and employees under this bill will probably cease to mention abortion out of fear of prosecution."[50] Dr. Debabrata Maulik also testified that the prohibition on "encouraging or counseling a woman to have an abortion" would leave a physician uncertain in distinguishing between lawful and unlawful discussions with patients.[51] The Court considers these interpretations only as evidence that health professionals may steer their conduct far wider than the lawful zone.

The State's counterargument is that the statutory language "encouraging or counseling" is designed to forbid only "affirmative advocacy" of abortions not necessary to save a woman's life. Defendants assert that the prohibition does not prevent a physician from informing a woman of "all options" or the "pros and cons" of an abortion. Further, defendants insist that even if Sections 188.210 and 188.215 must fail, Section 188.205 is *not* directed at any plaintiff, either as a physician or other health care provider, but only at "state and local officials or legislative bodies responsible for expending public funds."

[18, 19] Having applied the appropriate rigid standard here where the challenged statutes abut upon First

Footnote continued—

> seling, referring or any other activity whatsoever relating to abortion not necessary to save the life of the mother. Any other comment relative to abortion is prohibited.

50. Memo review of House Bill No. 1596 by R. Harmon, M.D., Director of Department of Health, Review dated April 28, 1986, at page 4. (Plaintiffs' Exhibit 13).

51. Dr. Maulik stated that the resulting impact on the medical practice would be "devastating."

Amendment freedoms, the Court concludes that Sections 188.205, 188.210 and 188.215 are sufficiently vague to render them unconstitutional. If men of common intelligence must speculate on a statute's meaning and differ as to its application, then a law is so vague that it violates due process. *Baggett v. Bullitt,* 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964). Even though a penal statute is not involved here, it is clear that the phrase "encouraging or counseling" elicits vastly different interpretations of the scope of the forbidden activity. The Supreme Court disapproved of similar terms such as "counsel," "advocate" and "advise" in the loyalty oath cases of 1960s because the language was "not susceptible of objective measurement" and threatened to restrict free speech. *Id.; Cramp v. Board of Public Instruction,* 368 U.S. 278, 286, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961).

Moreover, the Court is unpersuaded by the defendants' contention that Section 188.205, which relates to "public funds," could not apply to inhibit the free speech of any health care provider. The definition of "public funds" set forth in Section 188.200 certainly is broad enough to make "encouraging or counseling" unlawful for anyone who is paid from "funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers." § 188.200.

Having determined that these sections are void for vagueness, it is not essential to the outcome to address the additional grounds of unconstitutionality advanced by plaintiffs. However, the Court shall enter its findings and conclusions on each of plaintiffs' claims for purposes of appellate review.

B. *"Encouraging or Counseling"—First and Fourteenth Amendment Claims*

Even if the phrase "encouraging or counseling" was deemed to be sufficiently precise, plaintiffs contend that these sections interfere with a physician's ability to competently and professionally counsel patients, and the patient's opportunity to receive such information. As the Court has noted above, this activity is certainly within the realm of First Amendment protection. *See Kugler,* 342 F.Supp. at 1063.

Further, the United States Supreme Court has recognized that the right of privacy, founded in the Fourteenth Amendment's concept of personal liberty, requires that a physician be given "the room he needs to make his best medical judgment." *Doe v. Bolton,* 410 U.S. 179, 192, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973). Assisting a woman in deciding whether or not to have an abortion is included in the exercise of this medical judgment. *Colautti v. Franklin,* 439 U.S. 379, 387, 99 S.Ct. 675, 681, 58 L.Ed.2d 596 (1979); *City of Akron,* 462 U.S. at 427-430, 103 S.Ct. at 2490-93. Until the State has a compelling interest in either maternal health (approximately at the end of the first trimester) or fetal life (at viability), "a pregnant woman must be permitted, in consultation with her physician to decide to have an abortion and to effectuate that decision "free of interference by the State." *Akron,* 462 U.S. at 429, 103 S.Ct. at 2492, *quoting Roe,* 410 U.S. at 163, 93 S.Ct. at 731. Even where the State has an interest in preserving the fetus, a state may "not impose an increased risk to the life *or health* of the woman." *Thornburgh,* 106 S.Ct. at 2184 (emphasis added).

Plaintiffs insist that by prohibiting certain physicians and health care professionals from advocating an abortion that is "not necessary to save the woman's life," the statute intrudes on the physician-client relationship when the mother's *health* may be adversely affected, even if it is not an immediately life-threatening condition.[52] There was unchallenged testimony presented at trial that in such situations a physician has a professional duty to at least suggest or even urge the pregnant woman to have an abortion.[53]

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52. Dr. Maulik testified that an abortion is medically preferable where there are gross fetal anomalies, such as Down's Syndrome, Trisomy 18, and renal agenesis (the two latter conditions being lethal to the infant shortly after birth), or where maternal *health* may be compromised by cardiac disease, recurrent cerebral vascular accidents (CVAs or strokes), diabetic retinopathy (which threatens blindness) and renal disorders.

As a referral center, Dr. Maulik testified that TMC routinely serves patients with these problems.

Dr. Carl Pearman testified that almost all second trimester abortions performed at the University of Missouri Medical Center in Columbia (UMMC) are performed for the mother's *health*, though not necessarily to preserve her *life*, as with breast cancer or early amniotic sac rupture. *Accord*, Testimony of Dr. Warren Hern. *See also McRae v. Califano*, 491 F.Supp. 630, 669-76 (E.D.N.Y.1980), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

53. Dr. Maulik testified that the fear of civil liability and an ethical obligation would compel him to "strongly recommend," though never "force a decision" to have an abortion because of a woman's non-life-threatening health interests. A prohibition on this would be "devastating" to a medical practice. He further testified that it would be "dishonest" to merely discuss abortion as an option without a recommendation of "what in [his] judgment is the best possible course in terms of [the woman's] health and survival."

Dr. Carl Pearman also stated that he feels an ethical and professional obligation to give advice whether to choose abortion when requested by the patient to do so. If this were prohibited by law, Dr. Pearman stated that he would be forced to either violate the law or quit caring for patients who present with such health complications during pregnancy.

Defendants argue that the statutes prohibit only the "advoca[cy] of an unnecessary abortion [which] goes beyond the realm of the physician-client relationship discussed in *Akron*." The State also submits that

> "these sections do not have any impact whatsoever upon a private physician's ability to recommend any course of action he desires to a patient. He simply cannot be compensated by public funds [§ 188.205] or perform the abortion or persuade the woman to obtain the abortion while working in a public facility. [§§ 188.-210 and 188.215.]"[54]

Defendants rely on those Supreme Court cases which held that the government is not obligated to *fund* abortions, whether or not medically necessary, as authority for the constitutionality of these restrictions on public funds, public employees and public facilities. *See Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

The *Maher* court held that a state may make a policy choice favoring childbirth over abortions, and thus need not *remove* obstacles such as indigency in the path of a woman's exercise of her freedom of choice. *Maher*, 432 U.S. at 480, 97 S.Ct. at 2386. However, the state may not place obstacles in the path of free choice. *Harris*, 448 U.S. at 316, 100 S.Ct. at 2688.

[20] This Court concludes that the prohibitions on speech set forth in these sections impose a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice. *See Akron*, 462 U.S. at 427, 103 S.Ct. at 2491. Patients who fully pay for their

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54. Defendants' brief in opposition to plaintiffs' motion for summary judgment, at 29.

services would be denied access to medical information which may affect their decision whether to continue the pregnancy, perhaps enduring health risks. Here, the State is not asked to subsidize abortions or the exercise of First Amendment rights.[55] The Court further rejects defendants' narrow construction that the sections would only affect a woman "being affirmatively counseled to have an abortion and to *obtain that* abortion in a public facility."[56] (emphasis added.) The statutory language is obviously broader than this interpretation.

C. § 188.215—*Restrictions on Use of Public Facilities*

Plaintiffs challenge the provisions in Section 188.215 which make it unlawful for any public facility to be used for "performing or assisting" or "encouraging or counseling" a woman to have an abortion if it is not necessary to save her life.

Defendants submit that such restrictions are justified by the Supreme Court's holding in *Poelker v. Doe*, 432 U.S. 519, 520, 97 S.Ct. 2391, 2392, 53 L.Ed.2d 528 (1977), which denied an indigent woman the right to obtain a nontherapeutic abortion at a St. Louis public hospital where the City's policy was to deny funds for such abortions. The Court, however, finds *Poelker* uncontrolling here where

55. Mr. Richard Chern, Associate Administrator of Finance at Truman Medical Center, testified that the full cost of abortions at TMC are recovered from the patient, without any sliding scale for indigency.

Similarly, Dr. Carl Pearman testified that his private practice patients who are occasionally seen at the University of Missouri Medical Center are charged a full fee.

56. Defendants' brief in opposition to plaintiffs' motion for summary judgment, at 32.

there is no indication that "public funds" would be expended. Plaintiffs claim that these prohibitions are impermissible as applied to patients who seek to obtain and *pay for* such services at a public facility. The Eighth Circuit's holding in *Nyberg v. City of Virginia* (*Nyberg II*), 667 F.2d 754 (8th Cir.1982) supports this position.

[21] In *Nyberg II*, the Court of Appeals noted the "fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital." The Eighth Circuit observed that *Poelker* did not hold that a state may prevent physicians from performing paid abortions in the hospital. *Id.* at 758 n. 1. While it is true, as defendants argue, that in *Nyberg II*, the public facility was the only hospital in the community,[57] the gravamen of the holding was that there was no direct public expenditure and that abortion services would be provided only to paying patients.[58] Accordingly, the Court is convinced that § 188.215 is also unconstitutional for the reasons set forth in *Nyberg II*.

D. *"Assisting" an Abortion with Public Funds or by Public Employees—Eighth Amendment Claim*

Plaintiffs' fourth alternative challenge to the provisions which restrict public fund expenditures and assis-

57. Moreover, TMC is a public facility which performed 97% of all hospital-based abortions at 16-week or greater gestation in 1985 (stipulation of facts). All patients must pay in full (Testimony of Mr. Richard Chern). The Court has declared § 188.025 to be unconstitutional. However, if all 16-week or greater abortions were required to be performed in a hospital, TMC essentially would be the only available facility.

58. See *supra* note 55.

tance by public employees focuses on the Eighth Amendment rights of Missouri inmates to receive medical care. Although this argument was not raised previously and defendants have not responded, the Court considers this claim to be meritorious.

Plaintiffs contend that these provisions will effectively deny women inmates access to outside medical facilities for medically necessary, yet non-life-threatening abortions. Testimony at trial revealed that plaintiff RHS has performed abortions on prisoners from State institutions. The patients are transported in State vehicles and accompanied by two State employees. It is also evident that abortion facilities are not available at all the penal institutions in Missouri.[59]

The essence of plaintiffs' claim here is that the required escorted assistance and transportation by prison employees will be precluded by Sections 188.205 and 188.210. Consequently, women prisoners will be unable to terminate pregnancies which seriously threaten their health, even though their lives are not in immediate danger.[60]

In *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976), the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." (citing

59. Testimony of Judith Widdicombe, R.N. The inmate patients, usually shackled and/or handcuffed, have been accompanied by a matron and driver. Two trips are required if the gestation is 16 weeks or greater because laminaria must be inserted at least one day before the abortion procedure. See *supra* note 24.

60. See *supra* note 52 for medical testimony of such conditions.

Gregg v. Georgia, 428 U.S. 153, 182-83, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976)). Although there is no controlling authority that the prisoners' lack of access to a non-life-threatening abortion falls within the *Estelle* rule, the facts and law certainly indicate that a "serious medical need" may exist and the absolute statutory roadblock may constitute "deliberate indifference" to such needs. A New Jersey district court recently addressed a similar claim against a county jail policy in *Monmouth County Correctional Institution Inmates v. Lanzaro,* 643 F.Supp. 1217 (D.N.J.1986), finding an Eighth Amendment violation. The *Lanzaro* court further held that the desired abortions were "serious medical needs" which must be provided at government expense because the prisoners' incarceration resulted in financial dependency.[61]

[22] The Court does not determine here that public funds must actually be expended to pay for a prisoner's therapeutic abortion.[62] However, it is clear that an obstacle to the pregnant prisoner's serious medical needs exists even if she is capable of paying because Section 188.215 appears to make it unlawful for State employees

61. In *Lanzaro,* the district court considered it "extremely significant" that federal prisons are obligated to provide abortion counseling and assistance. 28 C.F.R. § 551.23 (1986) provides:

Abortion

(a) The inmate has the responsibility for deciding to have an abortion or bear the child.

(b) The Warden shall provide medical, religious and social counseling to aid the inmate in making the decision to have an abortion or bear the child.

(c) An inmate shall sign a statement of responsibility for the decision to have an abortion or bear the child.

(d) At the inmate's request, medical staff shall arrange for the abortion to take place at a hospital or clinic outside the institution.

62. *See Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671.

to assist with arranging for the procedure. Moreover, "public funds" would necessarily be involved for salaries and transportation expenses. Hence, these sections violate the Eighth Amendment.

E. *Academic Freedom*

[23] Finally, it is claimed that these sections interfere with academic freedom by removing clinical instruction in abortion procedures at state medical schools (public facilities) and by university faculty at any institution (public employees). In support of their legal argument, plaintiffs have relied on First Amendment cases which hold that a state may not forbid the teaching of a certain subject or theory simply because it offends the dominant belief of a community. *See Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1966); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Board of Education v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982).

Although the defendants have offered no counter-arguments, the Court is not persuaded that these sections rise (or fall) to the level of a state-imposed orthodoxy in the educational process. While not directly applicable here, there was conflicting evidence presented at trial as to the necessity of providing clinical instruction in abortion procedures in order for the medical curriculum to be complete.[63] However, the Court is unable to conclude that

63. Stipulated statement of Harry S. Jonas, M.D., Dean of the University of Missouri-Kansas City School of Medicine (clinical teaching of abortions required for complete medical school curriculum); *Accord*, Testimony of Dr. Carl Pearman.

Contra, Testimony of Dr. Daniel Martin (medical schools such as St. Louis University Medical School can competently teach Obstetrics and Gynecology without performing non-life-threatening abortions as part of the curriculum.)

these sections unconstitutionally interfere with academic freedom.

Accordingly, for the reasons stated above, it is hereby

ORDERED that the following provisions of the 1986 Missouri Act relating to the regulation of abortions are declared to be unconstitutional:

1. § 1.205.1(1) and (2)
2. § 188.039
3. § 188.025
4. The following portion of § 188.029:

   The second and final sentence which states:

   "In making this determination of viability the physician shall perform or cause to be performed such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother."

5. § 188.205
6. § 188.210
7. § 188.215

It is further

ORDERED that defendants shall be permanently enjoined from enforcing the provisions declared to be unconstitutional.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1641 and 87-2157

Reproductive Health Service; Planned Parenthood of Greater Kansas City; Howard I. Schwartz, M.D.; Robert L. Blake, M.D.; Carl C. Pearman, M.D.; Carroll Metzger, R.N.C.; Mary L. Pemberton, B.S.W.;
Appellees,

v.

William L. Webster; State of Missouri,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: January 12, 1988
Filed: July 13, 1988

Before LAY, Chief Judge, McMILLIAN and ARNOLD, Circuit Judges.

LAY, Chief Judge.

Five publicly-employed health care providers and two nonprofit corporations brought this class action against the State of Missouri and its Attorney General (the state), challenging the constitutionality of several sections

of Missouri's 1986 abortion-regulation statute.[1] Mo. Ann. Stat. §§ 1.205; 188.010-.220 (Vernon 1983 and 1988 Supp.) (Unless otherwise noted, all subsequent section references shall be to Missouri's statutes.) The district court declared several portions of the act unconstitutional and permanently enjoined their enforcement. *Reproductive Health Servs. v. Webster*, 662 F. Supp. 407 (W.D. Mo. 1987). The state appeals.[2] With one exception, we affirm.

A. Hospitalization Requirement

Section 188.025 of Missouri's abortion statute states: "Every abortion performed at sixteen weeks gestational age[3] or later shall be performed in a hospital." Applying the test laid out in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the district

1. The district court, the Honorable Scott O. Wright, United States District Judge for the Western District of Missouri, certified a plaintiff class consisting of (1) facilities, Missouri-licensed physicians, or other health care professionals offering abortion counseling and services; and (2) pregnant women seeking abortion services or pregnancy counseling within Missouri.

2. The state appeals from all aspects of the district court's ruling except those relating to the abortion statute's "informed consent" provisions. The court declared unconstitutional the statutory provisions requiring that: (1) the attending physician *personally* advise the pregnant woman of certain information; and (2) the physician inform the woman "whether she is or is not pregnant." *See* § 188.039. Because the state does not appeal these rulings, the constitutionality of these requirements is not at issue here.

3. Gestational age is measured from the first day of a woman's last menstrual period and is generally two weeks greater than fetal age. The distinction between gestational and fetal age measurement can be legally significant when applying the trimester approach of *Roe v. Wade*, 410 U.S. 113 (1973). Using the gestational age method, the second trimester encompasses the time from 13 1/3 through 26 1/3 weeks after the last menstrual period, and thus is the time period at issue here.

court held this requirement unconstitutional because (1) it significantly impacts on the exercise of the right to abortion by causing delay, increasing costs and health risks, and decreasing accessibility; and (2) the state failed to satisfy its burden of proving that the hospitalization requirement is reasonably related to the state's interest in maternal health.

Although the state asserts that the district court improperly applied *Akron's* legal standard, its challenge to this ruling is nothing more than an attack on the factual finding that was critical to the court's decision: non-hospitalized abortions at sixteen to eighteen weeks gestational age cannot reasonably be considered more dangerous for pregnant women than hospitalized abortions.[4] Because this finding is not clearly erroneous and because the district court committed no error of law, we affirm on the basis of the district court's opinion. *See also Akron*, 462 U.S. at 430-31 (regulations that significantly impact access to abortion pre-viability are constitutional only to the extent they reasonably relate to protection

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4. The district court stated:

> The Court has carefully considered the wealth of expert evidence presented by the parties in light of the appropriate standard of review, which places the burden of justifying the hospitalization requirement on the State. The Court concludes that the requirements of § 188.025 are overbroad. The State did not prove that a D & E [dilatation and evacuation] abortion at 16-18 weeks gestation can reasonably be considered more dangerous when performed in a qualified free-standing outpatient facility rather than in a hospital. In fact, the evidence suggests that the prevailing medical practice is for such procedures to be performed outside the hospital setting.

662 F. Supp. at 419-20. *See also Planned Parenthood Ass'n v. Ashcroft*, 664 F.2d 687 (8th Cir. 1981), *aff'd in relevant part*, 462 U.S. 476, 482 (1983) (invalidating Missouri's second-trimester (twelve week) hospitalization requirement) .

of maternal health; state has burden of proving the reasonable relationship); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482 (1983) (invalidating, as in *Akron*, statute requiring hospitalization for all second trimester abortions).

B. Tests to Determine Viability

The next challenged portion of Missouri's statute requires doctors to determine whether a fetus is viable before performing an abortion on any women whom the doctor has reason to believe is twenty or more weeks pregnant. In making the viability assessment, the doctor must determine and record the fetus's gestational age, weight, and lung maturity. § 188.029.

The district court held unconstitutional the requirements that doctors determine gestational age and fetal weight and lung maturity. 662 F. Supp. at 423. The court held that the testing requirements constituted "an impermissible legislative intrusion upon a matter of medical skill and judgment [because] * * * [t]he State may not dictate either the tests *or* the findings which enter into a decision whether or not a fetus is viable." *Id.* (emphasis in original).

As indicated by the district court, the Supreme Court has squarely addressed this point and declared that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). Nevertheless, this is precisely what the Missouri legislature has attempted to proclaim by requiring doctors to determine the fetus's gestational age,

weight, and lung maturity. We therefore affirm the lower court's judgment that this portion of section 188.029 is unconstitutional.[5]

C. When Human Life Begins

The first section of the bill that revised Missouri's abortion statute provides, in relevant part:

> 1. The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

5. The state attempts to defend the statute by arguing that it "only requires that a physician perform *necessary* medical examinations so as to determine viability[;] * * * in other words those tests which are always performed by any prudent physician * * *." (emphasis added). The state's argument appears premised on an entirely different statute, however; the *Missouri* statute does not require doctors to make those tests necessary to determine viability. Rather, the statute plainly declares that in determining viability, doctors *must* perform tests to find gestational age, and fetal weight and lung maturity. The district court found that this requirement, imposed at a point when the woman was believed to be 20 weeks pregnant, was not narrowly tailored to further either the state's interest in maternal health or its interest in the potential life of the fetus. 662 F. Supp. at 422. Tests to determine fetal weight, for instance, besides being unreliable and inaccurate, add $125 to $250 to the cost of abortions and generally are not medically appropriate until a point much later in pregnancy than required by section 188.029. *Id.* Similarly, performing amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28-30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus. *Id.* Given these findings, the district court correctly determined that the statute's requirements are unconstitutional.

> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
>
> 3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

§ 1.205.

The district court held that the declarations that human life begins at conception and that unborn children have protectable interests in life, health, and well-being are unconstitutional, because, as the Supreme Court has stated "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444 (citing *Roe v. Wade*, 410 U.S. 113, 159-62 (1973)).

1. Standing

The state challenges the plaintiffs' standing to attack sections 1.205.1(1) and (2) on two grounds. The state first maintains that section 1.205 merely expands state tort, property, and criminal law protections for unborn children, while specifically excluding abortion from its coverage by providing in section 1.205.2 that section 1.205.1 should be

interpreted consistently with the U.S. Constitution and Supreme Court decisions. Thus, the state argues, because section 1.205 does not involve abortion, no one in the plaintiff class has standing to challenge it. The state's second argument is that 1.205.1(1) and (2) have no substantive effect—they are merely statements of existing fact that cannot give rise to a cause of action in anyone. We disagree.

We first note that "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases." *Margaret v. Edwards*, 794 F.2d 994, 997 (5th Cir. 1986) (citing *Roe*, 410 U.S. at 123-29; *Doe v. Bolton*, 410 U.S. 179, 187-89 (1973)); *see also Singleton v. Wulff*, 428 U.S. 106, 113 (1976). Moreover, we are unpersuaded by the state's arguments against standing. Its first argument—that the statute at issue has nothing to do with abortion—is somewhat circuitous, requiring us fully to decide the merits before we can pass upon standing. Its second argument—that the statute at issue has no substantive effect—is belied by the state's vehement assertions to the contrary that the statute substantively affects tort, criminal, and property law.

> The plaintiff class alleged that
>
> Section 1.205.1(1) of the Act impermissibly attempts to establish that "[t]he life of each human being begins at conception," and §1.205.1(2) of the Act impermissibly attempts to establish that ["u]nborn children have protectable interests in life, health, and well-being" as the underpinnings of the entire Act, contrary to [*City of Akron*] and contrary to the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

> Complaint ¶ 20. The plaintiffs thus alleged that Missouri was attempting to do exactly what the Supreme Court has declared it may not do: espouse a theory of when life begins as the foundation of the state's regulation of abortion. No persons are better situated to attack the constitutionality of this endeavor than those parties who are directly affected by the state's abortion laws—laws that allegedly are based on and reflective of an impermissible theory of life. The plaintiffs are such parties.[6] We therefore reject the state's standing challenge.

2. Validity of Declaration

The state's arguments on the merits of sections 1.205.1 (1) and (2) are similar to its standing arguments: (1) because the statute is "abortion-neutral," it is not inconsistent with *Roe;* and (2) the statute merely determines when life begins in a non-abortion context, a traditional state prerogative.[7]

We reject the assertion that Missouri's emphatic declaration of a state-sanctioned theory of life is "abortion-neutral." Sections 1.205.1(1) and (2) were contained in

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6. As stated previously, the plaintiff class consists of health care professionals and facilities offering abortion counseling and services, and pregnant women seeking abortion services or pregnancy counseling. The status of the plaintiffs here is similar to the status of the plaintiffs in one of the Supreme Court's most recent abortion decisions. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 752 (1986) (plaintiffs included American College of Obstetricians and Gynecologists, certain Pennsylvania-licensed physicians, and Pennsylvania abortion counselors and providers).

7. The state also argues "that it is established biological fact that the life of an individual human being * * * begins at conception. * * * The United States Supreme Court misspoke when it declared that the question of when life begins could not be resolved." (emphasis omitted). We see no point in addressing this contention.

a bill that relates almost exclusively to abortion. As a "prefatory" statement, as so insistently urged by the state, the declaration of when life begins can only have been intended as an introductory and foundational comment. To adopt the state's contention that the statute is "abortion-neutral" is to overlook that every remaining section of the bill save one regulates the performance of abortions. The only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life. Rather than being abortion-neutral, the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations.

The state contends that sections 1.205.1(1) and (2) are saved by the pronouncement in section 1.205.2 that Missouri's laws are subject to the United States Constitution and to United States Supreme Court decisions. Hence, the state reasons, even though it has declared in an abortion bill that human life begins at conception, because that bill is subject to Supreme Court decisions holding that states may *not* declare when life begins in the abortion context, section 1.205.1 must not have anything to do with abortion. The state concludes that its declaration is abortion-neutral and constitutional.

We reject this reasoning. A recitation that state laws must be compatible with the United States Constitution is simply a restatement of the postulate contained in article VI of the Constitution. Such a statement cannot, however, validate state laws that are in fact incompatible with the constitution. To accept the state's position would be to hold that every state law is valid as long as it contains a clause subjecting the law to the supremacy

clause. We decline to so hold. We affirm the district court's judgment that sections 1.205.1(1) and (2) are invalid.[8]

D. Public Funds, Employees, and Facilities

The final portions of the statute that the lower court declared unconstitutional prohibit the use of public funds, employees, and facilities for the purpose of "performing or assisting" an abortion or for "encouraging or counseling" a woman to have an abortion not necessary to save her life.[9] We address separately the constitutionality

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8. We need not address the argument advanced by the plaintiffs that if in fact section 1.205.1(1) and (2) have nothing to do with abortion they must be invalidated because they violate the Missouri Constitution's requirement that "[n]o bill shall contain more than one subject * * *." Mo. Const. art. 3, § 23.

9. Specifically, the three sections provide:

188.205. Use of public funds prohibited, when

It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

188.210. Public employees, activities prohibited, when

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

188.215. Use of public facilities prohibited, when

It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

(Continued on following page)

of the "encourage or counsel" prohibitions and the "perform or assist" prohibitions.

1. "Encouraging or Counseling" Women to Have Abortions

The district court concluded that the ban on using public funds, facilities, or employees to "encourage or counsel" a woman to have an abortion is void for vagueness and violative of the right to privacy. We agree with these conclusions.

a. Vagueness

In assessing a vagueness challenge, the court first determines whether the challenged enactment implicates constitutionally protected conduct. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). If not, then the statute must be upheld unless it is impermissibly vague in all its applications. *Id.* at 497. If the statute does implicate constitutionally protected activity, the court must determine

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Footnote continued—

The statute employs the following definitions:

188.200. Definitions

* * *

(1) "Public employee", any person employed by this state or any agency or political subdivision thereof;

(2) "Public facility", any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof;

(3) "Public funds", any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

whether the statute is sufficiently precise to serve the goals of fair notice and fair enforcement. *Id.* at 498. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499 (footnote omitted).

As a threshold matter, the state argues that the statutes at issue should not be strictly scrutinized because their penalties are civil, rather than criminal, and because the statutes do not implicate first amendment freedoms. We disagree. To the extent that a lesser standard of scrutiny is appropriate because of the civil nature of the penalty, a proportionately greater increase in scrutiny is warranted because of the threat that the statutes will inhibit the exercise of constitutional rights. The prohibition on "encouraging or counseling" implicates both first and fourteenth amendment rights of both physicians and their patients: the right to disseminate and receive information about abortion, and the right to knowingly and intelligently choose an abortion after consulting a physician. We therefore conclude that the "encouraging or counseling" ban must be scrutinized with particular care.

The statute prohibits two distinct activities: "encouraging" and "counseling." The state's proffered interpretation of these words, however, equates the two activities as encompassing and banning only "affirmative advocacy." Although such a construction may be *desirable*, "it is not within our power to construe and narrow state laws[,]" *Grayned v. City of Rockford*, 408 U.S. 104,

110 (1972), and the scope of the encouraging or counseling ban appears literally to be much broader than the interpretation offered by the state. We believe the interpretation offered by the state violates basic principles of statutory construction. *See Colautti*, 439 U.S. at 392 (striking down a statute for vagueness, stating that the state's "argument that 'may be viable' is synonymous with 'viable' would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

More importantly, the statute is vague because the word "counsel" is fraught with ambiguity;[10] its range is incapable of objective measurement. *See Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). In such circumstances, the threat to the exercise of constitutionally protected rights is tangible; possible targets of the statute are chilled into avoiding even speech that is normally afforded the utmost protection under the Constitution.[11]

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10. The state cites to *Black's Law Dictionary* to support its argument that "counseling" has a clearly delimited definition; the state refers, however, to one of only several alternative definitions. *See, e.g., Webster's Third New International Dictionary* 518 (1981):

> 1a: instruction or recommendation esp. when given as a result of consultation: opinion, advice, direction * * * b: a policy or plan of action or behavior * * * 2: interchange of opinion esp. on possible procedure: discussion, deliberation, consultation * * * 3 obs: faculty or exercise of deliberate judgment: prudence, thoughtfulness 4 archaic: a plan arrived at through deliberation * * * 5a archaic: secret purpose or opinion: private confidence: secret * * * b: reflection, thought, intent, or plan discreetly and carefully guarded from being known * * * [.]

11. Indeed, the district court cited evidence that the statute had already had this pernicious effect:

(Continued on following page)

The state relies upon a Ninth Circuit case holding that Arizona's ban on state support for "counseling for abortion procedures" was not unconstitutionally vague. *Planned Parenthood v. State of Arizona*, 718 F.2d 938, 948-49 (9th Cir. 1983). We find this case to be inapposite, however, because the Arizona Attorney General had previously given a narrowing construction to the phrase "abortion procedures" such that the ban on counseling for abortion procedures was significantly more precise than the ban at issue here. *Id.* Moreover, the wording of the Missouri statute is sufficiently different from that of the Arizona statute as to render them incapable of identical interpretations; "[b]ecause of the nature of the vagueness doctrine, any holding that a statute is unconstitutionally vague must necessarily be highly case-specific." *Margaret v. Edwards*, 794 F.2d 994, 999 n.13 (5th Cir. 1986).

We conclude that the district court was correct to hold that the "encouraging or counseling" portions of sections 188.205, .210, and .215 are unconstitutionally vague.

Footnote continued—

> There was evidence that all staff and resident physicians at Truman Medical Center were instructed by the Executive Director not to make "any . . . comment relative to abortion" which is "not necessary to save the life of the mother." A memorandum by Department of Health Director, R. Harmon, M.D., revealed his belief that "[p]ublic facilities and employees under this bill will probably cease to mention abortion out of fear of prosecution." Dr. Debabrata Maulik also testified that the prohibition on "encouraging or counseling a woman to have an abortion" would leave a physician uncertain in distinguishing between lawful and unlawful discussions with patients.

662 F. Supp. at 425-26 (footnotes omitted).

b. Right to Privacy

Alternatively, we agree with the district court—and other federal courts that have recently considered similar issues—that the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently. *Cf. Commonwealth of Massachusetts v. Bowen,* 679 F. Supp. 137, 148 (D. Mass. 1988) (permanently enjoining enforcement of regulations promulgated by Secretary of Health and Human Services that preclude federally funded projects from providing counseling or referrals for abortion); *Planned Parenthood Fed'n of Am. v. Bowen,* 680 F. Supp. 1465, 1473 (D. Colo. 1988) (preliminarily enjoining same regulations on the ground that they violate, *inter alia,* a woman's fifth amendment liberty interest in choosing whether to have an abortion).

The Supreme Court has consistently held that meaningful exercise of the right to choose abortion requires the state not to erect obstacles to patients' receipt of their physicians' medical judgment and assistance:

> The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given "the room he needs to make his best medical judgment." *Doe v. Bolton,* 410 U.S. 179, 192 (1973). See *Whalen v. Roe,* 429 U.S. 589, 604-605, n.33 (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decision-making process and implementing her decision should she choose abortion. See *Colautti v. Franklin,* 439 U.S. 379, 387 (1979). * * *
>
> * * * Until [the state's interest in maternal health becomes compelling] a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision "free of interference by the State."

City of Akron, 462 U.S. at 427, 429-30 (quoting *Roe,* 410 U.S. at 163) (footnotes omitted).

Missouri's statute, however, places the state between physicians and their patients by forbidding the physicians from relaying certain information, opinions, and advice. The statute contains no exception, for instance, to allow a doctor to advise a patient to have an abortion in those situations where the doctor deems abortion medically necessary although not necessary to save the patient's life.[12]

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12. The district court pointed out that uncontradicted testimony demonstrated that "in such situations a physician has a professional duty to at least suggest or even urge the pregnant woman to have an abortion." 662 F. Supp. at 427. The court noted:

> Dr. Maulik testified that the fear of civil liability and an ethical obligation would compel him to "strongly recommend," though never "force a decision" to have an abortion because of a woman's non-life-threatening health interests. A prohibition on this would be "devastating" to a medical practice. He further testified that it would be "dishonest" to merely discuss abortion as an option without a recommendation of "what in [his] judgment is the best possible course in terms of [the woman's] health and survival."
>
> Dr. Carl Pearman also stated that he feels an ethical and professional obligation to give advice whether to choose abortion when requested by the patient to do so. If this were prohibited by law, Dr. Pearman stated that he would be forced to either violate the law or quit caring for patients who present with such health complications during pregnancy.

Id. at 427 n. 53.

Such an attempt to officially structure the dialogue between a woman and her doctor would require no discussion were it imposed on *all* doctors, because such attempts repeatedly have been held unconstitutional. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 759-65 (1986). The state maintains that Missouri's statute is different, however, because it intrudes into the protected doctor-patient relationship only when the doctor is a public employee, is paid with public funds, or uses a public facility. Relying upon cases holding that states may refuse to subsidize abortions, the state contends that its ban on "encouraging or counseling" women to have abortions is simply a refusal to subsidize abortions, reflecting the state's policy preference for childbirth over abortion. *See, e.g., Harris v. McRae,* 448 U.S. 297 (1980) (Congress need not provide funds for indigent women to have medically necessary abortions despite its provision of funds for other medically necessary services); *Maher v. Roe,* 432 U.S. 464 (1977) (states participating in Medicaid need not pay for nontherapeutic abortions for indigents simply because states pay childbirth expenses).

We think that the state's analogy of its ban on "encouraging or counseling" to bans on public abortion funding is completely inapt. Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

This state-created obstacle to exercise of the right to choose an abortion thus is far-removed from a state's refusal to remove obstacles not of its own creation. The Supreme Court has unequivocally stated that states cannot constitutionally impose such burdensome obstacles to what is at bottom a right *to decide* whether to terminate a pregnancy. *See Maher,* 432 U.S. at 473-74 (the right protected by *Roe v. Wade* is the right to make certain kinds of important decisions); *Harris,* 448 U.S. at 316 (*"government may not place obstacles in the path of a woman's exercise of her freedom of choice"*) (emphasis added). We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision. We therefore affirm the district court's judgment that the state's ban on "encouraging or counseling" is an unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment.

2. "Performing or Assisting" Abortions

The district court declared unconstitutional those portions of the statute prohibiting use of public employees, facilities, and funds, to "perform or assist" abortions. *See* §§ 188.205, .210, .215. With respect to the ban on using public facilities, the court based its holding on this court's decisions in *Nyberg v. City of Virginia,* 667 F.2d 754 (8th Cir. 1982) (*Nyberg II*), *appeal dismissed, cert. denied,* 462 U.S. 1125 (1983) and *Nyberg v. City of Virginia,* 495 F.2d 1342 (8th Cir.) (*Nyberg I*), *appeal dismissed, cert. denied,* 419 U.S. 891 (1974). The district court also declared all three sections violative of the eighth amendment's ban on cruel and unusual punishment.

a. Public Facilities

Section 188.215 makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother * * *." The statute defines "public facility" to mean "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof." § 188.200(2).

The constitutional validity of this statute depends on whether this court's *Nyberg* cases control, or, rather, whether the Supreme Court's decision in *Poelker v. Doe*, 432 U.S. 519 (1977), is more apposite. We agree with the district court and the plaintiffs that the *Nyberg* cases are controlling.

In *Nyberg II*, the city of Virginia adopted a resolution prohibiting doctors from using the facilities of the municipal hospital to perform any abortions other than those required to save the life of the mother. This court affirmed the district court's refusal to vacate an injunction barring implementation of the resolution. *Nyberg II*, 667 F.2d at 759. *Nyberg I and II* hold that states may not refuse to allow doctors to perform privately-paid abortions in public facilities. *Id.* at 758; *see also Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 854-55 n.9 (8th Cir. 1981) (interpreting holding in *Nyberg I*).

As we explained in *Nyberg II*, the abortion-funding cases the Supreme Court decided after *Nyberg I* did not require vacation of the injunction issued in *Nyberg I*. The Supreme Court cases, quite simply, held that the government need not provide public financing for elective abortions. *See Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding statute prohibiting use of state funds for abortions);

Harris v. McRae, 448 U.S. 297 (1980) (upholding constitutionality of the Hyde Amendment, which prohibited use of federal funds to reimburse women for the cost of abortions); *Poelker*, 432 U.S. at 521 (city not required to provide publicly financed hospital services for nontherapeutic abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (state not required to provide funding for nontherapeutic abortions). The issue in those cases thus was different from the issue presented both here and in *Nyberg*. *See Nyberg II*, 667 F.2d at 758 ("There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.").

The suggestion by the state that *Nyberg II* misinterpreted *Poelker* is refuted by *Poelker* itself. The *Poelker* Court stated that *Poelker* and *Maher* turned on the same issue and that the analysis in *Maher* controlled the issue in *Poelker*. *Poelker*, 432 U.S. at 521. ("the constitutional question presented here is identical in principle with * * * the issue before us in *Maher v. Roe*"). The issue in *Maher* was whether a state constitutionally could refuse to provide Medicaid benefits for abortion while providing them for childbirth. Similarly, in *Poelker* the plaintiff was an indigent who sought a free abortion at the expense of the city.

The due process challenge that was made in *Nyberg* and that is made here raises a totally different issue: whether the state creates an undue burden or obstacle to the free exercise of the right to choose abortion when it bans access to public facilities. To prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the availability of abortion to women. As we

explained in *Nyberg*, such a prohibition could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance. Such a rule could increase the cost of obtaining an abortion and delay the timing of it as well.

If *Poelker* will be extended to permit states to constitutionally prohibit all abortions at public facilities, it is far better that the Supreme Court, rather than this court, declare such a rule. Under the present status of the law we think it patently wrong to say that denial of the use of public facilities for abortion procedures does not violate the principles of *Roe v. Wade*.

Missouri's statute is indistinguishable from the resolution at issue in *Nyberg*:[13] it bars women seeking to obtain and pay for abortions access to public facilities when the evidence demonstrates that *no* public funds are expended by allowing the abortions.[14] As Judge Stephenson so concisely wrote in *Nyberg I*:

---

13. The state suggests that *Nyberg* is distinguishable because the public facility was the only hospital in the city of Virginia. The city's resolution therefore precluded any abortions from being performed in the city. This fact, however, was not particularly relevant—much less *essential*—to the holding in *Nyberg*. *Nyberg's* holding was based on the finding that the city was infringing the right to choose abortions that do not requires expenditure of public funds, in a way that was not narrowly tailored to achieve any compelling state interest.

14. As the district court noted: "Mr. Richard Chern, Associate Administrator of Finance at Truman Medical Center [a public facility], testified that the full cost of abortions at TMC are recovered from the patient, without any sliding scale for indigency." 662 F. Supp. at 428 n.55. Portions of Mr. Chern's testimony in response to questioning by plaintiffs' counsel were as follows:

> Overall we go through a process to determine or to approximate what the cost of the various services are and there are various methods that are used and it's primarily

(Continued on following page)

> The sweeping hospital resolution in question here cannot withstand the constitutional parameters framed by *Doe* and *Roe*. It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation.

Nyberg I, 495 F.2d at 1346. We affirm the ruling that section 188.215 violates the fourteenth amendment.

Footnote continued—

> based off of medicare regulations which set down the various costs of the hospital or the entire facility and step it down into the various department and they give their allocation basis such as square footage, they're allocated to various areas for example as far as labor, fringe benefit costs based on the salaries and the hours of people, so there are various methods that are used to spread all the various costs back into the cost centers or the revenue producing areas. From there we obtain a general costs to charge ratio and in general that gives us an approximation of what the costs are for the various services. From there there are other factors which are taken into consideration such as market conditions, what other similar hospitals in the area charge for a particular type of services and also as far as comparisons of charges per patient day overall, and per case, so that there are other comparisons made. From there there are determinations made as far as what the ultimate price will be.
>
> * * *
>
> Q. Is there more attention paid to the pricing of abortion procedures than other procedures?
>
> A. There is a specific policy of the institution or the corporation in which it is to be insured that the cost is recovered from the people that are receiving those services so as a result there is more attention paid to those—the pricing of that particular service.
>
> Q. This policy which you have just described, am I correct that you're saying it's a policy directed solely toward abortion patients?

(Continued on following page)

b. Public Employees

The state also challenges the trial court's ruling that section 188.210 is constitutionally infirm. Section 188.210 provides: "It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother."

Although we agree with the trial court that the statute is unconstitutional, our reasoning is different. The trial court held that the statute violates the eighth amendment. We do not reach the eighth amendment issue because we hold that this prohibition violates the due process clause as interpreted in *Roe* and its progeny.[15]

Footnote continued—

A. Yes, toward the abortion services.

Q. And that is to insure that the cost to the abortion patient makes it self-supporting, the procedure, is that the concept?

A. Yes.

* * *

Q. This policy of making the abortion patient pay the full cost of the service received, is there any distinction in that policy as applied to clinic patients of the hospital itself as opposed to private practice patients or physicians who bring their patients to Truman to do the procedure?

A. There's no distinction made as far as the type of patient.

Q. It's the same across the board?

A. Yes.

Transcript at 3-4 - 3-6.

15. We also need not decide the issue whether section 188.215 violates the eighth amendment, as the trial court held. Although plaintiffs did not challenge this specific provision under the due process clause, our ruling as to the provision concerning public facilities requires a similar holding as to the provision concerning public employees. It would be totally incongruous to hold that the state cannot deny use of public facilities for paid abortions but may forbid public employees from assisting in those surgical procedures.

Roe and its progeny established that the due process clause protects women from unduly burdensome state interference with their right to decide whether to terminate pregnancies. *See, e.g., Roe,* 410 U.S. at 154-55; *Maher,* 432 U.S. at 473-74. Although the due process clause "does not confer an entitlement to * * * *funds* [to pay for abortions]," *Harris,* 448 U.S. at 318 (emphasis added), it does preclude the states from "plac[ing] obstacles in the path of a woman's exercise of her freedom of choice * * *." *Id.* at 316. Just as a statutory prohibition on access to public facilities for privately-paid abortions constitutes such a government-created obstacle, so too does Missouri's ban on public employees performing or assisting abortions.

The evidence here showed that all of the public facility's costs in providing abortion services are recouped when the patient pays. Those costs must necessarily include the cost of employees' services. Hence, by refusing to permit public employees to perform or assist abortions, Missouri is not expressing its preference for childbirth over abortions by refusing to *fund* the latter. Rather, the state is declaring that even women who can afford abortions cannot obtain them through the assistance of public employees, for no other expressed reason than the state's desire to discourage abortions. This obstacle to exercise of the right to choose abortion cannot stand absent a compelling state interest; Missouri's desire to discourage abortions is not sufficient justification. We therefore affirm the judgment that Missouri's ban on performance or assistance of abortions by public employees is unconstitutional.

c. Public Funds

The final provision at issue is section 188.205, which makes it "unlawful for any public funds to be expended

for the purpose of performing or assisting an abortion, not necessary to save the life of the mother * * *." The trial court held that the prohibition on use of public funds to assist abortions constitutes cruel and unusual punishment under the eighth amendment because it precludes pregnant prison inmates from obtaining abortions. 662 F. Supp. at 429. Prison inmates seeking abortions receive assistance from state employees in the form of escorts and, often, transportation to outside facilities. Because the accompanying expenditure of public funds is barred by the statute, inmates are effectively prevented from obtaining abortions. The district court held that this violates the eighth amendment because it constitutes deliberate indifference to prisoners' medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

The state raises a number of challenges to this ruling,[16] but primarily maintains that "assistance" within the meaning of the statute does not encompass the type of assistance given by state employees to inmates when they obtain abortions. Thus, the state contends, the statute does not preclude state employees from transporting and escorting inmates to obtain abortions. The state further argues that it was erroneous for the district court to declare the "assist" portion *facially* unconstitutional simply because the court "could hypothesize an offbeat interpretation of the statute which under certain very unique circumstances could be applied to a person, a female inmate, so as to violate her rights." Because we agree with the state that the district court erroneously construed the term "assist," we need not address its second contention.

16. The state argues that no plaintiff has standing to raise this claim because none of the named plaintiffs is an inmate and third-party standing is not warranted. The state does not claim, however, that it was error to allow the named plaintiffs to represent a class of pregnant females seeking abortion services or counseling. That class includes pregnant female prison inmates. In addition, the evidence showed that plaintiff Reproductive Health Services has performed abortions on prisoners from state institutions. 662 F. Supp. at 428. In circumstances such as those present here, clinics and physicians have standing to raise the rights of their patients. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion) and *id.* at 128 (concurring and dissenting opinion of Powell, J., joined by three Justices) (agreeing that in the event of direct state interference with the physician-patient relationship, "one party to the relationship should be permitted to assert the constitutional rights of the other").

The state further suggests that the eighth amendment issue was not properly raised below because not pled in the complaint. Nevertheless, evidence was presented without objection at trial about the fact and the manner of inmates' receipt of abortion services at Reproductive Health Services. We deem the issue tried by implied consent of the parties. *See* Fed. R. Civ. P. 15(b).

We cannot accept the conclusion that "assisting" an abortion encompasses driving or escorting the patient to the location where the procedure is to take place. The abortion itself does not take place in the vehicle or as the patient is being escorted. We think a more reasonable interpretation of the phrase "assisting an abortion" is the one suggested by the state: direct participation in the surgical procedure itself. Because we thus hold that the statute does not prevent state employees from arranging for abortion procedures for inmates or from transporting and escorting inmates to abortion facilities, we must reverse the district court's judgment that section 188.205 violates the eighth amendment.[17] Moreover, because the

17. Because we resolve this issue on statutory grounds, we need not and do not decide the constitutional question resolved by the district court. We note, moreover, that this case does not present the question recently decided in the affirmative by the Third Circuit: whether the eighth amendment requires the government to assume the cost of providing inmates with elective abortions in the absence of alternative methods of financing. *See Monmouth County Correctional Institutional Inmates v.*

(Continued on following page)

Supreme Court has made clear that neither the due process clause nor the equal protection clause requires public funding for abortions, we conclude that Missouri's ban on the expenditure of public funds for the purpose of performing or assisting abortions is constitutional.[18]

E. Attorneys' Fees

The state also appeals from the district court's award of attorneys' fees to the plaintiffs, arguing that: (1) the rates awarded to most of the attorneys were unreasonable; and (2) the district court should have reduced the number of hours on which it based the award due to duplication of effort and an unreasonably high number of hours devoted to this action. The district court carefully considered both the rate and the number of hours expended and correctly applied the relevant legal criteria. Finding no abuse of discretion, we affirm the award of attorneys' fees and award plaintiffs full costs on appeal.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I join Parts A and B of the Court's opinion, holding invalid Mo. Ann. Stat. §§188.025 (hospitalization requirement) and 188.029 (tests to determine viability). I also join Part D(2)(c), upholding §188.205, the ban on expenditure of public funds for abortions not necessary to save the life of the mother.

As to Part D(1), invalidating those portions of §§188.205, 188.210, and 188.215 forbidding the use of public facilities, employees, or funds to encourage or counsel certain abortions, I concur in the result. These statutes sharply discriminate between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment, as incorporated against the states by the Due Process Clause of the Fourteenth Amendment.

As to Parts D(2)(a) and (b), I also concur in the result. I am unable to distinguish this case from *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed and cert. denied*, 462 U.S. 1125 (1983). This panel is bound by *Nyberg*.

As to Part C, I respectfully dissent in part. Of course a governmental declaration about when human life begins, insofar as it is used to justify regulation of abortion, is unconstitutional. *Roe v. Wade*, 410 U.S. 113 (1973). But I do not see why Mo. Ann. Stat. §1.205 should not be upheld insofar as it relates to subjects other than abortion. The statute, for example, may mean that the negligent killing of a fetus gives rise to a state-law tort action for wrongful death. Neither the District Court nor this Court suggests that such a change in the common law, if limited to non-abortion situations, would

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Footnote continued—

Lanzaro, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3789 (U.S. May 16, 1988); *see generally* Note, *Inmate Abortions—The Right to Government Funding Behind the Prison Gates*, 48 Fordham L. Rev. 550 (1980).

18. The plaintiffs argue here, as they did below, that sections 188.205, .210, and .215 violate "academic freedom" because they would remove clinical instruction in abortion procedures from the curricula of state medical schools. None of the named or class plaintiffs is alleged to be a medical student, however, and we hold that plaintiffs do not have standing to raise this claim.

violate the federal Constitution. Just such a purpose was apparently part of what the State Legislature had in mind when it passed this law. Section 1.205.4, which the Court does not quote, reads as follows:

> Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

The implication is that the section may properly be interpreted as creating causes of action against persons other than the mother. The statute also, the State argues, relates to the property rights of the unborn, and to the protection extended to them by the criminal law. Again, legislation on these subjects, wise or unwise, is within the purview of state legislatures, absent some constitutional obstacle, and none is suggested.

In short, I would not hold §§1.205.1(1) and (2) facially invalid, but only invalid as applied to the subject of abortion.

As to Part E of the Court's opinion (relating to attorneys' fees), I concur.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

(Filed September 29, 1988)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1641WM and 87-2157WM

REPRODUCTIVE HEALTH SERVICES et al.,
Appellees,

vs.

WILLIAM L. WEBSTER, et al.,
Appellants.

NOTICE OF APPEAL

Come now William L. Webster, Attorney General of Missouri, and the State of Missouri, appellants herein, by and through their attorneys, and give notice that they hereby appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1254(2) from the final judgment entered on July 13, 1988, by the United States Court of Appeals for the Eighth Circuit affirming an order of the United States District Court, Western District of Missouri, declaring the following provisions of the Revised Statutes of Missouri to be unconstitutional:

Sections 1.205.1(1) and (2);
Section 188.025;
A portion of Section 188.029;
Section 188.205;

Section 188.210; and
Section 188.215.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 28th day of September, 1988, to:

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APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const., Art. III § 2:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U. S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Const., Amend. XIV § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

RSMo. 1.140 (1986):

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

RSMo. 1.205.1 (1986):

1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health and well-being.

(3) The natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

RSMo. 188.010 (1986):

It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

RSMo. 188.029 (1986):

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill

and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

RSMo. 188.200 (1986):

As used in sections 188.200 to 188.220, the following terms mean:

(1) "Public employee", any person employed by this state or any agency or political subdivision thereof;

(2) "Public facility", any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof;

(3) "Public funds", any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

RSMo. 188.205 (1986):

It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion not necessary to save the life of the mother

or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

RSMo. 188.210 (1986):

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

RSMo. 188.215 (1986):

It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

RSMo. 188.220 (1986):

Any taxpayer of this state or its political subdivisions shall have standing to bring suit in a circuit court of proper venue to enforce the provisions of sections 188.200 to 188.215.

MOTION

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

—vs.—

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

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ADDITIONAL CONSTITUTIONAL PROVISION

Missouri Constitution, Article III, § 23 (1987):

No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.

STATEMENT

Appellees ("plaintiffs") move to affirm the judgment of the Court of Appeals for the Eighth Circuit on the basis that it is clearly correct and that the issues raised by appellants ("the State") are "so unsubstantial as not to need further argument." Sup. Ct. R. 16.1(c). Moreover, plaintiffs believe that a case or controversy no longer exists as to one of the issues the State raises in this appeal. Accordingly, that issue should be remanded for further proceedings. *See* Section V, *infra* p. 12.[1]

A review of the issues presented on this appeal will show that none of them requires reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973). Moreover, for the reasons set forth in Section VI, *infra* p. 16, *Roe v. Wade* should not be reconsidered.

This case involves a challenge to 1986 amendments to Missouri's abortion law ("the Act"). Four provisions of the Act have been brought to this Court for review of the holdings, first of the District Court and then of the Court of Appeals, that the provisions are unconstitutional. One provision bans the performance of abortions in public facilities, thereby eliminating what is effectively the only source of late in-hospital abortions in the state,[2] a crucial medical service for high risk patients. Mo. Rev. Stat. § 188.215 (1986); Jurisdictional Statement ("J.S.") at A 91. A second provision imposes "straitjacket" restrictions[3] on the ability of some doctors to communicate with their patients about abortion, and these restrictions are written in classically vague and viewpoint discriminatory language. Mo. Rev. Stat. § 188.205[4]; J.S. at A90-91. A third provision dictates

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1 Plaintiffs also suggest that this Court remand one of the Court of Appeals holdings for consideration of alternative state law grounds to support the judgment. *See* Section II, *infra* p. 6.

2 Jurisdictional Statement ("J.S.") at A51 n.57; *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 428 n.57 (W.D. Mo. 1987).

3 *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

4 The State appeals only the restriction on use of public funds for this purpose, not the restriction on the use of public facilities or employees. *See* Section V, *infra* p. 12.

to physicians that certain costly, medically dangerous tests be performed on women seeking abortions past the nineteenth week of pregnancy, even though the State does not dispute that these tests, in most instances, would be contrary to standard medical procedure. Mo. Rev. Stat. § 188.029; J.S. at A89-90. All of these restrictions are preceded by a fourth provision that declares that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1 (1) and (2); J.S. at A88.

The State makes some rather remarkable and inflammatory assertions about the opinion of the Court of Appeals and the issues presented to this Court for review. The State claims the Court of Appeals departed from "normal principles of constitutional adjudication . . . expand[ed] this Court's precedents in favor of abortion on demand . . . contract[ed] the State's compelling interest in the life of viable unborn children, and disregard[ed] this Court's holdings that abortion is a private matter which government need in no way subsidize." J.S. at 11.

However, a more objective review of the holdings below reveals that the State's assertions are unfounded rhetoric. The Court of Appeals and the District Court strictly applied this Court's precedents to sustain some provisions of the challenged statute[5] and to declare others unconstitutional. Further, the State has appealed to this Court only some of the Court of

5 The District Court sustained the requirement that physicians make a determination of viability at 20 weeks of gestation. Mo. Rev. Stat. § 188.029. J.S. at A36; 662 F. Supp. at 422. The Court of Appeals upheld the provision of the Act making unlawful the expenditure of public funds for the purpose of performing or assisting an abortion not necessary to save the life of the mother. Mo. Rev. Stat. § 188.205. J.S. at A79-82; *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1084-85 (8th Cir. 1988). Plaintiffs did not appeal either of these holdings.

Appeals' rulings of unconstitutionality.[6] This confirms that, contrary to the image the State seeks to portray in its Jurisdictional Statement, the court below hardly ran amok over the State's "legitimate interest in protecting . . . . the life and health of unborn human life." J.S. at 8.

As to those holdings appealed, a fair review reveals not only that the Court of Appeals was entirely correct, but that the issues raised by the State are without legal foundation or are minor contentions not rising to the level of substantial federal questions. With regard to the speech restrictions of the Act, the State has structured its appeal and framed this issue in a way that eliminates any case or controversy between it and the plaintiffs.

ARGUMENT

I. THE COURT OF APPEALS EMPLOYED THE CORRECT STANDARD OF REVIEW

The State's argument that the Court of Appeals applied an incorrect standard of review is frivolous. The standard of review for state regulations that impinge upon fundamental rights is long settled: the regulation "may be justified only by a 'compelling state interest,' " and "must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. at 155. It is not only the appropriate standard for state regulations impinging upon the exercise of the right to elect abortion, *id.*; *City of Akron v. Akron Center for Repro-*

6 The State has not appealed the Court of Appeals' invalidation of § 188.025, which would have required all post-15 week abortions to be performed in hospitals. J.S. at A57-58; 851 F.2d at 1073-74. Nor has the State appealed the Court of Appeals' holding of unconstitutionality as to those portions of §§ 188.210 and 215 which ban speech by public employees or in public facilities which encourages or counsels women to have abortions. J.S. at A65-73; 851 F.2d at 1077-81. Additionally, the State did not appeal the District Court's invalidation of the Act's requirement that a physician personally provide certain information to a pregnant woman considering an abortion. J.S. at A17-22; 662 F. Supp. at 413-16.

ductive Health, 462 U.S. 416, 420, 426-31 (1983);[7] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986), it is the standard applied to any regulation that impinges upon "fundamental rights." *Roe v. Wade*, 410 U.S. at 155.

The Court of Appeals faithfully applied the correct standard. It determined whether each provision of the Missouri Act directly interfered with access to abortion and, if so, whether the restriction was narrowly tailored to express the relevant state interests at stake. *See, e.g.*, J.S. at A59-60 and n.5; 851 F.2d at 1075 and n.5 (affirming the District Court's holding that Mo. Rev. Stat. § 188.029 was not narrowly tailored to further the State's interest in fetal life or maternal health).

Neither *United States v. Salerno*, 107 S. Ct. 2095 (1987); *Frisby v. Schultz*, 108 S. Ct. 2495 (1988); nor *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983) requires, as the State claims, a different standard. J.S. at 12-13.

In *Salerno*, 107 S. Ct. 2095, this Court inquired into whether the Bail Reform Act's pre-trial detention provisions were narrowly tailored to advance compelling state interests. *Id.* at 2103. Although this Court said that a facial challenge requires the plaintiff to establish that "no set of circumstances exists under which the Act would be valid," *id.* at 2100, that statement must

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7 In *City of Akron*, this Court answered the same argument made by the State here:

> It is true that a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the asserted state interest. But the lines drawn in a state regulation must be reasonable, and this cannot be said of § 1870.03. By preventing the performance of D&E abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. Section 1870.03 has 'the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks,' *Danforth*, 428 U.S. at 79, and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion (citations omitted).

462 U.S. at 438-39.

be understood in the context of that case: the plaintiff in *Salerno* made no allegations that the challenged law was unconstitutional as applied to him. *Id.* at 2100 n.3. In such abstract circumstances, a law which appears on its face to be narrowly tailored to meet compelling state interests will not be held facially invalid because it "might operate unconstitutionally under some conceivable set of circumstances." *Id.* at 2100.

In *Frisby*, 108 S. Ct. 2495, this Court upheld a ban on residential picketing because it was "narrowly tailored" to meet the state's significant interest in protecting unwilling listeners. *Id.* at 2501-502. The standard of review expressed was exactly that relied upon by the Court of Appeals here: "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Id.* at 2502.

In *Ashcroft*, 462 U.S. 476, which was decided the same day as *City of Akron*, 462 U.S. 416, this Court upheld Missouri's "second doctor" requirement for post-viability abortions on the ground that it furthered the state's compelling interest in viable fetal life. In a lengthy footnote, this Court dealt with the *Ashcroft* plaintiffs' contention that in some cases the method of abortion precluded fetal survival and therefore rendered the second doctor useless. *Ashcroft*, 462 U.S. at 483 n.7. This Court concluded, after a careful review of the evidence on the record, that such circumstances were "rare" and held the statute valid, concluding that "[l]egislation need not accommodate every conceivable contingency." *Id.*

Ashcroft did not, as the State contends, reject "the application of a 'narrowly drawn' standard" for abortion legislation. J.S. at 13. This Court did not uphold the Missouri law because it searched and found some valid application for it. Rather, it upheld the law because, in all but rare circumstances, it was justified by a compelling state interest: protection of viable fetal life.

The State implies that there was something "hypothetical" about the claims made by plaintiffs. J.S. at 13. Yet, it never identifies the basis for that contention. A review of the Court of Appeals' decision negates any such suggestion, and reveals that

it stringently followed the consistent mode of analysis dictated by this Court and applied uniformly by it and lower courts since 1973.

II. THE JUDGMENT OF THE COURT OF APPEALS STRIKING DOWN MO. REV. STAT. §§ 1.205.1 (1) AND (2) SHOULD BE AFFIRMED OR REMANDED FOR CONSIDERATION OF ALTERNATIVE STATE LAW GROUNDS TO SUPPORT THE JUDGMENT

The State's objection to the Court of Appeals' invalidation of Mo. Rev. Stat. §§ 1.205.1 (1) and (2) amounts to no more than a quibble. The State does not dispute the Court of Appeals' holding that these provisions are unconstitutional in so far as they adopt a theory of when life begins as a basis for regulating abortion. The State's sole contention is that it should be able to assert its theory of when life begins as a basis for legislating in certain other areas, such as inheritance rights. J.S. at 17-18. There is nothing in the Court of Appeals' opinion which forecloses the State from doing so, however, in a separate statute.[8] The State's argument with the Court of Appeals, therefore, boils down to one of statutory location, hardly an issue meriting plenary review.

Additionally, separate and independent state grounds exist which may render these sections invalid. Plaintiffs advanced the argument in the Court of Appeals that if, as the State maintains, §§ 1.205.1 (1) and (2) pertain to subjects unrelated to abortion, they violate the Missouri Constitution's requirement that "[n]o bill should contain more than one subject. . ." Mo. Const. art. III, § 23. The Court of Appeals, however, found it unnecessary to reach that issue. J.S. at A65 n.8; 851 F.2d at 1077 n.8.

Nevertheless, this Court has announced a strong policy of "avoiding the unnecessary adjudication of federal constitutional questions" where state law might provide "independent

8 Indeed, the provisions of the Act requiring Missouri's laws to be construed to protect the unborn remain in place and in effect. Mo. Rev. Stat. § 1.205.2.

support" for the judgment below. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-95 (1982). Moreover, this Court has recognized that the federal courts of appeal are in a better position than it to resolve questions of local law. *Id.* at 293.

Plaintiffs, therefore, urge this Court to affirm the judgment below or to remand this issue for consideration of alternative state grounds to support that judgment.

III. THE COURT OF APPEALS' INVALIDATION OF MO. REV. STAT. § 188.029, WHICH REQUIRES PHYSICIANS TO MAKE FINDINGS AS TO GESTATIONAL AGE AND FETAL WEIGHT AND LUNG MATURITY IN DETERMINING VIABILITY, IS CORRECT UNDER PRINCIPLES ANNOUNCED BY THIS COURT, AND THE STATE'S OBJECTIONS TO THE HOLDING BELOW DO NOT MERIT PLENARY REVIEW

Mo. Rev. Stat. § 188.029 requires a physician who has "reason to believe" a patient requesting an abortion is twenty or more weeks pregnant to conduct such "tests as are necessary to make a finding of the gestational age, weight, and lung maturity" of the fetus and enter those findings in the patient's medical record.[9] The Court of Appeals found the constitutionality of this requirement foreclosed by this Court's pronouncement that " 'neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor.' " J.S. at A59; 851 F.2d at 1074 (quoting *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979)).

The factual findings of the District Court which the Court of Appeals affirmed illustrate why the imposition of inflexible requirements in this medical context is unconstitutional: they serve neither the best interests of the patient nor the State's interests, compelling or otherwise. Extensive evidence at trial showed that forcing physicians to make these findings could

9 The District Court upheld the requirement that physicians determine viability at this stage of gestation. J.S. at A34; 662 F. Supp. at 421.

lead to added expense and health risks to the woman that were justified neither by state interests in maternal health nor protection of potential life. J.S. at A60 n.5; 851 F.2d at 1075 n.5. The evidence showed that: (1) tests for fetal weight are expensive and inaccurate and yield little useful information until much later than twenty weeks of pregnancy, and (2) amniocentesis, the only known test for lung maturity, is an invasive procedure which raises the costs and risks to both the woman and the fetus, including risks resulting from the delay required to schedule the procedure, without yielding information useful to the determination of viability until *at least* the twenty-eighth to thirtieth week of pregnancy. *Id.*; J.S. at A36-38 and nn.39-46; 662 F. Supp. at 422-23 and nn.39-46.[10]

The State does not dispute these factual findings or conclusions. It argues rather that the courts below misread the language of the statute and that the language does not require any particular medical test. J.S. at 21-22.[11]

10 Abortions past the twenty-eighth week of pregnancy are virtually non-existent. *See, e.g.*, Spitz *et al.*, *Third-Trimester Induced Abortions in Georgia, 1979 and 1980*, 73 Am. J. Public Health 594 (1983).

11 The State argues that amniocentesis will produce "no finding" on lung maturity at twenty weeks of pregnancy and it is therefore not a test " 'necessary to make a finding' " of lung maturity. J.S. at 21-22. The fact is, however, that the statute unequivocally requires physicians to make "findings" and record those findings in the patient's record; it contains no exception for circumstances where the "findings" invariably will be negative. If the only way to make those findings is through an invasive test such as amniocentesis, or an expensive one such as fetal weight determination, then the statute requires those tests. Moreover, even if the State is right that the statute requires only tests that will yield a positive "finding," it has failed to suggest what relevance findings of fetal weight or lung maturity have to viability or dispute the evidence at trial that, until thirty weeks of pregnancy, no test is relevant other then ultrasonography to determine gestational age. J.S. at A37; 662 F. Supp. at 422-23. The utter lack of evidence to establish a relationship between the findings required by § 188.029 and the State's interest in preserving fetal life indicates this statute is unconstitutional, whether judged under a "strict scrutiny" or a "rational basis" test.

This argument does not provide a basis for plenary review. This Court "defer[s] to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Frisby v. Schultz*, 108 S. Ct. at 2500 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) (citations omitted)). *See also Virginia v. American Booksellers Association, Inc.*, 108 S. Ct. 636, 643 (1988) ("[T]his Court rarely reviews a construction of state law agreed upon by the two lower federal courts").

The judgment of the Court of Appeals, therefore, should be affirmed.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT WHILE THE STATE HAS THE RIGHT TO CHOOSE NOT TO PAY FOR THE PERFORMANCE OF ABORTIONS, THE STATE CANNOT BAR ABSOLUTELY ACCESS TO PUBLIC FACILITIES BY WOMEN AND THEIR PERSONAL PHYSICIANS FOR THE PERFORMANCE OF ABORTIONS

The Court of Appeals adjudicated the restrictions on the use of public funds, public facilities, and public employees to perform or assist an abortion in precise harmony with this Court's holdings in *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980). Those cases held that the Constitution does not require the government to expend public funds to pay for abortions. Thus, in *Poelker*, where an indigent woman challenged a city policy of not allowing abortions to be performed in city-owned hospitals, this Court said:

> For the reasons set forth in our opinion in . . . [*Maher*], we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide *publicly financed* hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

432 U.S. at 521 (emphasis added).[12] Accordingly, the Court of Appeals upheld the Act's ban on the use of public funds for the purpose of performing or assisting an abortion. J.S. at A82; 851 F.2d at 1084.

Neither *Maher*, *Poelker*, nor *Harris*, however, authorizes the Act's ban on the use of public facilities or employees for the performance of abortions. These aspects of the Act bar access by women and their doctors to all facilities and employees that meet a broad definition of "public,"[13] even when, as here, no public funds are involved in the actual performance of, or assistance in, the procedures. J.S. at A76 n.14; 851 F.2d at 1082 n.14.

In *Maher*, this Court reasoned that a decision on allocation of funds was constitutional, because it "places no obstacles . . . in the pregnant woman's path to an abortion." 432 U.S. at 474. As the Court of Appeals recognized, the facilities and employees bar here is just such an obstacle:

> To prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the *availability* of abortion to women.
>
> . . . .
>
> [S]uch a prohibition could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital

12 Although the city policy barred paying as well as non-paying abortion patients, *Poelker* dealt with the policy as it applied to the plaintiff, an indigent woman seeking a publicly-funded abortion. This Court confirmed this point when it said the issue was "identical in principle" to that decided the same day in the companion case of *Maher v. Roe*, 432 U.S. 464 (1977), which dealt with a state's refusal to provide Medicaid benefits for abortions. *Poelker*, 432 U.S. at 521.

13 Mo. Rev. Stat. §§ 188.200 (1) and (2); J.S. at A90. This definition includes Truman Medical Center in Kansas City, Missouri, a hospital performing 97% of all post-fifteen week in-hospital abortions in Missouri. J.S. at A51 n.57; 662 F. Supp at 428 n.57.

> adopted a similar anti-abortion stance. Such a rule could increase the cost of obtaining an abortion and delay the timing of it as well.[14]

J.S. at A75-76; 851 F.2d at 1081 (emphasis added). *Cf. Doe v. Bolton*, 410 U.S. 179, 193-95 (1973); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 433-39 (prohibiting abortions from being performed in non-hospital facilities limits their availability).

There is a clear line between the right of a state, as recognized in *Maher*, *Poelker*, and *McRae*, to restrict funds from being used to finance abortions, and the right of a woman to be free of state-imposed obstacles on access to an abortion in a facility falling within the Act's broad definition of "public." By upholding the Act's public funds restriction while striking down the Act's public facilities and public employees restrictions, the Court of Appeals adhered firmly to that line.

This Court has already twice denied review of this issue in a series of cases arising out of the Eighth Circuit. *Nyberg v. City of Virginia, Minnesota*, 495 F.2d 1342 (8th Cir.), *appeal dismissed, cert. denied*, 419 U.S. 891 (1974); *motion to vacate injunction denied*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983). The second series of *Nyberg* decisions arose out of an attempt by the *Nyberg* defendant to vacate, in light of *Poelker*, an injunction against its policy of barring abortions in a city hospital. The Eighth Circuit Court of Appeals refused to lift that injunction on the same basis that it had invalidated the Missouri Act. *Nyberg*, 667 F.2d 754. This Court considered that issue unworthy of review then, 462 U.S. 1125, and nothing has changed to render it worthy of review now. The judgment of the Court of Appeals should be affirmed.

14 The State does not dispute this conclusion.

V. NO CASE OR CONTROVERSY REMAINS BETWEEN THE PLAINTIFFS AND THE STATE WITH RESPECT TO MO. REV. STAT. § 188.205, WHICH MAKES IT UNLAWFUL FOR PUBLIC FUNDS TO BE USED FOR THE PURPOSE OF ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION; IF A CASE OR CONTROVERSY DOES EXIST, THEN THE COURT OF APPEALS' JUDGMENT SHOULD BE SUMMARILY AFFIRMED.

The Act contains restrictions on counseling or encouraging a woman to have an abortion that apply to public funds (§ 188.205), public employees (§ 188.210), and public facilities (§ 188.215). Plaintiffs, who include three physicians who fit the Act's definition of "public employees" and who practice also as private physicians in "public facilities," challenged all three restrictions as violating their rights as well as their patients' rights. All three restrictions were considered and invalidated together by the lower courts. *See, e.g.*, J.S. at A66-73; 851 F.2d at 1077-80.

The State has not appealed the Court of Appeals' judgment that the public employees and public facilities restrictions are unconstitutional. It has appealed only the public funds restriction, and argues that "§ 188.205 does not implicate the First Amendment rights of any person. Section 188.205 merely directs officials not to expend public funds under their control . . . . The statute . . . does not forbid anyone from discussing the subject of abortion." J.S. at 24-25.

Therefore, the public employees and public facilities rulings of the Court of Appeals—rulings the State has not appealed—protect the plaintiffs and their patients. While plaintiffs are not prepared to agree that the public funds restriction "does not implicate the First Amendment rights of any person," *id.*, plaintiffs are not aware of any circumstance where the restriction will raise either First or Fourteenth Amendment concerns which are not already settled by the Court of Appeals' public employees and public facilities rulings. Therefore, on the record in this case, there is no longer a case or controversy between

plaintiffs and the State.[15] Accordingly, plaintiffs suggest that this Court vacate the judgment of the Court of Appeals as to the unconstitutionality of the public funds restriction on counseling or encouraging, and remand that issue for further proceedings in light of the State's decision not to defend further the public employees and public facilities restrictions on counseling and encouraging, and in light of plaintiffs' suggestion that a case or controversy no longer exists.

Should this Court believe that a case or controversy nonetheless exists, then the judgment of the Court of Appeals should be summarily affirmed because a restriction on counseling or encouraging is a classically vague and viewpoint discriminatory restriction on speech in violation of the First Amendment, and also violates the repeatedly recognized Fourteenth Amendment right of a woman to choose abortion in consultation with her physician.

Vagueness. The State does not dispute the Court of Appeals' finding that the "encouraging or counseling" ban, read literally, fails to give fair notice of what speech relating to abortion will or will not fall within the zone of proscribed conduct.[16] As

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15 The Solicitor General urges plenary review of this appeal because of what he believes are its implications for two federal programs where there are restrictions on counseling for or performance of abortions. His concerns are unfounded. There is no longer a case or controversy about counseling restrictions tied to public funds; and the Court of Appeals upheld the public funds restriction on performance of abortions. *See supra* note 5. *See also* Section IV, *supra* p. 9.

16 The State argues that the Court of Appeals should have accepted its interpretation of the Act as reaching only "affirmative advocacy." This suggestion, however, ignores the basic principle that it is not the function of the federal courts to adopt narrowing constructions of state laws unless they are reasonable and readily apparent from the language itself, *see Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), or, are "authoritative" narrowing constructions rendered by state courts or enforcement agencies. *See Kolender v. Lawson*, 461 U.S. 352, 355 (1983). The Court of Appeals found that the State's narrowing construction was not readily apparent, *see* J.S. at A68-69 and

the Court of Appeals said about the word "counsel," it is "fraught with ambiguity; its range is incapable of objective measurement."

> In such circumstances, the threat to the exercise of constitutionally protected rights is tangible; possible targets of the statute are chilled into avoiding even speech that is normally afforded the utmost protection under the Constitution.

J.S. at A68; 851 F.2d at 1078.[17] *See also Baggett v. Bullitt*, 377 U.S. 360, 366-67 (1964).

Viewpoint Discrimination. Judge Arnold, concurring in the result reached by the other two members of the Court of Appeals panel, said that the Act, in banning speech which encourages or counsels a woman to have an abortion, while providing no bar to speech which discourages abortion or counsels against it, "sharply discriminate[s] between kinds of speech on the basis of their viewpoint," and is therefore "flatly inconsistent with the First Amendment." J.S. at A83; 851 F.2d at 1085.

As this Court said in *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the prohibition on viewpoint discrimination is absolute:

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n.10; 851 F.2d at 1078-79 and n.10, and the Attorney General's self-serving statement made in the context of this litigation is not an "authoritative" construction: it does not bind a state court or an agency which hears actions to enforce the statute.

17 The Court of Appeals cited evidence on the record that the Director of a facility whose activities would be immediately affected has already directed his staff not to make " 'any. . . comment relative to abortion.' " J.S. at A69 n.11; 851 F.2d at 1078 n.11. In addition, it cited testimony the District Court heard from a physician who is the director of the perinatology service at Truman Medical Center, and specializes in counseling women with high risk pregnancies, that the statutory language would leave him uncertain how to distinguish between lawful and unlawful discussions with women about abortions necessary to preserve their health. J.S. at A71 n.12; 851 F.2d at 1079-80 n.12, citing 662 F. Supp. at 425-26.

> It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest . . . . [T]here are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

Id. at 804 (citations omitted).

The fact that the viewpoint discrimination involves only the use of public funds creates no exception to this absolute ban. Thus, in *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), when this Court struck down a ban on editorializing by publicly-funded radio stations on the basis that it was a "regulation of speech . . . motivated by nothing more than a desire to curtail expression of a particular point of view," even the dissent noted:

> This is not to say that the Government may attach *any* condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily 'aimed at the suppression of dangerous ideas.'

Id. at 407 (Rehnquist, J., dissenting).

Fourteenth Amendment Violation. This Court has " 'stressed repeatedly the central role of the physician . . . in consulting with the woman about whether or not to have an abortion.' " *City of Akron*, 462 U.S. at 447 (quoting *Colautti v. Franklin*, 439 U.S. at 387). As the Court of Appeals recognized, the restriction on counseling or encouraging is "an

obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth." J.S. at A72; 851 F.2d at 1080. It is a textbook example of the "state medicine" condemned in *Thornburgh*, 476 U.S. at 763, and thus violates the Fourteenth Amendment.

VI. *ROE V. WADE* SHOULD NOT BE RECONSIDERED

The State asserts that this appeal presents the question of whether *Roe v. Wade*, 410 U.S. 113 (1973), should be reconsidered. J.S. at 11. The State offers little support for requesting this extraordinary relief other than its subsequent assertion that if the provisions of the Act involved in this appeal "are unconstitutional under *Roe v. Wade* and its progeny as the Court below maintains, . . . *Roe v. Wade* should itself be reconsidered." J.S. at 11. The Solicitor General's brief *amicus curiae* also wistfully opines that, "if the Court is prepared to reconsider *Roe v. Wade*, this case presents an appropriate opportunity for doing so." Brief For The United States As *Amicus Curiae* at 12.[18]

In *City of Akron*, this Court was also presented with arguments that *Roe* "erred in interpreting the Constitution." 462 U.S. at 419. This Court rejected those arguments, and "reaffirm[ed] *Roe v. Wade*." *Akron*, 462 U.S. at 420. In doing so, the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*," as follows:

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. *See Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981).

462 U.S. at 420 n.1.

Again, in *Thornburgh*, the Solicitor General, among others, urged this Court to overrule *Roe v. Wade*. But the *Thornburgh* Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*." 476 U.S. at 759. In doing do, this Court noted that "[t]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Id.*

Neither the State nor the Solicitor General has offered anything new or different to justify reconsidering what this Court "considered with special care" in 1973, and has explicitly reaffirmed many times since then. Moreover, as outlined above, the issues raised by the State on this appeal hardly call into question the settled constitutional underpinnings of the decision below. " '[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' " *Thornburgh*, 476 U.S. at 759 (quoting *Brown v. Board of Education*, 349 U.S 294, 300 (1955) (citations omitted)).

The larger implications of the State's and *amicus curiae's* suggestions should not be overlooked. Turning back the clock fifteen years to a time when the States were free to criminalize abortion would reinstitute the untold misery and deaths of

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18 With his brief *amicus curiae*, the Solicitor General submitted a copy of his previous *amicus* brief, filed in *Thornburgh*, 476 U.S. 747, setting forth his views on this issue. Plaintiffs call to the Court's attention that these views were directly answered in a brief *amici curiae* filed in *Thornburgh* by eighty-one members of Congress. The views of the Solicitor General, expressed in his *Thornburgh* brief, should only be considered here if, at the same time, the answering views are also considered.

More significant, of course, is the fact, as pointed out above, that this Court has rejected the Solicitor General's views. *Thornburgh*, 476 U.S. at 759.

thousands of women from illegal operations and reverse startling improvements which the legalization of abortion has made in both maternal and infant mortality and morbidity. Legal, safe abortion is a choice now exercised by one of every four pregnant women in the United States, including half a million teenagers, women seeking to break the cycle of poverty through control of their own reproduction and family size, victims of rape, incest, AIDS, and drug abuse, and women whose fetuses are afflicted with serious genetic and congenital disorders. These benefits to human health and welfare have generated support for the principles of *Roe v. Wade* from national medical and public health organizations. Courts in other countries have cited *Roe v. Wade* when lifting restrictive laws within their own jurisdictions. *See, e.g., Morgentaler v. Her Majesty The Queen*, 1 S.C.R. 30, 44 D.L.R.4th 385 (Canada S. Ct. 1988). The State and the Solicitor General have offered no excuse or justification for such an upheaval of settled legal principles. Their suggestion should be rejected.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed with respect to Mo. Rev. Stat. §§ 1.205.1 (1) and (2), 188.029 and those portions of §§ 188.210 and 188.215 which forbid the performance of abortion by public employees in public facilities. Alternatively, this case should be remanded as to §§ 1.205.1 (1) and (2) for consideration of state law grounds to support the judgment. The judgment with respect to § 188.205, in so far as it relates to the expenditure of public funds to encourage or counsel abortion, should be remanded for further proceedings in light of plaintiffs' suggestion of the absence of a case or controversy, or alternatively, affirmed.

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AMICUS CURIAE

BRIEF

(3)

No. 88-605

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET AL., APPELLANTS

v.

REPRODUCTIVE HEALTH SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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INTEREST OF THE UNITED STATES

The court of appeals in this case struck down provisions of a Missouri statute that forbid, inter alia, the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. § 188.205) and the use of public employees and public facilities "for the purpose of performing or assisting an abortion not necessary to save the life of the mother" (§§ 188.210, 188.215). The United States has placed similar restrictions on the use of public funds and certain publicly-funded programs. See, *e.g.*, The Adolescent Family Life Act of 1981, 42 U.S.C. 300z-10(a); Title X of the Public Health Services Act of 1970, 42 U.S.C. 300a-6; 53 Fed. Reg. 2945 (1988) (to be codified in 42 C.F.R. 59.8(a)(1)). The United States therefore has a direct and substantial interest in the disposition of this case.

STATEMENT

In 1986, the State of Missouri passed a statute regulating abortions. The first section of the statute contains a general "finding" by the state legislature that "[t]he life of each human being begins at conception," and a requirement that all state laws be interpreted to provide unborn children with all the rights of other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court" (Mo. Stat. Ann. § 1.205.1-2). Among its various other provisions, the statute requires that, prior to performing an abortion on any woman whom a doctor has reason to believe is twenty or more weeks pregnant, the doctor must determine whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child" (§ 188.029). The statute also provides that no public funds, employees or facilities are to be used for the purpose of "performing or assisting" an abortion or for "encouraging or counseling" a woman to have an abortion (§§ 188.205, 188.210, 188.215).

Five publicly-employed doctors and nurses and two nonprofit corporations brought a class action challenging the constitutionality of these and other provisions of the Missouri statute. The district court struck down the provisions (J.S. App. A1-A55) and the court of appeals affirmed (*id.* at A56-A84). The court of appeals concluded (*id.* at A59-A60) that the requirement that doctors perform viability tests is an unconstitutional legislative intrusion on a matter of medical skill and judgment. The court also struck down (*id.* at A64) Missouri's declaration that life begins at conception on the grounds that "the statute is

simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." The court of appeals rejected (*ibid.*) Missouri's reliance on the declaration's caveat requiring compatibility with the Constitution and Supreme Court precedent on the grounds that a mere recitation of the Supremacy Clause "cannot * * * validate state laws that are in fact incompatible with the constitution." [1]

The court of appeals struck down Missouri's ban on the use of public funds for "encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. § 188.205) as both void for vagueness and as violating the right to abortion guaranteed by *Roe* v. *Wade*, 410 U.S. 113 (1973).[2] "[T]he statute is vague," the court stated (J.S. App. A68), "because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." Furthermore, the court held (*id.* at A70), the prohibition "is an unacceptable infringement of the woman's fourteenth amendment right to choose an

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[1] Judge Arnold dissented (J.A. App. A83-A84) from this aspect of the decision below, contending that Missouri's declaration of when life begins should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or bringing fetuses within the protection of the criminal law.

[2] The court of appeals also struck down the related provisions forbidding any public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life and forbidding the use of any public facilities for that purpose. See Mo. Stat. Ann. §§ 188.215, 188.220. The State of Missouri has not appealed from those aspects of the judgment below.

abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." The court rejected as "completely inapt" (*id.* at A72) the analogy drawn by the State of Missouri between its ban on the use of public funds to encourage or counsel abortions and the bans on the use of public funds to perform or assist abortions upheld in *Harris* v. *McRae,* 448 U.S. 297 (1980), and *Maher* v. *Roe,* 432 U.S. 464 (1977). "Missouri," the court contended (J.S. App. A72), "is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth."

The court of appeals also struck down Missouri's prohibition on the use of public facilities and public employees acting within the scope of their employment "to perform or assist an abortion not necessary to save the life of the mother." Mo. Stat. Ann. §§ 188.210, 188.215. The court distinguished this Court's cases holding that the government need not provide funding for elective abortions on the grounds that " '[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.' " J.S. App. A75 (quoting *Nyberg* v. *City of Virginia,* 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, cert. denied, 462 U.S. 1125 (1983)). The court noted (J.S. App. A79) that all of the public facilities' costs in providing abortion services, including the costs of employees' services, are recouped when the patient pays. Hence, the court stated (*id.* at A75), the question at issue is not whether the state is required to fund abortions but whether "the state creates an undue burden or obstacle to the free exercise of the right to choose an abortion" when it prohibits the use of public facilities and public employees to perform or assist abortions.

With respect to the ban on the use of public facilities, the court stated (J.S. App. A76) that "such a prohibition could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance. Such a rule could increase the cost of obtaining an abortion and delay the timing of it as well." With respect to the ban on using public employees to perform or assist abortions within the scope of their employment, the court stated (*id.* at A79) that "the state is declaring that even women who can afford abortions cannot obtain them through the assistance of public employees, for no other expressed reason than the state's desire to discourage abortions. This obstacle to exercise of the right to choose abortion cannot stand absent a compelling state interest; Missouri's desire to discourage abortions is not sufficient justification." Accordingly, the court struck down both prohibitions.

DISCUSSION

The State of Missouri appeals from a final judgment of the court of appeals striking down several sections of a Missouri statute, including provisions that forbid the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. § 188.205) and the use of public employees and public facilities "for the purpose of

performing or assisting an abortion not necessary to save the life of the mother" (§§ 188.210, 188.215).[3] Since the court of appeals issued a final judgment holding these portions of the Missouri statute "to be invalid as repugnant to the Constitution * * * of the United States" (28 U.S.C. 1254(2)), this case properly falls within the Court's appellate jurisdiction.[4] The federal questions presented by this case are substantial and should not be resolved by the Court without plenary consideration. Accordingly, probable jurisdiction should be noted.

1. Missouri's prohibition on the use of public funds to encourage or counsel a woman to have an abortion not necessary to save her life is not unconstitutionally vague. This Court has stressed that civil statutes are not to be held to the same standards of precision as criminal statutes, *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982), and Missouri's prohibition on the use of public funds does not impose any criminal penalties and can only be enforced by injunctive action. See J.S. 3; Mo. Stat. Ann. § 188.220. Furthermore, the statute is "not so vague that 'men of common intelligence must necessarily guess at its meaning.' " *Broadrick* v.

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[3] The United States does not have statutes or regulations implicated by the issues raised in Questions One, Two, or Three of the Questions Presented by the State of Missouri in its Jurisdictional Statement. We do not address those issues at this time.

[4] Although Section 1254(2) was repealed by Pub. L. No. 100-352, § 2(a), 102 Stat. 662, which was signed by the President on June 27, 1988, the repeal did not take effect until September 25, 1988 (§ 7, 102 Stat. 664), and does "not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*). The judgment of the court of appeals in this case was entered on July 13, 1988 (see J.S. App. A56).

Oklahoma, 413 U.S. 601, 607 (1973) (citation omitted). As the State of Missouri explains (J.S. 25), the statute "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Rather, the statute only forbids the use of public funds for "encouraging or counseling a woman to *have* an abortion" (Mo. Stat. Ann. § 188.205 (emphasis added)). In other words, the statute prohibits the use of public funds for advising a particular woman that she should have an abortion not necessary to save her life. "[A]lthough [that prohibition] may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC* v. *Letter Carriers*, 413 U.S. 548, 579 (1973).

The court of appeals was also mistaken in holding that the Missouri statute violates the right of pregnant women to have an abortion. Missouri has merely declined to encourage abortions in any respect, and this Court has already held that the states are not precluded from making "a value judgment favoring childbirth over abortion, and * * * implement[ing] that judgment by the allocation of public funds." *Maher* v. *Roe*, 432 U.S. at 474. The court of appeals stated (J.S. App. A72) that Missouri is impermissibly "erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth." The State, however, has simply chosen itself not to advise women to have abortions not necessary to save their lives. Women are still free to make a contrary choice and to seek out medical advice consonant with their decision. But the State will not, and need not, pay for that

advice. "There is a basic difference," this Court has noted (*Maher* v. *Roe*, 432 U.S. at 475), "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

The decision below conflicts in these respects with the decision of the Ninth Circuit in *Planned Parenthood* v. *Arizona,* 718 F.2d 938 (1983), appeal after remand, 789 F.2d 1348, aff'd, 479 U.S. 925 (1986). At issue in that case was an Arizona statute providing that "[n]o state money may be spent * * * by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion procedures or abortion referrals" (718 F.2d at 941 n.1).[5] The Ninth Circuit held (*id.* at 946-949) that the prohibition on the use of state funds for "counseling for abortion procedures" was not unconstitutionally vague. The court further held (*id.* at 944) that, although "the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, * * * the State need not support, monetarily or otherwise, those activities." In light of this conflict and the considerations noted above, Question Four of

[5] Another provision in the same statute had the effect of precluding an entire organization from receiving state funds if even one of its programs provided abortion-related services through the use of non-governmental funds (718 F.2d at 941 n.1). Following a remand for further factfinding, the Ninth Circuit struck down this provision as an unconstitutional penalty on protected activity. 789 F.2d 1348 (1983). This Court summarily affirmed, although three Justices would have noted probable jurisdiction and set the case for oral argument. 479 U.S. 925 (1986). No provision similar to the second provision in the Arizona statute is at issue in this case.

the State of Missouri's Jurisdictional Statement presents a substantial federal question.

2. The court of appeals' conclusion (J.S. App. A79) that Missouri's prohibition on the use of public facilities and public employees to perform or assist abortions must be supported by a "compelling state interest" runs directly counter to this Court's statement that it is "abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth" (*Maher* v. *Roe,* 432 U.S. at 477). In essence, the court of appeals has held that the Constitution compels Missouri to go into the abortion business provided only that Missouri can break even or turn a profit in doing so. This Court has stressed (*id.* at 474), however, that a woman's "freedom to decide whether to terminate her pregnancy * * * implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." The same principle applies when the State chooses to implement its value judgment by the allocation of public facilities and the services of public employees. Thus, in *Poelker* v. *Doe,* 432 U.S. 519, 521 (1977) (per curiam), the Court upheld a city's prohibition on the performance of abortions in city hospitals noting that "the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth." [6] In light of this conflict with *Poelker* v. *Doe,* Questions Five

[6] The suit in *Poelker* v. *Doe* was filed by an indigent who could not afford to pay for her abortion. The prohibition at issue in that case, however, applied whether or not the pregnant women was able to pay. 432 U.S. at 520; *id.* at 524 (Brennan, J., dissenting).

and Six of the State of Missouri's Jurisdictional Statement also present substantial federal questions.

3. Title X of the Public Health Services Act of 1970, 42 U.S.C. 300 *et seq.*, authorizes the federal government to make grants to public and private nonprofit entities to establish and operate family planning projects. Section 1008 of the Act expressly states that "[n]one of the funds appropriated under this [title] shall be used in programs where abortion is a method of family planning" (42 U.S.C. 300a-6). In 1988, the Department of Health and Human Services passed regulations setting standards for compliance by family planning programs with Section 1008. See 53 Fed. Reg. 2922 (1988). Under these regulations, both "counseling concerning the use of abortion as a method of family planning" and "referral for abortion as a method of family planning" are forbidden. 53 Fed. Reg. 2945 (1988) (to be codified in 42 C.F.R. 59.8(a)(1)).[7]

The Adolescent Family Life Act of 1981 (AFLA), 42 U.S.C. 300z *et seq.*, authorizes federal funds to support demonstration projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. The AFLA restricts the awarding of grants to "programs or projects which do not provide abortions or abortion

[7] The constitutionality of the Title X regulations is currently before three courts of appeals. The regulations have been permanently enjoined by two district courts. *Massachusetts* v. *Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal pending, No. 88-1279 (1st Cir.); *Planned Parenthood Federation* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.). They have been upheld by one district court. *New York* v. *Bowen*, No. 88-701 (S.D.N.Y. June 30, 1988), appeal pending, No. 88-6204 (2d Cir.).

counseling or referral" (42 U.S.C. 300z-10(a)).[8] Both programs, thus, forbid any award of funds to programs that perform or counsel abortions. Title X and AFLA programs accepting federal funds may not perform or counsel abortions even if those services are fully paid for by the client or by nonfederal funds obtained from other sources.[9] A summary affirmance of this case, or a dismissal of the State's appeal for want of a substantial federal question, would thus cast doubt on the constitutionality of both the Adolescent Family Life Act and Title X and its implementing regulations. These federal programs should not be so impaired without full consideration by this Court of the underlying constitutional issues.

4. Question Seven of the State of Missouri's Jurisdictional Statement asks this Court to reconsider, and upon reconsideration to overrule, its decision in *Roe* v. *Wade*, *supra*. The United States has stated its views on this issue in our brief as Amicus Curiae in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, Nos. 84-495 and 84-1379.[10] We note that this case is free of procedural defects and implicates a number of the legislative choices

[8] The constitutionality of the funding provisions of the Adolescent Family Life Act was recently upheld against a facial attack under the Establishment Clause in *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988).

[9] These restrictions, however, apply only within the Title X or AFLA program itself. They do not apply to separate programs that may be related to the Title X and AFLA programs through a parent organization. Compare n.5, *supra*.

[10] We attach a copy of our brief in *Thornburgh* for the convenience of the Court and the parties.

foreclosed by *Roe* v. *Wade*. Accordingly, if the Court is prepared to reconsider *Roe* v. *Wade*, this case presents an appropriate opportunity for doing so.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60750

SUPPLEMENTAL

BRIEF

(4)

No. 88-605

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

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OCTOBER TERM, 1988

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SUPPLEMENTAL STATEMENT

In order for this Court to be fully informed in its conferencing of this appeal, appellees note an appeal to this Court from a final judgment of the Sixth Circuit striking down another state statute which burdened access to abortion services. *State of Ohio v. Akron Center for Reproductive Health, et al.* (No. 88-805) appeals a holding that an Ohio statute requiring notification to parents of minors' abortions is unconstitutional. The Jurisdictional Statement was filed on or about November 14, 1988, and a responding motion is due January 13, 1989. Some of the attorneys in the instant case are counsel for appellees in *Akron Center.*

Additionally, appellees note that in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), a case in which the Eighth Circuit Court of Appeals upheld in part and invalidated in part a Minnesota statute also requiring parental notification, the parties have been granted until January 5, 1989 to petition for certiorari or appeal. Although another case involving restrictions on access to abortion, *Turnock v. Ragsdale* (No. 88-790), is also on appeal to this Court (responding motion due January 14, 1989), it involves only a preliminary injunction by the Circuit Court and would appear to be inappropriate for review at this time.

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APPENDIX

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement filed October 11, 1988.
Probable Jurisdiction noted January 9, 1989.

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No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

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JOINT APPENDIX

RELEVANT DISTRICT COURT DOCKET ENTRIES

Date		Proceedings
7/14/86	1	COMPLAINT - with JS-44C Cover sheet filed.
7/14/86	4	MOTION - for class certification with suggestions by plts.
7/14/86	5	MOTION - for preliminary injunction with suggestions by plts.
7/31/86	8	TEMPORARY RESTRAINING ORDER - dfts, their agents, employees, appointees & succesors are enjoined and restrained from applying, implementing, relying upon

Date		Proceedings
		or enforcing or threatening same of 1.205.1(1), 188.025, 188.029, 188.039, 2,3,&4 of MO Senate Committee Substitute for House Bill No 1596.
		TEMPORARY RESTRAINING ORDER - all parties shall appear for trial on plts' request for declaratory judgment & for preliminary & permanent injunctions, on 11/5,6,7/86 at 9:a.m. at the U.S. Courthouse, K.C., MO.
		TEMPORARY RESTRAINING ORDER - all pretrial briefs & proposed findings of fact & conclusions of law shall be filed with this court on or before 10/28/86 & the parties shall cooperate fully in providing each other with all requested discovery before that date.
		TEMPORARY RESTRAINING ORDER - no bond shall be required of the plts.
		TEMPORARY RESTRAINING ORDER - this order, by consent of the parties, shall remain in full force & effect until further order by this court.
8/4/86	9	ANSWER - to plt's complaint by dfts.
10/24/86	15	MOTION - for leave to file 1st amended complaint by interlineation by plts.
10/24/86	16	RENEWAL MOTION - for class certification with suggestions in support by plt.
11/7/86	18	MOTION - for summary judgment by plts with memorandum in support.

Date		Proceedings
11/26/86	22	RESPONSE - to plt's request for class certification by dfts.
11/26/86	23	RESPONSE - to plts' motion for summary judgment by dfts.
12/15/86	29	STIPULATION - of facts submitted by parties.
12/15/86	30	MOTION IN LIMINE - submitted by plts. GRANTED on last page by SOW.
12/15/86	33	NON-JURY TRIAL - non jury trial begins. Minute sheet filed.
12/16/86	34	NON-JURY TRIAL - held. Parties join for trial & plts continue to present evidence before the court.
12/17/86	35	NON-JURY TRIAL - held. parties join for trial & plts continue to present evidence before the court. Plts rest 11:04a.m. Dft will present its evidence starting 12/18/86. Court in recess until 9:30a.m. 12/18/86.
12/18/86	36	NON-JURY TRIAL - held. 4th day of trial. Findings of fact and conclusions of law to be filed jointly by parties by 1/19/87. Reply is due by 1/26/87.
12/18/86	37	LIST OF EXHIBITS - offered at trial by dfts.
12/18/86	38	LIST OF EXHIBTIS - offered at trial by plts.
3/17/87	48	ORDER - 'that the specific provisions of the 1986 Missouri Act relating to the reg-

Date		Proceedings
		ulation of abortions are declared to be unconstitutional.
		ORDER - that dfts shall be permanently enjoined from enforcing the provisions declared to be unconstitutional. (Copies mailed).
3/25/87	49	MOTION - to amend judgment, pursuant to FRCP #59(e) by plts.
3/26/87	50	CLERK'S JUDGMENT - of the court entered & mailed.
4/13/87	51	MOTION - for attorneys' fees and costs with affidavits and suggestion in support by plts.
4/24/87	53	ORDER - that dfts are granted until 5/11/87 to file their resp to plt's mt for attys' fees and costs.
4/30/87	54	ORDER - the court amends its prior "Order" of 3/17/87, by the deletion in its entirety of foot note 32 on page 22.
5/15/87	56	NOTICE - of appeal of orders from 3/17/87, 3/26/87 & 4/30/87 by dfts.
6/1/87	62	REPLY - to dfts' suggs in resp and oppo to plts' mt for fees and cost by plts.
7/24/87	64	ORDER - that plts' attys shall be awarded fees and exp in the following amounts: Mr. Susman $40,022.50 for legal work and $1,262.50 for fee preparation - Total $41,-285.00; Mr. Blumentahl - $13,225.00; Mr. Evans - $19,500.00 for legal work, $125.00

Date		Proceedings
		for fee preparation and $2,662.50 for travel time - Total 22,287.50; Ms. Klassel - $32,-562.50 for legal work, $200.00 for fee preparation and $1,687.50 for travel time - Total $34,450.00; Ms. Otten - $9,202.50 for legal work.
		ORDER - Expenses for Mr. Susman and Mr. Blumenthal - $5,956.17 No expenses shall be awarded to Mr. Evans, Ms. Klassel Ms. Otten until itemized documentation is provided to the court.
8/18/87	65	RESPONSE - to ord of 7/24/87 by Roger Evans.
8/20/87	66	NOTICE - of appeal of ord of 7/24/87 by dfts.

RELEVANT COURT OF APPEALS DOCKET ENTRIES

Date	Proceedings
1987	
May 20	DOCKETED appeal
May 20	CERTIFIED copies of notice of appeal, docket entries and orders dated 3/17/87; 3/26/87; 4/30/87.
May 27	APPEARANCE for appellee.
June 1	APPEARANCE for appellant.
July 13	OPINION BY LAY PUBLISHED. DISSENT BY ARNOLD
July 13	JUDGMENT: The judgment of the dist ct is affirmed except for that portion of the judgment which held that section 188.205 of Missouri Annotated Statutes violates the eighth amendment. It is adjudged and decreed that Missouri's ban on the expenditure of public funds for the purpose of performing or assisting abortions is constitutional. The award of attorneys' fee is also affirmed and plaintiffs are awarded full costs on appeal.
Jul. 26	APPELLEES' MOTION for Attorneys fees and costs
Aug. 3	MANDATE ISSUED
Aug. 6	APPELLANTS' RESPONSE to appellees' motion for fees and costs. w/service
Aug. 17	ORDER: THE Court has considered appellees' motion for attorney fees and costs, and the response thereto. It is ordered that the total attorney fees for all attorneys of the appellees shall be awarded in the sum of $20,000.00. The expenses of counsel Evans, Kassel and Otten in the amount of $787.50 are also allowed, as are the expenses of counsel Susman and Blumenthal in the sum of $383.80. The Clerk of the District Court is requested to insert these amounts in the previously issued mandate.
Sept. 29	Notice of Appeal to Sup.Ct. of the U.S.by MO Atty.Gen.Webster and State of MO
Oct. 19	NOTICE OF FILING of pet. for writ of cert. to the Sup. Ct.of the U.S. as case No. 88-605, dated 10-11-88.
1989	
Jan. 12	ORDER OF SUP. CT. OF US. NOTING probable jurisdiction.

NOTE ON PRIOR OPINIONS

The June 23, 1987, final judgment and opinion of the district court is reported at 662 F. Supp. 407 (W.D. Mo. 1987), superseding 655 F. Supp. 1300 (W.D. Mo. 1987), and is reproduced in the Jurisdictional Statement (No. 88-605) at A1 through A55.

The final judgment and opinion of the United States Court of Appeals for the Eighth Circuit on July 13, 1988, is reported at 851 F.2d 1071 (8th Cir. 1988) and is reproduced in the Jurisdictional Statement (No. 88-605) at A56 through A84.

(Filed July 14, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

Cause No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF GREATER KANSAS CITY, HOWARD I. SCHWARTZ, M.D., ROBERT L. BLAKE, JR., M.D., CARL C. PEARMAN, M.D., CARROLL METZGER, R.N.C., C.M.A., and MARY L. PEMBERTON, B.S.W., on behalf of themselves, other medical care providers similarly situated and their patients and clients,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, Attorney General of the State of Missouri, and THE STATE OF MISSOURI,
Defendants.

CLASS ACTION COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. This is a civil action pursuant to 42 U.S.C. §1983 for judgment declaring Missouri Senate Committee Substitute for House Bill No. 1596 (hereafter the "Act"), which regulates the performance of abortion, assisting abortion and abortion counseling, both in the public and

private sector, to be unconstitutional and for appropriate injunctive relief. The Act was enacted by the Missouri General Assembly on April 23, 1986, was signed by Governor Ashcroft on June 26, 1986, and is effective on August 13, 1986. A true copy of the Act is attached hereto and marked as "Exhibit A."

II JURISDICTION

2. Plaintiffs invoke the jurisdiction of this Court under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Sections 1331 and 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; and under United States Code, Title 42, Chapter 21, Sections 1983 and 1988.

Plaintiffs challenge as unconstitutional and seek to enjoin the operation of §§1.205.1(1), 188.025, 188.029, 188.039, 2, 3 and 4 of the Act.

4. Both Defendants are residents of and the claims herein arise within this federal judicial district and division.

II PARTIES

Plaintiffs

5. Plaintiff Reproductive Health Services (hereafter "RHS") is a Missouri not-for-profit, federal tax-exempt corporation with its principal office in St. Louis, Missouri. RHS offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services. RHS provides abortion services up to 22 weeks

"gestational age" and is the largest abortion provider within the State of Missouri.

6. Plaintiff Planned Parenthood of Greater Kansas City (hereafter "PPKC") is a Missouri not-for-profit, federal tax-exempt corporation with its principal office in Kansas City, Missouri. PPKC offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services. PPKC provides abortion services up to 14 weeks gestational age.

7. Howard I. Schwartz, M.D., is a resident of Jackson County, Missouri and a physician and surgeon licensed by and within the State of Missouri. Dr. Schwartz is a board-certified obstetrician/gynecologist and is primarily engaged in the practice of medicine within his county of residence. Dr. Schwartz is Clinical Assistant Professor, Department of Obstetrics and Gynecology at the University of Missouri School of Medicine at Kansas City and is Medical Director of PPKC. As part of his medical practice, he performs abortions up to 12 weeks gestational age. Dr. Schwartz is employed part time as a "public employee" as that term is defined by §1(1) of the Act by Truman Medical Center, a teaching hospital of the University of Missouri Medical School at Kansas City, a "public facility" as that term is defined by §1(2) of the Act. In said capacity, he is consulted by pregnant female patients whom he counsels about their options, including abortion. During said consultations and when medically indicated, he has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions.

On said occasions, Dr. Schwartz is paid for such services by "public funds" as that term is defined by §1(3) of the Act. On occasion, Dr. Schwartz counsels about and performs abortions on private practice patients and public health patients within Truman Medical Center.

8. Robert L. Blake, Jr., M.D., is a resident of Boone County, Missouri and a physician and surgeon licensed by and within the State of Missouri. Dr. Blake is a Diplomate of the American Board of Family Practice, Associate Professor in the Departments of Family and Community Medicine at the University of Missouri Medical School and Graduate School at Columbia, and is an attending physician at the University of Missouri Hospital at Columbia. Dr. Blake is the author of numerous articles in the field of medicine. Dr. Blake is employed as a "public employee" as that term is defined by §1(1) of the Act by the University of Missouri Medical School a "public facility" as that term is defined by §1(2) of the Act. In said capacity, he is consulted by pregnant female patients whom he counsels about their options, including abortion. During said consultations, he has occasion to encourage or to counsel said women to terminate pregnancies, although the same are not necessary to save the patients' lives on said occasions. On said occasions, Dr. Blake is paid for such services by "public funds" as that term is defined by §1(3) of the Act.

9. Carl C. Pearman, M.D., is a resident of Boone County, Missouri and a physician and surgeon licensed by and within the State of Missouri. Dr. Pearman is a board-certified obstetrician/gynecologist and is Assistant Professor in the Department of Obstetrics and Gynecology at the University of Missouri Medical School at Columbia. As part of his medical practice, he performs

abortions up to 22 weeks gestational age. Dr. Pearman is affiliated with the University of Missouri Hospital in Columbia. Dr. Pearman is employed as a "public employee" as that term is defined by §1(1) of the Act by the University of Missouri Medical School, a "public facility" as that term is defined by §1(2) of the Act. In said capacity, he is consulted by pregnant female patients whom he counsels about their options, including abortion. During said consultations, he has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions. On said occasions, Dr. Pearman is paid for such services by "public funds" as that term is defined by §1(3) of the Act. On occasion, Dr. Pearman performs abortions on both private practice patients and public health patients within the University of Missouri Hospital in Columbia, a "public facility" as that term is defined by §1(2) of the Act.

10. Carroll Metzger, R.N.C., C.M.A., is a resident of Jackson County, Missouri and a certified registered nurse and certified medical assistant licensed by and within the State of Missouri. Ms. Metzger is the Administrator of the outpatient clinic of Truman Medical Center in Kansas City, Missouri. Ms. Metzger is employed as a "public employee" as that term is defined by §1(1) of the Act by Truman Medical Center a "public facility" as that term is defined by §1(2) of the Act. In said capacity, she is consulted by pregnant female patients whom she counsels about their options, including abortion. During said consultations, she has occasion to encourage or to counsel said women to terminate pregnancies, although the same are not necessary to save

the patients' lives on said occasions. On said occasions, Ms. Metzger is paid for such services by "public funds" as that term is defined by §1(3) of the Act.

11. Mary L. Pemberton, B.S.W., is a resident of Johnson County, Kansas and a social worker. Ms. Pemberton is a health education/social worker in the teenage obstetrics program at Truman Medical Center in Kansas City, Missouri. Ms. Pemberton is the author of articles in the field of counseling/social work. Ms. Pemberton is employed as a "public employee" as that term is defined by §1(1) of the Act by Truman Medical Center a "public facility" as that term is defined by §1(2) of the Act. In said capacity, she is consulted by pregnant female patients whom she counsels about their options, including abortion. During said consultations, she has occasion to encourage or to counsel said women to terminate pregnancies, although the same are not necessary to save the patients' lives on said occasions. On said occasions, Ms. Pemberton is paid for such services by "public funds" as that term is defined by §1(3) of the Act.

12. Plaintiffs RHS, PPKC, Dr. Schwartz, Dr. Blake, Dr. Pearman, Carroll Metzger and Mary L. Pemberton bring this cause of action on their own behalf and on behalf of the entire class consisting of facilities and Missouri licensed physicians or other health care professionals offering abortion services or pregnancy counseling and on behalf of the entire class of pregnant females seeking abortion services or pregnancy counseling within the State of Missouri. Said classes of facilities, physicians, medical care providers and pregnant females are so numerous that joinder of all members is impractical. There exist substantial questions of law and fact com-

mon to the classes, and the claims of Plaintiffs are typical of the claims of the classes. Plaintiffs shall fairly and adequately represent the interests of the classes.

Defendants

13. Defendant William L. Webster is the Attorney General of the State of Missouri and as such is charged with the defense, implementation and administration of said Act throughout the State of Missouri.

14. The State of Missouri is one of the United States of America, and the Act is a statutory enactment of said Defendant.

15. Defendants' responsibilities, duties, acts and obligations in the enactment, defense, implementation and application of the Act are pursued and undertaken under color of state law.

III CAUSES OF ACTION

16. Named Plaintiffs and the medical provider class members are severely inhibited, restrained, deterred and precluded from offering medical and counseling services in their finest, wisest and most healthful manner by the present, actual and threatened enforcement, effect, application and impact of the Act.

17. The traditional and vital privacy of the doctor-patient relationship and the practice of medicine and surgery are gravely curtailed by and adversely impacted by the Act.

18. The Act severely inhibits, restrains, deters and precludes pregnant patient class members from the full exercise of their constitutional rights within the child-bearing realms of privacy and decision-making and de-

prives them of the benefit of the professional judgment of medical care providers, in light of the then attendant circumstances of an individual member of the pregnant patient class.

19. The Act on its face expressly violates the prior decisions of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) and in *Doe v. Bolton*, 410 U.S. 179 (1973) and their progeny, through *Thornburgh v. American College of Obstetricians and Gynecologists*, ... U.S. ..... (No. 84-495, June 11, 1986), 54 L.W. 4618.

20. Section 1.205.1(1) of the Act impermissibly attempts to establish that "[t]he life of each human being begins at conception," as the underpinning of the entire Act, contrary to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 *supra*, 416, 444 (1983) and contrary to the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

21. Section 188.025 of the Act impermissibly requires abortions at "sixteen weeks of gestational age or later" to be performed in a hospital. This section is directly contrary to the holdings in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431-39 (1983) and *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 481-82 (1983). Defendants are bound by the principle of *res judicata* that "a non-hospitalized second trimester D&E procedure is just as safe as those second trimester D&E procedures conducted in hospitals." *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 664 F.2d 687, 690 (8th Cir. 1981), *affirmed*, 462 U.S. 476, 481-82 (1983).

22. Plaintiff RHS's present practice of offering and performing abortion services at and beyond 16 weeks

gestational age for its patients outside the hospital setting is in the best health interests of its patients. Requiring such procedures to be performed in a hospital setting would significantly and adversely impact the availability of abortions by reason of increased anxiety through greater loss of anonymity and of privacy, increased cost burdens, increased risks of infection and exposure to more serious strains of infections, increased uses and risks of general anesthesia, and delays by reason of scheduling and extended time in the delivery of services. All of these factors raise the patient's anxiety, directly increasing the risks of morbidity and mortality to her. The vast majority of in-hospital second trimester abortions in Missouri are performed at Truman Medical Center in Kansas City, Missouri, and at the University of Missouri Hospital in Columbia, Missouri, both being "public facilities" as that term is defined in §1(2) of the Act. The combination of this section (§188.025) with the definition of §1(2) and the prohibition of §4 bars any further abortions at these institutions after 16 weeks gestational age.

23. Section 188.029 requiring medical tests to determine viability of fetuses "twenty or more weeks gestational age" is unconstitutional by reason of its increased cost burdens upon abortion, its increased health risks to the patient, its interference with the physician's choice of treatment, and its failure to promote maternal health or to preserve fetal life. This section violates the mandates of *Coulatti v. Franklin*, 439 U.S. 379 (1979) and *Thornburgh, supra*.

24. Section 188.039 of the Act unconstitutionally intrudes into the doctor-patient relationship and substantially burdens a woman's right to an abortion by requiring

that the patient offer proof to the doctor of her age and the doctor's certification of the same; that the patient execute a consent form supplied by the State Department of Health; and that the physician certify that according to his or her best medical judgment, the patient is or is not pregnant. The section does not permit the physician to use his or her best medical judgment to inform the patient that he or she is unable to form a medical judgment as to pregnancy. This type of requirement was previously declared unconstitutional in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 483 F.Supp. 679, 697-98 (W.D.Mo. 1981), *affirmed*, 655 F.2d 848, 868-69 (8th Cir. 1981), and the principle of *res judcata* requires a finding of unconstitutionality as to §188.039.2(1) of the Act. The entire §188.039 is also unconstitutional by reason of its requirement that all consent provisions and information be conveyed by the physician to the patient, directly contrary to the holding in *City of Akron, supra*, 462 U.S. at 448-49, and *Thornburgh, supra*, 54 L.W. at 4621-23.

25. Sections 2, 3 and 4 of the Act are unconstitutional as creating situations of gross professional malpractice for "public employees" forbidden to advise properly their patients and clients. By eliminating abortion (which is a recognized medical alternative to an unwanted or medically undesirable pregnancy) from the full range of options available for discussion, encouragement, counseling, performance and assistance between a health care professional and his or her patient or client is to regulate unconstitutionally the practice of medicine and the rights of free speech and association and to interfere unconstitutionally with the privacy rights of pregnant women seeking abortions or seeking professional advice and assistance as to their pregnancies.

26. Section 4 of the Act is unconstitutional and substantially burdens a woman's right to abortion by interfering with her choice of physician and by interfering with her and her physician's choice of medical facility for treatment, while serving no compelling state interest. This section is expressly inconsistent with the decision in *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), and with the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

27. Sections 2, 3 and 4 of the Act prohibiting the use of public facilities, funds and employees in educational endeavors involving the teaching and/or discussion of abortion, have chilled and have resulted in violations of one or more Plaintiffs' First Amendment rights.

28. The Act denies to named Plaintiffs and members of the Plaintiff classes due process of law by depriving named Plaintiffs and the Plaintiff class members of life, liberty and property without the guarantees afforded under the Fourteenth Amendment to the United States Constitution.

29. The Act is unconstitutionally vague and uncertain on its face and is in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution.

30. The Act on its face deprives named Plaintiffs and Plaintiff class members of their rights to privacy in the physician-patient relationship, as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

31. The Act on its face deprives named Plaintiffs and medical provider class members of their rights to practice medicine according to the highest standards of

medical practice, as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

32. The Act on its face impacts upon and deprives pregnant patient class members of their fundamental right to determine whether to bear children, as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

33. The Act on its face infringes upon pregnant patient class members' right to life due to inherent risks involved in childbirth or alternative medical procedures, in violation of the Fourteenth Amendment to the United States Constitution.

34. The Act on its face infringes upon named Plaintiffs' and medical provider class members' rights to give and pregnant patient class members' rights to receive safe, competent, complete and adequate medical advice and treatment pertaining to the decision of whether to carry a given pregnancy to term and the methods of pregnancy termination, in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

35. The Act on its face deprives named Plaintiffs, medical provider class members and pregnant patient class members, each in their own classification, of the equal protection of the laws, by treating similarly situated classes differently and discriminatorily, with no compelling justification for such classifications, all in violation of the Fourteenth Amendment to the United States Constitution.

36. The implementation of and obedience to the Act places named Plaintiffs and medical provider class mem-

bers in the position of decision making beset with such inherent possibilities of bias and conflict of interest, as to deprive named Plaintiffs and all class members of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

37. The failure of this Court to act will cause named Plaintiffs and all class members irreparable harm.

38. The named Plaintiffs and all class members have no adequate remedy at law.

IV RELIEF PRAYED

WHEREFORE, named Plaintiffs, for themselves and for all other members of the above described Plaintiff classes, pray this Court to:

39. Certify the Plaintiff classes set forth in above paragraph 12, pursuant to Federal Rule of Civil Procedure No. 23.

40. Issue a preliminary injunction restraining Defendants, their agents, employees, appointees and successors from enforcing, implementing, applying, relying upon or threatening to enforce, to implement, to apply or to rely upon said Act.

41. Issue a declaratory judgment holding said Act to be in violation of the rights of named Plaintiffs, of medical provider class members and of pregnant patient class members, as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

42. Issue a permanent injunction restraining Defendants, their agents, employees, appointees and successors from enforcing, implementing, applying, relying upon

or threatening to enforce, to implement, to apply or to rely upon said Act.

43. Grant such other and further relief as the Court may deem meet and proper under the circumstances, to award to Plaintiffs reasonable attorneys' fees and expenses, pursuant to 42 U.S.C. §1988, and to tax all costs herein against Defendants.

Respectfully submitted,

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EXHIBIT A

SECOND REGULAR SESSION
[TRULY AGREED TO AND FINALLY PASSED]
SENATE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 1596
83RD GENERAL ASSEMBLY

AN ACT

To repeal sections 188.010, 188.040, 188.045, and 188.080, RSMo 1978, and sections 188.015, 188.025, 188.028, 188.039, 188.063, and 565.024, RSMo Supp. 1984, relating to unborn children and abortion, and to enact in lieu thereof twenty new sections relating to the same subject, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 188.010, 188.040, 188.045, and and 188.080, RSMo 1978, and sections 188.015, 188.025, 188.028, 188.039, 188.063, and 565.024, RSMo Supp. 1984, are repealed and twenty new sections enacted in lieu thereof, to be known as sections 1.205, 188.010, 188.015, 188.025, 188.028, 188.029, 188.039, 188.080, 188.100, 188.105, 188.110, 188.115, 188.120, 188.130, 565.024, 1, 2, 3, 4, and 5, to read as follows:

1.205. 1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being;

(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988 the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

188.010. It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

188.015. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purposes of sections

188.010 to 188.130 shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Abortion facility", a clinic, physician's office, or any other place or facility in which abortions are performed other than a hospital;

(3) "Conception", the fertilization of the ovum of a female by a sperm of a male;

(4) "Gestational age", length of pregnancy as measured from the first day of the woman's last menstrual period;

(5) "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts;

(6) "Unborn child", the offspring of human beings from the moment of conception until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus;

(7) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems.

188.025. Every abortion performed at sixteen weeks gestational age or later shall be performed in a hospital.

188.028. 1. No person shall knowingly perform an abortion upon a pregnant woman under the age of eighteen years unless:

(1) The attending physician has secured the informed written consent of the minor and one parent or guardian; or

(2) The minor is emancipated and the attending physician has received the informed written consent of the minor; or

(3) The minor has been granted the right to self-consent to the abortion by court order pursuant to subsection 2 of this section, and the attending physician has received the informed written consent of the minor; or

(4) The minor has been granted consent to the abortion by court order, and the court has given its informed written consent in accordance with subsection 2 of this section, and the minor is having the abortion willingly, in compliance with subsection 3 of this section.

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

(1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and ad-

dresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

(2) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the the abortion is in the best interests of the minor;

(3) In the decree, the court shall for good cause:

(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or

(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or

(c) Deny the petition, setting forth the grounds on which the petition is denied;

(4) If the petition is allowed, the informed consent of the minor, pursuant to a court grant of majority rights, or the judicial consent, shall bar an action by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties;

(5) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

3. If a minor desires an abortion, then she shall be orally informed of and, if possible, sign the written consent required by section 188.039 in the same manner as an adult person. No abortion shall be

performed on any minor against her will, except that an abortion may be performed against the will of a minor pursuant to a court order described in subdivision (4) of subsection 1 of this section that the abortion is necessary to preserve the life of the minor.

188.029. Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

188.039. 1. No physician shall perform an abortion unless, prior to such abortion, the physician certifies in writing that the woman gave her informed consent, freely and without coercion, after the attending physician had informed her of the information contained in subsection 2 of this section and shall further certify in writing the pregnant woman's age, based upon proof of age offered by her.

2. In order to insure that the consent for an abortion is truly informed consent, no abortion shall be performed or induced upon a pregnant woman

unless she has signed a consent form that shall be supplied by the state department of health, acknowledging that she has been informed by the attending physician of the following facts:

(1) That according to the best medical judgment of her attending physician whether she is or is not pregnant;

(2) The particular risks associated with the abortion technique to be used;

(3) Alternatives to abortion shall be given by the attending physician.

3. The physician may inform the women of any other material facts or opinions, or provide any explanation of the above information which, in the exercise of his best medical judgment, is reasonably necessary to allow the woman to give her informed consent to the proposed abortion, with full knowledge of its nature and consequences.

188.080. Notwithstanding any other penalty provision in this chapter, any person who is not a licensed physician as defined in section 188.015 who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 188.015, is guilty of a class B felony, and, upon conviction, shall be punished as provided by law. Any physician performing an abortion who does not have surgical privileges at a hospital which offers obstetrical or gynecological care shall be guilty of a class B felony, and, upon conviction shall be punished as provided by law.

188.100. Unless the language or context clearly indicates a different meaning is intended, the fol-

lowing words or phrases for the purposes of sections 188.100 to 188.120 shall mean:

(1) "Employer", the state, or any political or civil subdivision thereof, or any person employing two or more persons within the state, and any person acting as an agent of the employer;

(2) "Participate in abortion", to perform, assist in, refer for, promote, procure, or counsel a woman to have an abortion not necessary to save the life of the mother; or to undergo an abortion;

(3) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or other organized groups of persons.

188.105. 1. It shall be unlawful:

(1) For an employer:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's refusal to participate in abortion;

(b) To limit, segregate, or classify his, her, or its employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's refusal to participate in abortion;

(c) To discharge, expel, or otherwise discriminate against any person because he or she has opposed

any practices forbidden under sections 188.100 to 188.120 or because he or she has filed a complaint, testified, or assisted in any legal proceeding under sections 188.100 to 188.120;

(2) For any person, whether an employer or employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under sections 188.100 to 188.120, or to attempt to do so.

2. Notwithstanding any other provisions of sections 188.100 to 188.120, the acts proscribed in subsection 1 of this section shall not be unlawful if there can be demonstrated an inability to reasonably accommodate an individual's refusal to participate in abortion without undue hardship on the conduct of that particular business or enterprise, or in those certain instances where participation in abortion is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

3. Nothing contained in sections 188.100 to 188.-120 shall be interpreted to require any employer to grant preferential treatment to any individual because of such individual's refusal to participate in abortion.

188.110. 1. No public or private college, university or hospital shall discriminate against any person for refusal to participate in abortion.

2. No applicant, student, teacher, or employee of any school shall be required to pay any fees that would in whole or in part fund an abortion for any other applicant, student, teacher, or employee of that school, if the individual required to pay the fee gives written notice to the proper school authorities that it

would be in violation of his or her conscience or beliefs to pay for or fund abortions. The school may require the individual to pay that part of the fees not funding abortions, if the school makes reasonable precautions and gives reasonable assurance that the fees that are paid are segregated from any fund for the payment of abortions.

188.115. If any provision of sections 188.100 to 188.120 is found by a court of competent jurisdiction to be invalid or unconstitutional as applied to a specific person or class of persons, the provisions of sections 188.100 to 188.120 shall remain in full force and effect as to every other person or class of persons who is otherwise covered under these sections.

188.120. Any individual injured by any person, association, corporation, or entity by reason of any action prohibited by sections 188.100 to 188.120, as now or hereafter amended, may commence a civil cause of action against the person, association, corporation, or entity who caused the injury, and shall recover treble damages, including pain and suffering, sustained by such individual, the costs of the suit and reasonable attorney's fees.

188.130. 1. No person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been aborted.

2. No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.

565.024. 1. A person commits the crime of involuntary manslaughter if he:

(1) Recklessly causes the death of another person; or

(2) While in an intoxicated condition operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause the death of any person.

2. Involuntary manslaughter is a class C felony.

Section 1. As used in sections 1 to 5 of this act, the following terms mean:

(1) "Public employee", any person employed by this state or any agency or political subdivision thereof;

(2) "Public facility", any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof;

(3) "Public funds", any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Section 2. It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Section 3. It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Section 4. It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Section 5. Any taxpayer of this state or its political subdivisions shall have standing to bring suit in a circuit court of proper venue to enforce the provisions of sections 1 to 4 of this act.

(Filed August 4, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, et al.,
Plaintiffs,

v.

WILLIAM L. WEBSTER, et al.,
Defendants.

ANSWER

Come now the defendants, by and through counsel, and for their answer to plaintiffs' class action complaint for declaratory judgment and injunctive relief state as follows:

First Defense

Plaintiffs fail to state a claim upon which relief can be granted against defendant William L. Webster, Attorney General of the State of Missouri, because plaintiffs can allege no case or controversy against Attorney General William L. Webster.

Second Defense

Plaintiffs' action against the State of Missouri is barred by the Eleventh Amendment to the United States Constitution.

Third Defense

Plaintiffs fail to state a claim upon which relief can be granted pursuant to 42 U.S.C. § 1983.

Fourth Defense

1. Defendants admit that House Bill No. 1596 was enacted by the Missouri General Assembly on April 23, 1986, was signed by Governor Ashcroft on June 26, 1986, and becomes effective on August 13, 1986. Defendants further admit that Exhibit A is a true copy of the act. Defendants specifically deny that plaintiffs state a cause of action pursuant to 42 U.S.C. §1983 and all other allegations contained in paragraph 1 of plaintiffs' complaint.

2. Defendants deny the allegations contained in paragraph 2 of plaintiffs' complaint.

3. Defendants acknowledge that plaintiffs are challenging the constitutionality of Sections 1.205.1(1), 188.025, 188.029, 188.039, 2, 3, and 4 of the Act. Defendants specifically deny that said sections are unconstitutional.

4. Defendants admit the allegations contained in paragraph 4 of plaintiffs' complaint.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 5 of plaintiffs' complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 6 of plaintiffs' complaint.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 7 of plaintiffs' complaint.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 8 of plaintiffs' complaint.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 9 of plaintiffs' complaint.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 10 of plaintiffs' complaint.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 11 of plaintiffs' complaint.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 12 of plaintiffs' complaint.

13. Defendants deny the allegation contained in paragraph 13 of plaintiffs' complaint.

14. Defendants admit the allegation contained in paragraph 14 of plaintiffs' complaint.

15. Defendants admit the allegations contained in paragraph 15 of plaintiffs' complaint.

16. Defendants deny each and every allegation contained in paragraph 16 of plaintiffs' complaint.

17. Defendants deny each and every allegation contained in paragraph 17 of plaintiffs' complaint.

18. Defendants deny each and every allegation contained in paragraph 18 of plaintiffs' complaint.

19. Defendants deny each and every allegation contained in paragraph 19 of plaintiffs' complaint.

20. Defendants deny each and every allegation contained in paragraph 20 of plaintiffs' complaint.

21. Defendants deny each and every allegation contained in paragraph 21 of plaintiffs' complaint.

22. Defendants deny each and every allegation contained in paragraph 22 of plaintiffs' complaint.

23. Defendants deny each and every allegation contained in paragraph 23 of plaintiffs' complaint.

24. Defendants deny each and every allegation contained in paragraph 24 of plaintiffs' complaint.

25. Defendants deny each and every allegation contained in paragraph 25 of plaintiffs' complaint.

26. Defendants deny each and every allegation contained in paragraph 26 of plaintiffs' complaint.

27. Defendants deny each and every allegation contained in paragraph 27 of plaintiffs' complaint.

28. Defendants deny each and every allegation contained in paragraph 28 of plaintiffs' complaint.

29. Defendants deny each and every allegation contained in paragraph 29 of plaintiffs' complaint.

30. Defendants deny each and every allegation contained in paragraph 30 of plaintiffs' complaint.

31. Defendants deny each and every allegation contained in paragraph 31 of plaintiffs' complaint.

32. Defendants deny each and every allegation contained in paragraph 32 of plaintiffs' complaint.

33. Defendants deny each and every allegation contained in paragraph 33 of plaintiffs' complaint.

34. Defendants deny each and every allegation contained in paragraph 34 of plaintiffs' complaint.

35. Defendants deny each and every allegation contained in paragraph 35 of plaintiffs' complaint.

36. Defendants deny each and every allegation contained in paragraph 36 of plaintiffs' complaint.

37. Defendants deny each and every allegation contained in paragraph 37 of plaintiffs' complaint.

38. Defendants deny each and every allegation contained in paragraph 38 of plaintiffs' complaint.

39. Defendants deny each and every allegation of plaintiffs' complaint not specifically admitted herein.

Relief Requested

Wherefore, defendants respectfully request:

1. That the Court deny each and every portion of the relief prayed for in plaintiffs' complaint as contained in paragraphs 39, 40, 41, 42, and 43.

2. That the Court dissolve the restraining order and preliminary injunction entered herein and refuse to grant a permanent injunction against the enforcement and application of the challenged statutory provisions.

3. That the Court refuse to certify the class as requested by the plaintiffs.

4. That the defendants be discharged and that all costs in this matter be taxed against the plaintiffs.

Respectfully submitted,

William L. Webster
Attorney General
/s/ Michael L. Boicourt
Michael L. Boicourt
Assistant Attorney General
/s/ Jerry L. Short
Jerry L. Short
Assistant Attorney General
8th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8782
Attorneys for Defendants

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 4th day of August, 1986, to:

Roger K. Evans
Dara Klassel
Beth Otten
Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, N. Y. 10019

Frank Susman, P.C.
Susman, Schermer, Rimmel
& Parker
10th Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105

/s/ Michael L. Boicourt
Assistant Attorney General

(Filed October 24, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, *et al.*,
Defendants.

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT BY INTERLINEATION

Come now Plaintiffs and move this Honorable Court for leave to amend their Complaint by interlineation pursuant to Federal Rule of Civil Procedure 15(a). For this motion, Plaintiffs state:

1. The Plaintiffs filed their original Complaint on July 14, 1986, and Defendants filed their responsive pleading on August 5, 1986.

2. Plaintiffs wish to amend their Complaint by interlineation to correct typographical omissions in Paragraphs 3 and 20.

3. Plaintiffs' proposed amendments do not substantively change their cause of action nor materially prejudice the Defendants.

4. A copy of Plaintiffs' proposed First Amended Complaint by Interlineation is attached hereto and incorporated herein by reference.

WHEREFORE, Plaintiffs pray that this Honorable Court enter an Order granting Plaintiffs leave to file their First Amended Complaint by Interlineation and that the attached First Amended Complaint by Interlineation be accepted by the Court as the filing of that Amendment.

Respectfully submitted,

/s/ (Illegible)
Susman, Schermer, Rimmel & Parker
Frank Susman, P.C.
Thomas M. Blumenthal
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300
ACLU EM & WM

Roger K. Evans
Dara Klassel
Beth Otten
Planned Parenthood Federation of America. Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of this instrument was on this 22nd day of October, 1986, personally delivered or mailed first class, postage prepaid, to all parties or counsel of record, as below reflected.

/s/ FS/fo

Mr. Michael L. Boicourt
Mr. Jerry L. Short

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, *et al.*,
Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT BY INTERLINEATION

Come now Plaintiffs and amend their "Class Action Complaint for Declaratory Judgment and Injunctive Relief," heretofore filed, amending the same as follows:

1. The second full paragraph on page 2 is deleted in its entirety, and the following is substituted in lieu thereof:

> 3. Plaintiffs challenge as unconstitutional and seek to enjoin the operation of §§1.205.1(1), 1.205.1(2), 188.025, 188.029, 188.039, 2, 3, and 4 of the Act.

2. The deletion of paragraph 20 as the same presently appears on page 9 and substitution of the following in lieu thereof:

> 20. Section 1.205.1(1) of the Act impermissibly attempts to establish that "[t]he life of each human being begins at conception," and §1.205.1(2) of the Act impermissibly attempts to establish that [u]n-

born children have protectable interests in life, health, and well-being" as the underpinnings of the entire Act, contrary to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 *supra*, 416, 444 (1983) and contrary to the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

/s/ (Illegible)
Susman, Schermer, Rimmel & Parker
Frank Susman, P.C.
Thomas M. Blumenthal
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300
ACLU/EM & WM

Roger K. Evans
Dara Klassel
Beth Otten
Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of this instrument was on this 22nd day of October, 1986, personally delivered or mailed first class, postage prepaid, to all parties or counsel of record, as below reflected.

/s/ FS/fo

Mr. Michael L. Boicourt
Mr. Jerry L. Short

(Filed November 7, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

Cause No. C86-4478-CV-5

REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF GREATER KANSAS CITY, HOWARD SCHWARTZ, M.D., ROBERT L. BLAKE, JR., M.D., CARL C. PEARMAN, M.D., CARROLL METZGER, R.N.C., C.M.A., and MARY L. PEMBERTON, B.S.W., on behalf of themselves, their patients, and all similarly situated individuals or entities,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, Attorney General of the State of Missouri, and THE STATE OF MISSOURI,
Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this court to enter summary judgment on their behalf declaring House Bill No. 1596, sections 188.025, 188.029, 188.039, and sections 1 through 5, to be in violation of the First, Fifth, and Fourteenth Amendments to the United States Constitution for the

reasons set forth in the attached Memorandum of Law in support of this motion.

Respectfully submitted,

/s/ (Illegible)
Susman, Schermer, Rimmel & Parker
Frank Susman, P.C.
Thomas M. Blumenthal
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105
(314) 725-7300
ACLU of Eastern and
Western Missouri

Roger K. Evans
Dara Klassel
Beth Otten
Planned Parenthood Federation of
America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800
Attorneys for Plaintiffs

October 31, 1986

CERTIFICATE OF SERVICE

I certify that a copy of this instrument was on this 5th day of November, 1986, personally delivered or mailed first class, postage prepaid, to all parties or counsel of record, as below reflected.

/s/ FS/fo

Michael L. Boicourt
Jerry L. Short

(Filed December 15, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, et al.,
Plaintiffs,

v.

WILLIAM L. WEBSTER, et al.,
Defendants.

STIPULATION OF FACTS

The parties, in order to eliminate uncontested issues of fact from dispute at trial, hereby stipulate to the following facts:

1. Exhibit A, as attached to plaintiffs' original complaint, is a true and accurate copy of Missouri Senate Committee Substitute for House Bill No. 1596, which was enacted by the Missouri General Assembly on April 23, 1986, and was signed into law by Missouri Governor Ashcroft on June 26, 1986. (The enactment will hereafter be referred to as "the Act.")

2. The Act (except as otherwise indicated below) by its terms became effective on August 13, 1986. By agreement of the parties, the Court, on July 31, 1986, entered a temporary restraining order enjoining enforcement and application of the provisions challenged in plaintiffs' complaint. Sections 1.205.1(1) (effective January

1, 1988), 188.025, 188.029, 188.039, and Sections 2, 3, and 4 of the Act. Plaintiffs amended their complaint on October 24, 1986, to include a challenge to § 1.205.1(2) (effective January 1, 1988).

3. Defendant William L. Webster is the Attorney General of the State of Missouri and in that capacity is undertaking the defense of the Act.

4. The State of Missouri is one of the United States of America and the Act is a statutory enactment of said State. For the sole purpose of defending the constitutionality of this Act, the State of Missouri agrees to waive its Eleventh Amendment immunity from suit in federal court in this declaratory action. Eleventh Amendment immunity is not waived for any other legal action or proceeding.

5. The defendants' responsibilities, duties, acts, and obligations in the enactment, defense, implementation and application of the Act are pursued and undertaken under color of state law.

6. Both defendants are residents of the district encompassed by the United States District Court for the Western District of Missouri, Central Division.

7. The claims herein arise, in part, within the area encompassed by the United States District Court for the Western District of Missouri, Central Division.

8. Plaintiff Reproductive Health Services (hereafter "RHS") is a Missouri not-for-profit, federal tax-exempt corporation with its principal offices in St. Louis, Missouri.

9. RHS offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services.

10. The term "gestational age" as used in these stipulations of fact and in the Act refers to the weeks of gestation or weeks of pregnancy counted from the onset of the pregnant woman's last menstrual period. This is the definition adopted by the Act in § 188.015(4).

11. RHS provides abortion services up to 22 weeks gestational age.

12. RHS is the largest abortion provider within the State of Missouri.

13. Plaintiff Planned Parenthood of Greater Kansas City (hereafter "PPKC") is a Missouri not-for-profit, federal tax-exempt corporation with its principal offices in Kansas City, Missouri.

14. PPKC offers to its patients a broad range of counseling, gynecological and family planning services, including the provision of contraceptive and abortion services.

15. PPKC provides abortion services up to 14 weeks gestational age.

16. RHS and PPKC are not licensed under Missouri Ambulatory Surgical Center Licensing Law, Section 197.200, RSMo, *et seq*. To date, there is no legal requirement that they be licensed.

17. Plaintiff Howard I. Schwartz, M.D., is a resident of Jackson County, Missouri, and is a physician and surgeon licensed by and within the State of Missouri.

18. Plaintiff Schwartz is a Board-certified obstetrician/gynecologist and is primarily engaged in the practice of medicine within the greater Kansas City area.

19. Plaintiff Schwartz is Clinical Assistant Professor, Department of Obstetrics and Gynecology at the Univer-

sity of Missouri School of Medicine at Kansas City and is Medical Director of Plaintiff PPKC.

20. Plaintiff Schwartz, as part of his medical practice, performs abortions up to 14 weeks gestational age.

21. Plaintiff Schwartz is employed part-time as a "public employee" as that term is defined by § 1(1) of the Act by Truman Medical Center, a teaching hospital of the University of Missouri Medical School at Kansas City.

22. The Truman Medical Center and the University of Missouri Medical School at Kansas City are both a "public facility" as that term is defined by § 1(2) of the Act.

23. In his capacity as a public employee of a public facility, plaintiff Schwartz is paid for any services rendered by "public funds" as that term is defined by § 1(3) of the Act.

24. Plaintiff Robert L. Blake, Jr., M.D., is a resident of Boone County, Missouri, and is a physician and surgeon licensed by and within the State of Missouri.

25. Plaintiff Blake is a Diplomate of the American Board of Family Practice, Associate Professor in the Departments of Family and Community Medicine at the University of Missouri Medical School and Graduate School at Columbia, and is an attending physician at the University of Missouri Hospital at Columbia.

26. Plaintiff Blake is employed as a "public employee" as that term is defined by § 1(1) of the Act by the University of Missouri Medical School.

27. The University of Missouri Medical School at Columbia and the University of Missouri Hospital at Columbia are both a "public facility" as that term is defined by § 1(2) of the Act.

28. In his capacity as a public employee of a public facility, plaintiff Blake is paid for the services he renders by "public funds" as that term is defined by § 1(3) of the Act.

29. Plaintiff Carl C. Pearman, M.D., is a resident of Boone County, Missouri, and is a physician and surgeon licensed by and within the State of Missouri.

30. Plaintiff Pearman is a Board-certified obstetrician/gynecologist and is Assistant Professor in the Department of Obstetrics and Gynecology at the University of Missouri Medical School at Columbia.

31. As part of his medical practice, plaintiff Pearman performs abortions up to 22 weeks gestational age.

32. Plaintiff Pearman is affiliated with the University of Missouri Hospital in Columbia.

33. In his affiliation with the University of Missouri Hospital in Columbia, and with the University of Missouri Medical School at Columbia, plaintiff Pearman is a "public employee" as that term is defined by § 1(1) of the Act.

34. In his capacity as a public employee of a public facility, plaintiff Pearman is paid for the services which he renders by "public funds" as that term is defined by § 1(3) of the Act.

35. A public hospital located in the greater metropolitan Kansas City area performed 97 percent of all 16-week or greater hospital-performed abortions in 1985 within Missouri, and 98 percent of all 16-week or greater hospital-performed abortions in 1984 within Missouri.

36. Outpatients facilities, *i.e.* nonhospital facilities, performed 78 percent of all abortions performed in 16 weeks or greater in Missouri in 1985 and over 72 percent of such abortions in 1984.

37. Delay in the delivery of abortion services increases the risks of morbidity and mortality to the patient.

Respectfully submitted,

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/s/ (Illegible)
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Attorneys for Defendants

Dated this ..... day of December, 1986.

(Filed December 15, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

Cause No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, *ET AL.*,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, *ET AL.*,
Defendants.

MOTION IN LIMINE

Comes now the Plaintiffs and move this Honorable Court for an Order limiting the testimony in the trial of this action by precluding any evidence or testimony on the question raised by Plaintiffs' challenge to §1.205.1(1) and §1.205.1(2) of Senate Committee Substitute for House Bill 1596. In support of their Motion, the Plaintiffs state:

1. Plaintiffs have challenged the constitutionality of the above referenced sections which state, in part, as follows:

> 1.205.1(1) The life of each human being begins at conception.
>
> 1.205.1(2) Unborn children have protectable interests in life, health, and well being . . . .

2. The statements made in these statutes are not a proper subject of expert testimony or opinion. The U.S. Supreme Court has dealt with this question and held:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe v. Wade, 410 U.S. 113, 159 (1973). The development of man's knowledge has not progressed significantly since that decision.

3. The propositions found in the questioned statutes are inconsistent with the U.S. Supreme Court's holding in *Roe. City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 444 (1983).

4. "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Thornburgh v. A.C.O.G.,* ..... U.S. ....., 90 L.Ed.2d 779, 793 (1986).

5. Defendants have indicated in pretrial discovery that they plan to introduce evidence on these subjects.

WHEREFORE, Plaintiffs respectfully pray for an Order of this Court precluding the introduction of testimony concerning the issue of "when life begins," or at

what point a fetus has a protectable interest, and for such other relief as this Court deems just and proper.

Respectfully submitted,

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(Filed December 18, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

REPRODUCTIVE HEALTH SERVICES, et al.,

Plaintiffs,

v.

WILLIAM L. WEBSTER, et al.,

Defendants.

No. 86-4478-CV-C-5

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Defendants'

EXHIBITS

✓ = Offered and admitted without objection.
X = Offered and admitted over objection.
Ex = Offered but objected to and excluded.
N.O. = Marked but not offered.
D.B. = Admitted, de bene.
W.D. = Offered, then withdrawn.
Ltd. = Admitted for limited purposes.

Exhibit	Action Taken	Date	Time	Description
A	X	12/18/86	9:43	The Developing Human: Clinically Oriented Embryology, 2nd Ed., Keith L. Moore, 1977 (excerpts)
B	X	"	"	Human Embryology, 3rd Ed., Bradley M. Patten, 1968 (excerpts)
C	X	"	"	Developmental Anatomy, Rev. 7th Ed., Leslie Brainerd Arey, 1974 (excerpt)
D	X	"	"	Human Embryology, 4th Ed., W. J. Hamilton and H. W. Mossman, 1972 (excerpts)
E	X	12/18/86	9:43	Human Reproduction: Conception and Contraception, 2nd Ed., E. S. E. Hafez, 1980 (excerpt)

The Court retained all exhibits 12/18/86

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Exhibit	Action Taken	Date	Time	Description
F	X	12/18/86	9:43	Biological Principles and Modern Practice of Obstetrics, J. P. Greenhill and Emanuel A. Friedman, 1974 (excerpts)
G	X	"	"	Principles and Management of Human Reproduction, Duncan E. Reid, Kenneth J. Ryan, Kurt Benirschke, 1972 (excerpt)
H	X	"	"	Molecular Biology of the Gene, 3rd Ed., James D. Watson, 1976 (excerpt)
I	X	12/18/86	9:43	36 Lectures in Biology, S. E. Luria, 1975 (excerpt)
J				Modern Biology, James H. Otto, Albert Towle, 1969 (excerpts)
K				Time: Atlas of the Body, "Reproduction," Rand McNally and Co., Pub., 1980 (excerpt)
L				Encyclopaedia Britannica, 14th Ed., Macropaedia, Vol. 14, "Pregnancy," 1974 (excerpt)

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M	✓	12/18/86	9:44	Standards for Obstetric-Gynecologic Services, 6th Ed., American College of Obstetricians and Gynecologists, 1985
N	X	12/18/86	9:45	Abortion Surveillance, U. S. Department of Health and Human Services, Centers for Disease Control, 1985
O				Gynecology Principles and Practice, 4th Ed., Robert W. Kistner, 1986
P	X	12/18/86	9:49	Fertility Control, Stephen L. Corson, Richard J. Derman, Louise B. Tyrer, Eds., 1985
Q	X	12/18/86	9:49	Strategies in Gynecologic Surgery, Herbert J. Buchsbaum, Leslie A. Walton, Eds., 1986

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Exhibit	Action Taken	Date	Time	Description
R	W.D.	12/18/86	9:45	Patten's Human Embryology: Elements of Clinical Development, Clark Edward Corliss, 1976
S	W.D.	12/18/86	9:45	The Developing Human, Clinically Oriented Embryology, 2nd Ed., Keith L. Moore, 1977
T	W.D	12/18/86	9:45	Developmental Stages in Human Embryos, Part A: Embryos of the First Three Weeks (Stages 1 to 9), Ronan O'Rahilly, 1973
U	X	12/18/86	9:50	"Analysis of Gestational Interval," American Journal of Obstetrics & Gynecology, Alan E. Treloar, Borghild G. Behn, Donald W. Cowan, 1967
V	X	"	"	Complications in Obstetric and Gynecologic Surgery, George Schaefer, Edward A. Graber, Eds., 1981
W	X	"	"	Contraceptive Technology 1986-1987, 13th Revised Ed., Robert A. Hatcher, Felicia Guest, Felicia Stewart, Gary K. Stewart, James Trussell, Sylvia Cerel, Willard Cates, 1986
X	X	"	"	Operative Obstetrics, 4th Ed., Edward J. Quilligan, Frederick Zuspan, 1982
Y	X	12/18/86	9:50	"Deaths from Second Trimester Abortion by Dilatation and Evacuation: Causes, Prevention, Facilities," Willard Cates, Jr., David A. Grimes, Obstetrics and Gynecology, October 1981

Exhibit	Action Taken	Date	Time	Description
Z	X	12/18/86	9:50	"Second-Trimester Abortion by Dilatation and Evacuation: An Analysis of 11,747 Cases," William F. Peterson, F. Norman Berry, Mamdouh R. Grace, Christie L. Gulbranson, Obstetrics and Gynecology, August 1983
AA	X	12/18/86	9:50	Reid's Controversy in Obstetrics and Gynecology-III, Frederick P. Zuspan, C. D. Christian, 1983
BB	X	"	"	"Improved Survival and Short-Term Outcome of Inborn 'Micropremies,'" Jeffrey S. Gerdes, Soraya Abbasi, Vinod K. Bhutani, Frank W. Bowen, Jr., Clinical Pediatrics, August 1986
CC	X	"	"	"What Is the Lower Limit of Viability?," Jeanette R. Pleasure, Mary Dhand, Manjeet Kaur, American Journal of Diseases of Children, August 1984
DD	X	"	"	"Mortality and Follow-up Data for Neonates Weighing 500 to 800 g at Birth," Sharon Buckwald, William A. Zorn, Edmund A. Egan, American Journal of Diseases of Children, August 1984
EE	X	"	"	"A Reassessment of Menstrual Regulation," Jane E. Hodgson, Studies in Family Planning, October 1977
FF	X	"	"	Ultrasonography in Obstetrics and Gynecology, Peter W. Callen, 1983
GG	X	12/18/86	9:50	"The Need for Routine Sonography Prior to Late Abortion," Frank A. Chervenak, et al., New York State Journal of Medicine, January 1985

Exhibit	Action Taken	Date	Time	Description
HH				Te Linde's Operative Gynecology, 6th Ed., Richard F. Mattingly, John D. Thompson, 1985

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI Central DIVISION

Reproductive Health Services, et al vs. William L. Webster, et al.

ACTION NUMBER: 86-4478-CVC-5

CONTINUATION EXHIBIT LIST - Page # 7

Exhibit Number	Action Taken	Date	Time	Description
II				Curriculum vitae of William Keenan M.D.
JJ	✓	12/18/86	11:40	Curriculum vitae of Daniel J. Martin M.D.
KK				Curriculum vitae of Leslie Iffy M.D.
LL				Curriculum vitae of Micheline Mathers -Ruth M.
MM				Curriculum vitae of Mohammed Waheed-Uz-Zaman R M
NN				Curriculum vitae of Raymond Gasser PhD
OO	X	12/18/86	9:50	"Induced Abortions in re first Trimester" Laszlo Lampe M.D. and Leslie Iffy M.D." Operative Perinatology, Invasive Obstetric Technique 1982
PP	X	12/18/86	9:50	"Biparietal diameter as a Prediction of Fetal Lung Maturity" Edward R. Newton M.D., Curtis L. Cantralo M.D., Douglas J. Kosa M.D. The Journal of Reproductive Medicine July 1983.
QQ	X	12/18/86	9:50	"The Use of Ultrasound in the Prediction of Fetal Pulmonary Maturity" Ruth A. Petrucha M.D., Steven H. Golde M.D., Lawrence D. Platt. M.D. American Journal of Obstetric & Gynecolog

I CERTIFY THAT I HAVE THIS DATE _____ received from th Clerk,U.S.District Court,Western District Of Missouri,the following numbere exhibits, listed hereon,for which I will hold myself responsible:

Printed Name

Signature

CONT BLK EX LIST D-1

December, 198

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI Central DIVISION

Reproductive Health Services et als. William L. Webster, et al.

ACTION NUMBER: 86-4478-CV-C-5

CONTINUATION EXHIBIT LIST - Page # 8

Exhibit Number	Action Taken	Date	Time	Description
RR	X	12/18/86	9:50	"Real-time ultrasound of the placenta in
				Assessment of Fetal Pulmonic Maturity" Ruth
				A. Petruela, M.D., Steven H. Golde, M.D.,
				Lawrence D. Platt M.D. American Journal
				of Obstetrics and Gynecology February 1982.
SS	X	12/18/86	9:50	"Perinatal Implication of Therapeutic Abortion'
				Leslie Iffy, M.D. Autal Jakobovits M.D.,
				PhD. Principles and Practices of Obstetrics
				and Perinatology 1982
TT	X	12/18/86	9:50	"Perinatal Statistics: The Effect
				Internationally of Liberalized Abortion"
				Leslie Iffy, M.D. et al New Perspectives
				on Human Abortion 198[illegible]

I CERTIFY THAT I HAVE THIS DATE _____ received from the Clerk,U.S.District Court,Western District Of Missouri,the following numbered exhibits, listed hereon,for which I will hold myself responsible:

_____
Printed Name

_____
Signature

CONT BLK EX LIST D-1

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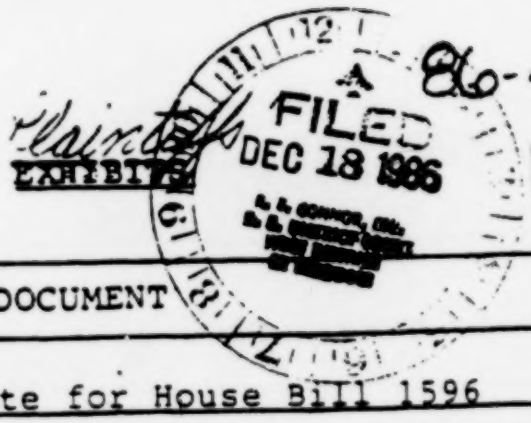
(Filed December 18, 1986)

Reproductive Health
William Webster



86-4478-CV-C-5

Plaintiffs EXHIBITS

M

NO.	DOCUMENT	ACTION OFFER	ACTION ADMIT	DATE
1	Copy of Senate Substitute for House Bill 1596			
2	Curriculum Vitae of Judith Widdicombe, R.N.	✓	12/16/86	11:4
3	Curriculum Vitae of Howard Irl Schwartz, M.D.			
4	Curriculum Vitae of Robert L. Blake, Jr., M.D.			
5	Curriculum Vitae of Carl C. Pearman, M.D.	✓	12/15/86	3:3
6	Curriculum Vitae of Harry S. Jonas, M.D.	✓	12/17/86	11:(
7	Curriculum Vitae of David Harris, M.D.			
8	Curriculum Vitae of Stanley K. Henshaw, Ph.D.	✓	12/17/86	10:(
9	Curriculum Vitae of Warren E. Hern, M.D., M.P.H.	✓	12/16/86	10:(
10	Curriculum Vitae of Robert Dale Crist, M.D., Ph.D	✓	12/15/86	3:1

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11	Curriculum Vitae of James J. Mongan, M.D.			
12	Memorandum from James J. Mongan to Staff of Truman Medical Center dated July 11, 1986 (2 pages)	X	12/17/86	10:1
13	Analysis of H.B. 1596 by R. Harmon, M.D., Director, Missouri Department of Health, April 28, 1986 (7 pages)	X	12/16/86	10:(
14	Curriculum Vitae of Dev Maulik, M.D., Ph.D.	✓	12/15/86	10:(
15	Missouri Vital Statistics, 1985, Missouri Department of Health, State Center for Health Statistics (116 pages)	✓	12/16/86	11:(
16	Computer printout from State Center for Health Statistics - 1984 and 1985 procedures greater and less than 16 weeks performed, broken down by clinics and hospitals - determined gestation by last normal menses			
17	Computer printout from State Center for Health Statistics - 1984 and 1985 procedures greater and less than 16 weeks performed, broken down by clinics and hospitals - determined by physician statements	✓	12/16/86	11:(

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The court retained all exhibits
12/18/86

EXHIBITS

NO.	DOCUMENT	ACTION ~~OFFER~~ / ~~ADMIT~~	DATE	TIME
18	Computer printout from State Center for Health Statistics - 1984 and 1985 procedures greater and less than 16 weeks performed, broken down by clinics and hospitals - hospital only broken down by individual hospital	✓	12/16/86	11:4
19	Computer printout from State Center for Health Statistics - 1984 and 1985 procedures greater and less than 16 weeks performed, broken down by clinics and hospitals - hospital only broken down by individual hospital	✓	12/16/86	11:4
20	ACOG Standards 6th Ed. pgs 62-72	✓	12/17/86	10:
21	APHA Standards pgs 652-656	✓	12/17/86	10:0
22	Williams on Obstetrics			

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

R.H.S., et al., Plaintiff [s]

VS.

WILLIAM WEBSTER, et al., Defendant [s]

CIVIL / CRIMINAL

ACTION NUMBER 86-4478-CV-C-5

PLAINTIFFS'

EXHIBITS - CONTINUED

Exhibit Number	Action Taken	Date	Time	Description
23	✓	12/16/86	10:20	"Serial Multiple Laminaria...," article by Warren M. Hern
24	✓	12/17/86	11:03	"Deaths from Second Trimester Abortion," Cates + Grimes, ObGyn Vol. 58, No. 4, pp. 401-4
25	✓	12/17/86	11:03	"2nd Trimester Abortions in the U.S.," Grimes, Fam. Plann. Persp., Vol. 16, No. 6, pp. 26
26	✓	12/17/86	11:03	"Midtrimester Abortion," Kafrissen, et al., JAMA, Vol. 251, No. 7, 2-17-84
27	✓	12/18/86	12:18	"The Relationship of Placental Grade, Fetal Lung Maturity, and Neonatal Outcome in Normal and Complicated Pregnancies," Fazzi, et al., Vol. 148, No. 1, Am. J. Ob. Gyn. 1/1/84.
28	✓	12/18/86	12:18	"The Use of Ultrasound in the Diagnosis of Fetal Lung Maturity," Golde + Platt, Clinical Obstetrics and Gynecology, Vol. 27, No. 2, June,
29	✓	12/18/86	12:18	"Ultrasound Prediction of Fetal Lung Maturity," Hadlock, et al Radiology, 1985, Vol. 155, No. 2, May 1985.

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(Filed March 26, 1987)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Plaintiffs,

vs.

WILLIAM L. WEBSTER, *et al.*,
Defendants.

PLAINTIFFS' MOTION TO AMEND JUDGMENT, PURSUANT TO F.R.C.P. NO. 59(e)

Come now Plaintiffs and pursuant to F.R.C.P. No. 59(e) move this Court to amend its March 17, 1987, "Order" in the following manners and respects:

1. Footnote 32 on page 22 of said Order presently provides:

> 32. Dr. Stanley Henshaw testified that data from 6 other states in 1983 revealed that 17.1% of post-16-week D&Es were outpatient procedures. The parties stipulated as to the statistics in Missouri.

2. The Court inadvertently misinterpreted the testimony in these regards. Dr. Henshaw testified that "[i]n 1983 the proportion was 77.9% of abortions at 16 weeks or later by D&E performed outside of hospitals" (Tr. 3-17, lines 21-23) and that the "six states . . . did include Missouri" (Tr. 3-20, lines 10-12).

3. Plaintiffs and Dr. Henshaw desire to correct the percentage figure reference ("17.1%" to "77.9%"), the gestational age reference ("post-16-week" to "16 weeks or later"), the situs of procedure reference ("outpatient" to "outside of hospitals"), and the states' reference ("6 other states" to "six states includ[ing] Missouri").

WHEREFORE, Plaintiffs pray the Court amend its prior "Order" of March 17, 1987, as above prayed and consistent with the attached proposed order.

Respectfully submitted,

/s/ (Illegible)
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(212) 541-7800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was delivered or mailed first class, postage prepaid, to all parties or counsel of record, as below reflected, this 24th day of March, 1987.

/s/ Frank Susman/fo

Michael Boicourt
Jerry L. Short
Andrew F. Puzder

(Filed May 15, 1987)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 86-4478-CV-C-5

REPRODUCTIVE HEALTH SERVICES, et al.,
Plaintiffs,

v.

WILLIAM L. WEBSTER, et al.,
Defendants.

NOTICE OF APPEAL

Come now William L. Webster, Attorney General of Missouri, and the State of Missouri, defendants herein, by and through their attorneys, and give notice that they hereby appeal to the United States Court of Appeals for the Eighth Circuit, from the District Court's Order and Memorandum of March 17, 1987, Order of March 26, 1987, and Order of April 30, 1987, ordering that the following provisions of the Revised Statutes of Missouri are declared to be unconstitutional: Sections 1.205.1(1) and (2), Section 188.025, a portion of Section 188.029, Section 188.205, Section 188.210, and Section 188.215; and further ordering that the defendants shall be permanently enjoined from enforcing the provisions declared to be unconstitutional.

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR APPELLANTS

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Attorneys for Appellants

*Counsel of Record
February 23, 1989

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

63P

QUESTIONS PRESENTED FOR REVIEW

1. Do physicians or other medical personnel have standing to contest the constitutionality of a state legislative preamble in an abortion statute?

2. Are legislative findings in the preamble to a state abortion bill that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being" facially unconstitutional? See RSMo 1.205.1(1), 1.205.1(2) (1986).

3. Where a statute requiring a determination of fetal viability when a physician "has reason to believe" that the fetus is "of twenty or more weeks gestational age" (LMP) has been held to be constitutional, is it facially unconstitutional to require that, in making this determination, the physician shall cause to be performed such "medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ."? See RSMo 188.029 (1986).

4. Is a state civil statute facially unconstitutional that makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life"? See RSMo 188.205 (1986).

5. Is a state civil statute facially unconstitutional that makes it "unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother"? See RSMo 188.210 (1986).

6. Is a state civil statute facially unconstitutional that makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother"? See RSMo 188.215 (1986).

7. Should the *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed be reconsidered and discarded in favor of a rational basis test?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the State of Missouri was a defendant in the district court and an appellant in the court of appeals; Planned Parenthood of Greater Kansas City, Howard I. Schwartz, M.D., Robert L. Blake, M.D., Carl C. Pearman, M.D., Carroll Metzger, and Mary L. Pemberton were plaintiffs in the district court and appellees in the court of appeals.

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Cases

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 12, 14, 17, 18

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Allen v. Wright, 468 U.S. 737 (1984) 23, 24

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) 21, 22

Babbitt v. Planned Parenthood, 479 U.S. 926 (1986) 42, 43

Baggett v. Bullitt, 377 U.S. 360 (1964) 44

Beal v. Doe, 432 U.S. 438 (1977) 19, 20, 29

Belotti v. Baird, 443 U.S. 622 (1979) 12, 20

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Doe v. Bolton, 410 U.S. 179 (1973) 12, 15, 19

Eisenstadt v. Baird, 405 U.S. 438 (1972) 16

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Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) 27
Loving v. Virginia, 388 U.S. 1 (1967) 16
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Maher v. Roe, 432 U.S. 464 (1977) .....*passim*
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Black's Law Dictionary, 620 (4th ed. 1957) 42
A. Bickel, *The Morality of Consent* (1975) 14
E. Blackschmidt, *The Beginning of Human Life* (1977) 26
Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329 14
Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973) 17
Coleman, *Roe v. Wade: A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7 (1984) 14
A. Cox, *The Role of the Supreme Court in American Government* (1976) 13

Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L.Rev. 359 (1979) 17
J. H. Ely, *Democracy and Distrust* (1980) 14
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 14
Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 14
Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817 14
K. Moore, *The Developing Human: Clinically Oriented Embryology* (3d ed. 1982) 26
W. Prosser, *Handbook on The Law of Torts*, 337 § 55 (4th ed. 1971) 27
Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudications*, 83 Yale L.J. 221 (1973) 14

OPINIONS BELOW

The June 23, 1987, final judgment of the district court is reported at 662 F. Supp. 407 (W.D. Mo. 1987), superseding 655 F. Supp. 1300 (W.D. Mo. 1987), and is reproduced in the Jurisdictional Statement Appendix (hereinafter "J.S. App.") at A1-A55. The July 13, 1988, final judgment of the court of appeals is reported at 851 F.2d 1071 (8th Cir. 1988) and is reproduced at J.S. App. at A56-A84.

JURISDICTION

On July 13, 1988, the United States Court of Appeals for the Eighth Circuit entered a final judgment, holding unconstitutional on their face the Missouri statutes challenged. On September 29, 1988, appellants filed a notice of appeal from the court's final judgment of July 13, 1988 (J.S. App. A85). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2). The Jurisdictional Statement was filed on October 11, 1988. Probable jurisdiction was noted on January 9, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. III, § 2;
U.S. Const., Amend. I;
U.S. Const., Amend. XIV, § 1;
§ 1.140, RSMo 1986;
§ 1.205, RSMo 1986;
§ 188.010, RSMo 1986;
§ 188.029, RSMo 1986;
§ 188.200, RSMo 1986;
§ 188.205, RSMo 1986;
§ 188.210, RSMo 1986;
§ 188.215, RSMo 1986;
§ 188.220, RSMo 1986.

The pertinent text of each constitutional provision and statute is set forth in the Jurisdictional Statement Appendix at A87-A91, pursuant to Rule 15(f) and Rule 34(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

On June 26, 1986, the Governor of the State of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596. The effective date was to be August 13, 1986.

Five publicly employed doctors and nurses and two non-profit corporations filed this facial class action challenge on July 14, 1986, pursuant to 42 U.S.C. § 1983 (1982) and 42 U.S.C. § 1988 (1982). Jurisdiction was predicated on 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiffs challenged § 1.205.1(1), a portion of the preamble to a section defining the rights of unborn children; § 188.025, which provides that abortions after sixteen weeks gestational age be performed in a hospital; § 188.029, which requires a physician to determine whether a fetus is viable before performing an abortion on a woman who the physician has reason to believe is twenty or more weeks pregnant and requires the doctor to perform and record "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child"; § 188.039, an informed consent requirement; and §§ 188.205, 188.210, and 188.215, which forbid the expenditure of public funds or the use of public employees or public facilities for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Plaintiffs claimed that each statutory section was unconstitutional on its face because it violates the First,

Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. (Complaint, ¶¶ 2, 19, 30-35, Joint Appendix (hereinafter "J.A.") at A9, A15, A18, A19).

Plaintiffs alleged that plaintiff Howard Schwartz, M.D., was a "public employee," as the term is defined in § 188.200(1), at Truman Medical Center, a "public facility" as that term is defined in § 188.200(2); that he "has occasion to encourage or to counsel said women to terminate pregnancies and on occasion to perform or to assist in the performance of abortions, although the same are not necessary to save the patients' lives on said occasions," and that "[o]n said occasions, Dr. Schwartz is paid for such services by 'public funds' as that term is defined by § 188.200(3) of the Act." (Complaint, ¶ 7, J.A. A10.) Virtually identical allegations were made by all individual plaintiffs and incorporated into the district court's opinion (J.S. App. A10).

On October 24, 1986, the plaintiffs requested leave to file a first amended complaint by interlineation in order to challenge the constitutionality of § 1.205.1(2), which states that unborn children have protectable interests in life, health, and well-being. The court addressed the constitutionality of this section in its final order.

The trial was conducted in the district court December 15 through December 18, 1986. Initially, the district court granted summary judgment declaring that § 188.039.1 was facially unconstitutional as a matter of law because it required a physician to personally provide information to the patient. The district court also granted plaintiffs' motion in limine prohibiting the defendants from presenting any testimony or evidence regarding the constitutionality of §§ 1.205.1(1) or 1.205.1

(2). Defendants later submitted as exhibits numerous medical articles regarding the subject matter of §§ 1.205.1 (1) and 1.205.1(2), which were admitted as offers of proof. See defendants' Exhibits A, B, C, D, E, F, G, H, I, R, S, and T (Tr. 4-2 - Tr. 4-4). (J.A. A60-A65.)

Numerous expert witnesses testified in support of or in opposition to those sections of the Act regarding which the court allowed testimony. Where appropriate in the argument portion of this brief, defendants set forth references to the factual record which relate to the specific statutes presently before this Court for review.

With regard to §§ 1.205.1(1) and 1.205.1(2), the district court cited *Roe v. Wade,* 410 U.S. 113 (1973), and concluded that "a state may not adopt one theory of when life begins to justify abortion regulation" and that it was "inappropriate for this Court to conduct an inquiry into such a difficult and philosophical question." Accordingly, the trial court held that the legislature's pronouncement conflicts with the essence of *Roe v. Wade*, and that it is "invalid as a matter of law." (J.S. App. A15.)

The district court invalidated § 188.025, which required that abortions at and after sixteen weeks gestation (LMP) be performed in a hospital. The court concluded that the state did not carry its burden of proving that the requirement was reasonably related to preserving maternal health (J.S. App. A30-A31).

The district court upheld as constitutional the first sentence of § 188.029, which requires a physician to determine whether a fetus is viable when the physician "has reason to believe" that the woman is twenty or more weeks pregnant (LMP), relying on *Colautti v. Franklin,* 439 U.S. 379 (1979), and *Planned Parenthood*

v. Danforth, 428 U.S. 52 (1976). However, the court proceeded to invalidate on its face the second sentence of § 188.029. The Court found that "tests to determine fetal weight are not only unreliable and inaccurate, but also add "$125.00 to $250.00 to the cost of abortion." (J.S. App. A36.) The court also found that "the only method to evaluate lung maturity is by amniocentesis, an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks gestation." (J.S. App. A36.) Since the state failed to demonstrate that this provision was "narrowly tailored" to protect the state's interest in fetal life, the court severed the second sentence, and declared it invalid, relying on *Colautti.*

The district court also declared §§ 188.205, 188.210, and 188.215 unconstitutional. The court held that the "encouraging and counseling" language in each section "abut[s] upon First Amendment freedoms." (J.S. App. A45-A46.) Applying the "appropriate rigid standard," the court held that all three sections were "sufficiently vague to render them unconstitutional." The district court reasoned that this Court "disapproved of similar terms such as 'counsel,' 'advocate' and 'advise' in the loyalty oath cases of the 1960's because the language was 'not susceptible of objective measurement' and threatened to restrict free speech." (J.S. App. A45-A46.)

Besides holding that these three sections were void for vagueness, the court also held that §§ 188.205, 188.210, and 188.215 violated the First Amendment and the right of privacy under the Fourteenth Amendment. First, the court held that the "encouraging and counseling" language in §§ 188.205, 188.210, and 188.215 "impose[d] a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice." This would

result in a situation where "[p]atients who fully pay for their services would be denied access to medical information . . . ." (J.S. App. A49-A50.) Second, the court held that the prohibition in § 188.215 on the use of public facilities was unconstitutional under *Nyberg v. City of Virginia,* 667 F.2d 754 (8th Cir. 1982), appeal dismissed for want of jurisdiction, cert. denied, 462 U.S. 1125 (1983), and that *Poelker v. Doe,* 432 U.S. 519 (1977), was not controlling "where there is no indication that 'public funds' would be expended." (J.S. App. A50-A51.)

Finally, the court held that the "performing or assisting" language, as applied to public funds or public employees, violated "the Eighth Amendment rights of Missouri inmates to receive medical care," relying on *Monmouth County Correctional Institution Inmates v. Lanzaro,* 643 F. Supp. 1217 (D. N.J. 1986), aff'd in part, modified in part, 834 F.2d 326 (3d Cir. 1987), cert. denied, 108 S.Ct. 1731 (1988). However, the court rejected plaintiffs' claims that these provisions violated "academic freedom" by affecting instruction in abortion procedure at state medical schools (J.S. App. A51-A54).

On March 25, 1987, plaintiffs filed a motion to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. That motion was granted by the court on April 30, 1987. Defendants' notice of appeal was filed May 15, 1987.

Appellants appealed from all aspects of the district court's decision, except from the injunction against § 188.039, which related to informed consent. No cross appeal was taken from the district court's approval of the first sentence of § 188.029.

The court of appeals affirmed in part and reversed in part. The court of appeals affirmed the invalidation of § 188.025, regarding the performance of abortions in

a hospital at sixteen weeks gestation. The court also affirmed the invalidation of the second sentence of § 188.029, regarding tests to determine viability, relying on this Court's statement in *Colautti v. Franklin,* 439 U.S. 379 (1979), that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor." (J.S. App. A59.) The court rejected the State's argument that the statute did not require any particular tests but only those "necessary medical examinations so as to determine viability," concluding that the statute "plainly declares that in determining viability, doctors must perform tests to find gestational age, and fetal weight and lung maturity." (J.S. App. A60, n. 5.)

The court also affirmed the invalidation of the preamble findings of § 1.205.1. The court held that the plaintiffs had standing because the preamble did "exactly what the Supreme Court has declared it may not do: espouse a theory of when life begins as the foundation of the state's regulation of abortion" and "[n]o persons are better situated to attack the constitutionality of this endeavor than those parties who are directly affected by the state's abortion laws—laws that allegedly are based on and reflective of an impermissible theory of life." (J.S. App. A63.) The court invalidated the preamble as "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." (J.S. App. A64.)

The court also affirmed the invalidation of §§ 188.205 (in part), 188.210, and 188.215 because the "encourage or counsel" language was "void for vagueness and violative of the right to privacy." Even though these provisions carry no criminal penalties, the court held that

a "strict scrutiny" standard applied in evaluating the vagueness challenge because the provisions "implicate[d] both first and fourteenth amendment rights of both physicians and their patients . . . ." (J.S. App. A67.) Rejecting the State's limiting construction that the "encouraging and counseling" language banned only "affirmative advocacy," the court concluded that the language was "much broader than the interpretation offered by the state" and was "vague because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." *Id.* Finally, the court agreed that the "encouraging and counseling" language of §§ 188.205, 188.210, and 188.215 constituted "an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (J.S. App. A70.)

The appellate court affirmed the district court decision that the "performing or assisting" language of § 188.215 (public facilities) was contrary to *Nyberg v. City of Virginia, supra.* The court also decided that the "performing or assisting" language of § 188.210 (public employees) was equally invalid. However, the court of appeals reversed the lower court's order regarding the "performing or assisting" language of § 188.205 because it was inconsistent with *Poelker v. Doe, supra.* The court of appeals also rejected the district court's construction of the "performing or assisting" language and stated that the Eighth Amendment was not implicated.

Overall, the court of appeals affirmed the permanent injunction against all provisions appealed, except for the "performing or assisting" language of § 188.205 which was severed and declared facially constitutional.

In this appeal, the State of Missouri is contending that the court of appeals grievously erred in its review

of the state statutes in question and that the court should be reversed insofar as it declared unconstitutional §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215. The remainder of the court of appeals' decision will not be challenged.

SUMMARY OF THE ARGUMENT

I.

Initially, this Court must consider the standard of review to be utilized in reviewing the Missouri Statutes struck by the courts below in accordance with *Roe v. Wade.* The State of Missouri maintains that the trimester approach established in *Roe v. Wade* is inherently flawed because the point of viability is arbitrary and the State has a compelling interest in protecting life through all stages of pregnancy. The textual, doctrinal, and historical basis for *Roe v. Wade* is flawed and is a source of such instability in the law that this Court should reconsider the decision, and on reconsideration abandon it and adopt the rational basis test for reviewing abortion regulation in accordance with *Bowers v. Hardwick.* Alternatively, if this Court continues to deem the abortion decision to be a fundamental right, state regulations should be upheld unless they unduly burden the abortion choice at any stage of pregnancy in accordance with *Maher v. Roe* and *Harris v. McRae.*

II.

The State of Missouri maintains that the courts below erred in declaring §§ 1.205.1(1) and (2) unconstitutional as a matter of law because the stricken provisions are prefatory statements with no substantive effect. The plaintiffs lack standing to challenge the preamble provisions because the statute does not unduly burden the abortion decision or restrict or regulate the performance

of abortions. The stricken provisions are valid statements of fact and policy which justify the operative sections of the statute, wherein the State bestows rights on unborn children under Missouri law in non-abortion situations.

III.

Missouri maintains that the second provision of § 188.029 should have been upheld by the courts below because the statute does not require unnecessary or inappropriate tests to determine viability and because the State's requirement that a physician record his findings regarding the viability of an unborn child which he has reason to believe is twenty weeks gestational age furthers the State's compelling interest in preserving the life of a viable unborn child.

IV.

The courts below erred in declaring a provision of § 188.205 forbidding the expenditure of public funds for "the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" to be in violation of a woman's right to privacy or void for vagueness. The State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counseling and services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe, Harris v. McRae,* and *Poelker v. Doe* conclusively establish that a limitation on the expenditure of public funds does not constitute an obstacle in violation of a woman's right to obtain an abortion.

Section 188.205 does not implicate the First Amendment rights of any person. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties and does

not forbid speech. An examination of the language declared vague by the courts below in its proper context indicates that the restriction is not so vague that a person of common intelligence must guess at its meaning. The provision provides a reasonable person fair notice of conduct which will not be subsidized by the State.

V.

In §§ 188.210 and 188.215 the State of Missouri declared it unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother or for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia* (*Nyberg II*). The appellants submit that the Eighth Circuit's decision to rely upon *Nyberg II* and declare the performing or assisting language in each of these two statutes to be unconstitutional is directly contrary to the reasoning of *Poelker v. Doe*. The court below erred in limiting the principles expressed in *Poelker v. Doe, Maher v. Roe,* and *Harris v. McRae* to mean merely that the government is not obligated to fund abortions. The State of Missouri submits that a refusal by the State to allow the use of public facilities or public employees for the performance of abortions not necessary to save the life of the mother does not constitute an undue burden or create an unlawful obstacle preventing a woman from effectuating her decision to obtain an abortion. A woman who desires an abortion continues as before to be dependent on private sources for the services she desires. Consequently, the courts below should have severed and upheld the performing or assisting language of §§ 188.210 and 188.215.

ARGUMENT

I. The Standards to Be Applied in the Review of Abortion-Related State Legislation Should Be Reconsidered and Modified.

A. A Determination of the Appropriate Standard of Review Is a Threshold Issue in This Appeal.

The first step in the judicial review of the Missouri statutes at issue is to determine the appropriate standard of review: strict scrutiny, rational basis, or some intermediate standard. In cases involving state regulation of abortion, this Court has consistently set forth the standard of review before considering the particular statutes at issue. In *Roe v. Wade*, 410 U.S. 113 (1973), the majority labored at great length over the appropriate constitutional analysis before striking down the Texas abortion statute. Subsequently, in every major abortion case reaching this Court, the standard of review has been a threshold issue.[1] The State of Missouri submits that this initial issue must again be addressed before directly confronting the specific statutes facially challenged by the plaintiffs and ordered enjoined by the courts below.

B. Missouri's Compelling Interest in Life Cannot Be Confined by a Shifting Point of Viability.

Six years ago, Justice O'Connor observed in her dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983), that:

1. See *Doe v. Bolton*, 410 U.S. 179, 189, 195 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976); *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Colautti v. Franklin*, 439 U.S. 379, 386-387 (1979); *Belotti v. Baird (II)*, 443 U.S. 622, 633-642 (1979); *Harris v. McRae*, 448 U.S. 297, 311-318, 319-320, 322-323, 324 (1980); *H. L. v. Matheson*, 450 U.S. 398, 408-410 (1981); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-420, 426-431 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

> [t]he *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the state may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decision-making through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . .' A. Cox, *The Role of the Supreme Court in American Government*, 114 (1976).

The evidence presented by the parties in this action dramatically demonstrates the accuracy of Justice O'Connor's prediction. The testimony of medical experts for both parties and the documentary evidence overwhelmingly established that a woman who appears to be carrying an unborn child of twenty weeks gestational age (LMP) may have a viable unborn child under 1986 medical technology (J.S. App. A33; n. 37, 38). The evidence regarding this was so persuasive that the plaintiffs did not challenge the district court's findings or conclusions regarding this question even though the court was focusing on a point during pregnancy two months prior to the third trimester line drawn in *Roe v. Wade*.

The facts established in this case make it very evident that the concept of viability is entirely arbitrary. It is simply a discretionary point which may shift because of the opinion of a physician requested to perform an abortion or due to the availability of medical facilities to preserve the life of a premature baby. Clearly, "[t]he choice of viability as the point at which the state in-

terest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

The State of Missouri therefore submits that its compelling interest in protecting human life exists throughout pregnancy. The trimester approach of *Roe v. Wade* has been rendered impotent by advances in prenatal medicine and the arbitrariness of the lines drawn by the majority. See *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

C. Roe v. Wade Should Be Reconsidered Because Its Textual, Historical, and Doctrinal Basis Is Illegitimate.

The second reason for urging reconsideration of *Roe v. Wade* is the State of Missouri's belief that the textual, historical, and doctrinal basis for the abortion right created by *Roe v. Wade* is inherently flawed.

It has now been sixteen years since the Supreme Court decided *Roe v. Wade*. Criticism regarding the legitimacy of the right declared to be fundamental in *Roe v. Wade* continues unabated since the date of the decision.[2] An exhaustive and persuasive examination of

2. A broad spectrum of constitutional scholars have repeatedly exposed the flaws which undermine the legitimacy of the decision. See, e.g., J. H. Ely, *Democracy and Distrust* 2-3, 248, n. 52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Bickel, *The Morality of Consent* 27-19 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudications*, 83 Yale L.J. 221, 297-311 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Coleman, *Roe v. Wade: A Retrospective Look at a Judicial Oxymoron*, 29 St. Louis U.L.J. 7 (1984).

the flaws of *Roe v. Wade* was presented by the Solicitor General in the United States' brief as amicus curiae in *Thornburgh v. American College of Obstetricians and Gynecologists, supra*, Nos. 84-495 and 84-1379. Consequently, appellants do not feel compelled to reiterate arguments quite familiar to this Court. However, the circumstances presented by this case, the fifteenth abortion case since *Roe v. Wade* and *Doe v. Bolton* to be considered by the Court, warrant a careful look at the path the Court has followed. Upon reconsideration, the appellants will urge this Court to overrule *Roe v. Wade* and return the law to the condition in which it was before the case was decided. As Justice White has observed, the liberty interest in abortion, unlike the Court's precedents involving childbearing, has no basis in liberty interests that are either "implicit in the concept of ordered liberty," *Thornburgh*, 476 U.S. at 792, or otherwise "deeply rooted in this Nation's history and tradition." *Id.* Only by reference to these two sources of fundamental rights is the Court able:

> . . . to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . .

Thornburgh, 476 U.S. at 791 (White, J., dissenting).

It is Missouri's position that the values implicit in the Constitution do not compel recognition of abortion liberty as fundamental. As Justice White concluded in his *Thornburgh* dissent:

> The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves

over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences. (Footnotes omitted.)

Id. at 793-794.

D. The Appropriate Standard of Review Is the Rational Basis Test.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the respondents sought to decriminalize homosexual conduct by arguing that the right to privacy encompassed sodomy as part of a fundamental right to decide to beget or bear a child. In support of this position, the respondents cited the Court's substantive due process cases dealing with child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships, *Prince v. Mass.*, 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and abortion, *Roe v. Wade*.

After considering the two basic tests used by the Court in identifying fundamental liberties, the *Bowers* Court completely rejects respondents' argument:

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. (Citations and footnotes omitted.)

Id. at 192-194.

The Court's reasoning in *Bowers* constitutes a forceful basis for rejecting the philosophical underpinning of *Roe*. It cannot be seriously argued that a right to engage in abortion is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." As the Court acknowledged in *Roe v. Wade*, 410 U.S. at 138-139, and as Justice Rehnquist emphasized in dissent (*id.* at 174-176, n. 1), state laws restricting abortion were widely in force throughout the nineteenth and twentieth centuries.[3]

In both *Akron* and *Thornburgh*, this Court reaffirmed *Roe* on grounds of *stare decisis*. *Akron*, 462 U.S. at 419-420, n. 1; *Thornburgh*, 476 U.S. at 747. Although the principle of *stare decisis* weighs against reconsidering precedents in order to promote the continuity and consistency of adjudication, the principle does not demand total obedience in constitutional litigation. See

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3. See Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L.Rev. 359 (1979).

Akron, 462 U.S. at 420; *Glidden Company v. Zdanok*, 370 U.S. 530, 543 (1962). As Justice White has indicated in his *Thornburgh* dissent:

> But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.

476 U.S. at 787.

Where a judicial scheme affecting the allocation of constitutional powers has proven "unsound in principle and unworkable in practice," or where it "leads to inconsistent results at the same time that it disserves principles of democratic self-governance," this Court has not hesitated to reconsider a prior decision. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547 (1985). Consequently, the appellants submit that the doctrine of *stare decisis* should not deter this Court from altering a constitutional doctrine "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution. *Garcia*, 469 U.S. at 557.

In the event this Court decides to reconsider *Roe v. Wade* in light of the test set forth in *Bowers* to determine fundamental rights, it is evident that state legislation regulating abortion should be upheld so long as it has a rational basis and seeks to further a legitimate state interest, that is, the state's interest in protecting life. *Bowers*, 478 U.S. at 196.

E. Alternatively, if the Court Continues to Deem the Abortion Decision to Be a Fundamental Right, State Regulations Should Be Upheld Unless They Unduly Burden the Abortion Choice at Any Stage of Pregnancy.

In *Roe v. Wade*, the Court concluded that the "right of privacy" emanating from the Fourteenth Amendment's due process clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." However, the Court rejected the contention that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153. The privacy right involved in an abortion decision, the Court concluded, "cannot be said to be absolute." *Id.* at 154. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand").

Prior to *Thornburgh*,[4] this Court has repeatedly adopted an "unduly burdensome" analysis in the context of reviewing legislative enactments impacting upon the abortion decision. *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 473-474 (1977); *Beal v. Doe*, 432 U.S. 438, 446 (1977). As the Court stated in *Maher*,

> The right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified "constitutional right to an abor-

4. The majority's decision in *Thornburgh* has been characterized as an "attempt to discredit and preempt state abortion regulation regardless of the interests its serves and the impact it has." *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting).

> tion," as the district court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.

432 U.S. at 473-474. See also *Belotti v. Baird,* 443 U.S. 622, 640 (1979) (*Belotti II*) (Opinion of Powell, J.) ("The question before the Court is whether a Massachusetts statute provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion"). Clearly, before *Thornburgh,* abortion regulations invalidated by the Court were not found objectionable merely because they impacted upon some unusually discrete zone of privacy, but rather because they resulted in an unduly burdensome interference with the abortion choice. See, e.g., *Harris v. McRae, supra,* 448 U.S. at 328 (White, J., concurring).

As Justice O'Connor has explained in her *Thornburgh* dissent:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancment of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. *Akron* at 461-463 (O'CONNOR, J., dissenting). An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." *Id.* at 464 (O'CONNOR, J., dissenting).

Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting).

In the remaining sections of this Argument, Missouri will consider the specific statutes in question pursuant

to the "undue burden" standard which was consistently followed by this Court prior to *Thornburgh.* Appellants will maintain that the statutory language should be declared constitutional, in accordance with that standard, and the decision of the court of appeals should be reversed.

II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being" Pursuant to a Public Policy of Protecting the Life and Health of Unborn Children to the Fullest Extent Possible in Tort, Criminal, Property, and Abortion Law.

The court below held that §§ 1.205.1(1) and 1.205.1(2), RSMo 1986, were invalid because they conflicted with *Roe v. Wade,* 410 U.S. 113, 162 (1973), wherein the United States Supreme Court declared that a state could not adopt one theory of when life begins to justify abortion regulation. Prior to trial, the district court granted plaintiffs' motion in limine to exclude any evidence related to the provisions of § 1.205. Presumably, the subsections in question were struck solely because the content of the finding violates the privacy right to an abortion established in *Roe.*

Initially, one must note that the two subsections declared invalid are preamble or prefatory statements of fact and principle enacted in order to provide guidance in interpreting the operative language of § 1.205. Neither subsection does anything substantively.

It is well established that "preambles to statutes do not impose substantive rights, duties or obligations." *National Wildlife Federation v. Marsh,* 721 F.2d 767 (11th Cir. 1983). See *Association of American Railroads v. Costle,* 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander*

v. HUD, 555 F.2d 166, 171 (7th Cir. 1977).[5] By declaring the Missouri General Assembly's findings to be in violation of the plaintiff class's right to privacy, the court of appeals had to decide that the preamble *did something* which is directly contrary to decisions in other circuits that preambles have no operative effect. *Association of American Railroads v. Costle, supra.*

The substantive language of § 1.205 expands existing state tort, property, and criminal law protection for unborn children. However, § 1.205 excludes legal abortion from its ambit by providing unborn children only those rights, privileges and immunities permitted by "the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court and [not contrary to] specific provisions . . . in the statutes and constitution of this state." Section 1.205.2, RSMo. The statute also specifically provides that it does not create any cause of action against a pregnant woman with respect to the prenatal care of an unborn child. Section 1.205.4, RSMo.

A. Legislative Findings Without Operative Effect Cannot Threaten Injury So As to Create a "Case or Controversy."

The statute in question does not regulate any woman's constitutional right to choose abortion over childbirth. A different chapter of the Revised Statutes of Missouri regulates abortion. See Chapter 188, RSMo 1986. Section 1.205 defines the point at which unborn children

5. Congress frequently makes findings to justify new federal spending programs. Such findings have no substantive effect unless Congress intends for the language to have such effect. See, for example, the Bill of Rights provisions of the Developmentally Disabled Assistance and Bill of Rights (Act), 42 U.S.C. § 6010 (1976 ed. and Supp. III), as interpreted in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).

are entitled to the protections of Missouri law in circumstances other than those involved in abortion. The court's decision to strike the challenged preamble provisions of the statute does not diminish the statute's substantive impact on state law.

Since § 1.205 cannot infringe upon any judicially established right of any plaintiff class member who desires to obtain an abortion or perform an abortion, the plaintiffs in this action lack standing to challenge any provision of § 1.205, RSMo. The doctrine of standing requires that a plaintiff allege personal injury fairly traceable to a defendant's alleged unlawful conduct. Without standing, a litigant cannot meet the Article III "case and controversy" requirement of federal judicial power. *Allen v. Wright*, 468 U.S. 737, 754-758 (1984).

As the Court explained in *Allen*:

> The requirement of standing . . . has a core concept derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Id. at 751 (citation omitted). The plaintiffs in the present case cannot demonstrate any injury traceable to sections 1.205.1(1)-(2), and thus have no standing to challenge these provisions. See also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982).

It is unclear on what basis the courts below could even speculate that a merely declaratory enactment could give rise to an injury in fact. Such a law has, by definition, no legal effect. At most, the Missouri preamble creates an ideological tension between the plaintiffs' philosophy of abortion and the declared policy of Missouri. This is, however, a plainly insufficient ground

for standing. The conscientious beliefs of plaintiffs in *Valley Forge* and *Allen* were all insufficient to give standing in those cases. Moreover, if the mere psychological effect of the *substantive* regulations at issue in those cases was too remote or speculative to create a case or controversy, then the psychic impact of the purely *declaratory* sections of the Missouri law must also be insufficient.

In the present case, plaintiffs lacked standing to challenge the declaratory sections of the Missouri law: they suffered no "injury in fact" from the mere existence of these provisions. Hence, the courts below lacked jurisdiction to consider the constitutionality of these sections. The order of the court of appeals should therefore be reversed.

B. Roe v. Wade Does Not Prohibit a State From Making a Declaration That Life Begins at Conception and That the State Has Interests in All Human Life.

The court below overturned the prefatory subsections of the Missouri law on the basis of a supposed conflict with *Roe v. Wade*. Neither *Roe* nor its progeny, however, forbid a state declaration that life begins at conception and has protectable interests from that moment.

Ignoring the unduly burdensome standard for judging legislation alleged to affect the right to privacy, the courts below based their decisions instead on specific language, taken out of context, from *Roe v. Wade*:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [when life begins] the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe v. Wade, 410 U.S. at 159. The district court concluded that "the legislative pronouncement by the Missouri General Assembly clearly conflicts with the essence of *Roe v. Wade*. Consequently, §§ 1.205.1(1) and (2) are invalid as a matter of law." (J.S. App. A15.)

The court of appeals saw no point in addressing the factual validity of the State's findings and held the following:

> As a "prefatory" statement, as so insistently urged by the state, the declaration of when life begins can only have been intended as an introductory and foundational comment. To adopt the state's contention that the statute is "abortion-neutral" is to overlook that every remaining section of the bill save one regulates the performance of abortions. The only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life. Rather than being abortion-neutral, the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations.

(J.S. App. A64.)

If *Roe v. Wade* actually stands for the principle espoused by the court of appeals, then *Roe* is even more flawed than previously recognized. *Roe* did not impose a judicial fiat against any law assuming or declaring a certain view of life. Such a sweeping declaration would forbid the numerous laws—regarding wrongful death, homicide, inheritance, and child custody—recognizing the existence of children prior to birth. Rather, this Court held that a state may not, "*by* adopting one theory of life . . . *override the rights* of the pregnant woman that are at stake." 410 U.S. at 162 (emphasis added). In other words, while a state may *assert* a given theory of

life, such assertion cannot, according to the Supreme Court, *justify restrictions* on abortion.

The prefatory Missouri sections make mere assertions, not restrictions, and thus cannot conflict with *Roe*. Indeed, *Roe* itself acknowledges that states have an "important and legitimate interest in protecting" children prior to birth, *id.* at 162, and *Maher* recognizes the authority of a state to "make a value judgment favoring childbirth over abortion," 432 U.S. at 474. Sections 1.205.1(1) and (2) do no more.

The courts below essentially imposed upon all state officials a duty to submit, not only in act but also in word, to an ideology favoring abortion. That holding must be reversed.

The first subsection struck by the courts below is a statement of fact. Although one can quibble over terminology, one cannot dispute the established biological fact that the life of an *individual* human being (or any mammal) begins at conception.[6] Of course, it is of no consequence whether a legislature or court pronounces as true or false a fact of nature. The Earth still moves around the sun, whether a government or a court recognizes that fact.

Nonetheless, it is not improper for a government or a court to recite findings in making or interpreting law. Although the members of a legislature cannot create a fact by pronouncement, they can recognize truth and acknowledge the existence of certain facts as a basis for action. Subsection (1) constitutes an effort by the General As-

6. See, e.g., Defendant Exhibits A, B, C, D, E, F, G, H, I, R, S, and T (Tr. 4-2 - 4-4); see J.A. A60-A65 for titles; see also E. Blackschmidt, *The Beginning of Human Life*, 16-17 (1977); K. Moore, *The Developing Human: Clinically Oriented Embryology*, 1, 13 (3d ed. 1982).

sembly of Missouri to recognize a truth justifying the substantive legislation which follows.

The second subsection in the preamble is a statement of value and policy, not fact.

In Missouri, "the legislative power . . . is vested in the General Assembly . . . ." *State v. Green*, 470 S.W.2d 571, 573 (Mo. banc 1971). See Mo. Const., Art. III, § 1. This "legislative power is plenary and residual, subject only to the limits of the federal and state constitutions." *Penner v. King*, 695 S.W.2d 887, 889 (Mo. banc 1985). The Missouri General Assembly is therefore the proper governmental body to make legislative policy decisions for the State of Missouri. The declaration of policy set forth in subsection (2) is entirely consistent with Missouri's policy recognizing the sanctity of life.[7]

Traditionally, states have determined the point at which unborn children are entitled to the protections of state law . For example, most states provide children a cause of action in tort for prenatal injuries inflicted by a person other than the child's mother. See W. Prosser, *Handbook on The Law of Torts*, 337 § 55 (4th Ed. 1971) ("when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick"). *Kelly v. Gregory*, 282 App. Div. 542, 543-544, 125 N.Y.S.2d 696, 697 (1953) (child may recover for previability injuries in part because "what we now know makes it possible

7. See § 188.010, RSMo 1986, which states:
It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.
See also *Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. en banc 1988).

to demonstrate clearly that separability begins at conception.")

Many states also provide a cause of action to the parents for the wrongful death of their unborn children. For example, the Rhode Island Supreme Court held in *Presley v. Newport Hospital*, 117 R.I. 179, 365 A.2d 748 (1976) that the word "person" as used in the Rhode Island Wrongful Death Act includes unborn children. 117 R.I. at 188, 365 A.2d at 754. As recently as 1983, the Missouri Supreme Court held that the term "person" as used in Missouri's Wrongful Death Statute "includes the human fetus *en ventre sa mere*" stating that its conclusion was "supported by a strong positive trend among other jurisdictions holding that a fetus is a 'person,' 'minor' or 'minor child' within the meaning of their particular wrongful death statutes." *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo. banc 1983).

Most states recognize in unborn children certain rights under property law. For example, the Uniform Probate Code provides that unborn children are to be treated as though born within the lifetime of the decedent. *Uniform Probate Code*, § 2-108; *Uniform Probate Code Practice Manual*, p. 11, § 1.11.

Finally, many states provide criminal sanctions for the intentional or criminally negligent killing of an unborn child. For example, a number of states impose criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child. See, *e.g.*, Ark. Stat. Ann. § 41-2553 (1947); Cal. Penal Code § 187 (West 1970); Fla. Stat. Ann. § 782.09 (West Supp. 1983); Mich. Comp. Laws Ann. § 750-322 (West Supp. 1983); Nev. Rev. Stat. §§ 200.210, 200.220 (Supp. 1983); Okla. Stat. Ann. titl. 21 §§ 713, 714 (West Supp. 1983). In fact, until Missouri's General Assembly enacted § 1.205, Missouri

also had such a law. See § 565.024.1(3), RSMo 1978 (amended by L. 1986, H.B. No. 1596, § A).

The foregoing examples amply demonstrate that the matters dealt with in § 1.205 have long been recognized as within the proper purview of state regulation and proper subjects for legislative enactments. In *Roe v. Wade*, this Court decided that women have a constitutionally protected right to choose abortion. However, the Court placed no limit on state legislation concerning unborn children where such legislation leaves unimpaired a woman's right to choose abortion. In fact, the *Roe* Court itself acknowledged that states have a valid and important interest in encouraging childbirth. It stated that states have an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. The Court repeated its *Roe* language in *Beal v. Doe*, 432 U.S. 438 (1977), adding that a state's "strong and legitimate interest in encouraging normal childbirth" exists "throughout the course of the woman's pregnancy." 432 U.S. at 445-46.

In *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court faced the question of whether a woman's "freedom of choice" included an entitlement to Medicaid payments for abortions that are not medically necessary. The Supreme Court stated that the district court failed to understand the scope of the right recognized in *Roe*. The *Roe* Court did not create an *absolute* right to abortion; rather, it protects a woman from "unduly burdensome interference" with her right to obtain an abortion. The Court emphasized that *Roe* "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion . . . ." 432 U.S. at 471, 473-474.

The *Maher* Court emphasized that a state need not show a compelling interest for its policy choice favoring

normal childbirth. 432 U.S. at 477. A state statute need only comply with the less demanding test that the statute be rationally related to a "constitutionally permissible purpose." 432 U.S. at 78. The Court acknowledged the state's " 'strong and legitimate interest in encouraging normal childbirth' . . . an interest honored over the centuries" and held that the regulation rationally furthered that interest. See also *Harris v. McRae,* 448 U.S. 297, 325 (1980).

Section 1.205 clearly complies in its entirety with the pronouncements and guidelines of *Maher* and *McRae.* It does not create any "unduly burdensome interference" with the right to choose abortion, but, at most, indicates a "value judgment favoring childbirth over abortion . . . ." *Maher v. Roe, supra,* 432 U.S. at 471, 473-474. The findings and policy declarations made to justify this legislation are constitutional and the courts below erred by holding otherwise.

III. The State of Missouri Has a Compelling Interest in Requiring a Physician Who Is About to Perform an Abortion to Make a Determination Whether the Unborn Child Is Viable, and in So Doing to Cause to Be Performed Such Examinations and Tests As Are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child.

The district court and court of appeals correctly upheld the first sentence of § 188.029, which requires that before performing an abortion on a woman "he has reason to believe is carrying an unborn child of twenty or more weeks gestational age," the physician "shall first determine if the unborn child is viable . . . ." This holding was based on medical evidence by the plaintiffs' own witness, Dr. Maulik, and others, that showed that the twenty-week designation was reasonably related to

viability because there may be a four-week or greater error in estimating gestational age (J.S. App. A33; *supra,* n. 37, 38).

Despite this conclusion, the court below facially invalidated the second sentence of § 188.029. The court of appeals, relying on dictum in *Colautti v. Franklin,* 439 U.S. 379 (1979), that legislatures could not "proclaim one of the elements entering into the ascertainment of viability," concluded that "this is precisely what the Missouri legislature has attempted to proclaim." (J.S. App. A59.) The court of appeals also adopted the findings of the district court that the lung maturity provision required the use of amniocentesis, which was expensive and not rationally related to the determination of viability at twenty weeks (J.S. App. A60, n. 5).

The court of appeals' reliance on *Colautti* is misplaced. *Colautti* dealt with a state statute which subjected a physician to potential criminal liability if he failed to use a certain procedure "when the fetus 'is viable' or when there is 'sufficient reason to believe that the fetus may be viable.' " 439 U.S. at 381. There the Court stated, "[b]ecause this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." *Id.* at 389. The Court struck down this provision, concluding that the term "may be viable" was unconstitutionally vague when stated in conjunction with the phrase "is viable" and because a "scienter requirement with respect to the finding of viability" was absent. *Id.* at 390.

Despite the fact that the court of appeals relied on the *Colautti* dictum that the legislature could not "pro-

claim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant," that dictum is plainly not applicable to § 188.029. First, the General Assembly has not emphasized any "single factor," but instead has specified *three* factors—consistent with medical science—for which a finding must be made. Second, the legislature has not prejudged what those findings must be. Finally, the legislature has not made all or any of these factors "determinant" of viability. The determination of viability is left to the medical judgment of the attending physician. Although three objective factors medically consistent with a determination of viability are identified, none of these factors is made determinant and the physician may consider any other factors. For these reasons, *Colautti* does not warrant the striking of § 188.029.

Medical experts for both plaintiffs and defendants concurred during the trial that it is standard medical practice to perform an ultrasound examination to determine gestational age and viability of a fetus whenever it appears that a woman seeking an abortion is at least twenty weeks pregnant. The undisputed evidence further indicated that no current test other than measurements which can be performed with the use of ultrasound provide information necessary to determine viability prior to at least thirty weeks gestational age (Keenan Tr. 4-78; Maulik Tr. 1-55; Crist Tr. 1-98, 1-117; Pearman Tr. 1-139; Widdicombe Tr. 2-65).

The Court should note that the most important language of § 188.029 was ignored by the courts below during the process of construing the stricken provision. That vital language is contained in the first sentence, which was upheld by the district court. It states:

> . . . the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions.

This crucial language imposes upon the physician a standard of care which would clearly forbid the performance of a medical examination or test which could not reveal anything or might unnecessarily increase the risk of harm to a mother or unborn child. The State of Missouri submits that § 188.029 cannot be construed as requiring a physician to perform examinations or tests contrary to the standard of care imposed upon a careful and prudent physician under similar circumstances. Yet the construction utilized by the courts below mandates actions by a physician contrary to the appropriate standard of care set forth in the statute.

The court's invalidation of the second sentence of § 188.029 because of the fetal weight and lung maturity language ignores normal principles of constitutional adjudication in a facial challenge. See *United States v. Salerno*, 107 S.Ct. 2095, 2100 (1987). The court of appeals misread the plain language of § 188.029 as a matter of law. The plain language provides that the physician shall cause to be performed such examinations and tests "as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child . . . ." The court read this language as saying that "doctors *must* perform tests to find gestational age, and fetal weight and lung maturity." (J.S. App. A60, n. 5.) But there is a significant difference between a requirement to perform "tests to find" and one to perform "such . . . tests as are necessary to make a finding."

The court read into the plain language specific tests which are not required by the statute on its face. The statutory language allows for the distinct possibility that no findings can be made, or that findings can be made by a single test, thereby making *unnecessary* the use of another test, or that a finding can be derived without an intrusive test. The statutory language provides flexibility that the court's construction excises.

This allowance for flexibility in obtaining a finding is directly relevant to the "lung maturity" language. The district court and the court of appeals would read the plain language as specifically requiring amniocentesis, despite the fact that the plain language specifies no tests, but refers more generally to "such . . . tests as are necessary to make a finding." The evidence provided by the medical experts at trial was that amniocentesis could make "no finding" of lung maturity at twenty weeks. Within the language of the statute, an amniocentesis test *cannot* be a "necessary" test to "make a finding" if it can provide no information.

The appellants submit that the only reasonable facial construction of § 188.029 is that the statute requires a physician to use ordinary care and utilize such medical examinations or tests as are necessary to make appropriate findings in the case before him. An unnecessary test should never be utilized and an examination or test which increases the risk to a mother or her unborn child should only be utilized if medically appropriate for the care of the mother or unborn child. Under all circumstances, however, the State has a compelling interest in requiring a physician to record his findings regarding viability and the findings derived from such tests as he deems necessary to render a decision. Statutes designed to further the State's compelling interest in preserving

life need not be drafted to "accommodate every conceivable contingency." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 483, n. 7 (1983).

The court of appeals' analysis was erroneous as a matter of law. It was based on a misreading of the plain language and it employed an erroneously high standard of review. The court thus erred in facially invalidating the second sentence of § 188.029.

IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.

The court below reversed the district court's decision declaring the first part of § 188.205 to be unconstitutional because the trial court's order was contrary to the holdings of *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which decided that a government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. The court felt bound to uphold the provision of § 188.205 which forbids the expenditure of public funds for the purpose of performing or assisting an abortion, not necessary to save the life of the mother. However, the court declared the remainder of § 188.205 to be facially invalid because the phrase "encouraging or counseling a woman to have an abortion not necessary to save her life" was unconstitutionally vague and because the ban constituted an obstacle to a woman's exercise of her right to privacy. Each rationale expressed by the court below is inconsistent with decisions rendered by this court regarding the subsidizing of constitutional rights and the standard for reviewing facial challenges to state statutes on the basis of vagueness.

A. The State Is Not Required to Subsidize With Public Funds the Exercise of a Constitutional Right.

As recently as March, 1988, this Court held that a government is not required to furnish funds in order for a person to maximize the exercise of a constitutional right. The Court stated in *Lyng v. International Union, UAW*, 108 S.Ct. 1184, 1190 (1988), that "'we have held in several contexts [including the first amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)." Clearly, with regard to § 188.205, the State of Missouri does not violate a woman's right to obtain an abortion by refusing to allow public funds to be used for abortion counselling services. Contrary to the court of appeals' decision, this Court's rulings in *Maher v. Roe*, *Harris v. McRae*, and *Poelker v. Doe*, 432 U.S. 519 (1977), conclusively establish that § 188.205, which is concerned expressly with the expenditure of public funds, does not constitute an obstacle in violation of a woman's right to privacy.

The court of appeals' decision that the right to privacy is violated by a refusal to fund abortion counseling would in another context mean that a parent has a right to have his or her child taught a particular foreign language in any free public school. The district court's reasoning would prohibit the state from restricting the content of its curriculum. Such reasoning has been explicitly rejected by the United States Supreme Court in *Maher v. Roe*. In that case the Court stated:

> [W]ere we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here. We think it abundantly clear that a state is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a state must so justify its election to fund public but not private education.

Id., 432 U.S. at 477; see also *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

Similarly, if a city may ban the performance of abortions and staff a hospital with physicians who refuse to perform abortions, as in *Poelker*, government may necessarily refuse to provide public counseling to have abortions not necessary to save the life of the mother. By doing so, it merely leaves the woman dependent on private funding.

This was confirmed by the Ninth Circuit in *Planned Parenthood of Central & Northern Arizona v. State of Arizona*, 718 F.2d 938 (9th Cir. 1983). Reviewing a state ban on public assistance for "counseling for abortion procedures," the Ninth Circuit held that the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech, but the state need not support, monetarily or otherwise, those activities. 718 F.2d at 944. The appeal from this holding to the Supreme Court was dismissed. *Babbitt v. Planned Parenthood*, 479 U.S. 926 (No. 86-378) (1986). See also *Planned Parenthood Association-Chicago Area v. Kempiners*, 531 F. Supp. 320, 325 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir. 1983).

This Court should note that the court of appeals did not separately focus on the "encouraging and counseling" language of § 188.205. Instead, it broadly held "that the ban on using public funds, employees and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth

amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." (J.S. App. A70.) Clearly, the court below was primarily concerned with the more restrictive language contained in §§ 188.210 and 188.215, which sought to forbid speech by employees and in public facilities. Section 188.205 does not forbid speech; it is only concerned with the spending of public money. By refusing the use of public funds for the purpose of directly urging a woman to have an abortion not necessary to save her life, the State does not impose any obstacle on the right created by *Roe v. Wade*.

Consequently, it cannot be concluded that the language of § 188.205 facially violates a right to privacy. The court of appeals' broad condemnation is inapplicable to the limited restrictions of this statutory provision.

B. First Amendment Rights Are Not Infringed by a Restriction on the Use of Public Funds.

As indicated above, both *Regan v. Taxation With Representation*, 461 U.S. at 546, and *Lyng v. International Union*, 108 S.Ct. at 1190, "reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized . . . ."

The language of § 188.205 directs officials not to expend public funds under their control for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion not necessary to save her life. It is well recognized that the First Amendment rights of public employees are only implicated when employees "comment on matters of 'public concern.'" *Rankin v. McPherson*, 107 S.Ct. 2891 (1987); *Connick v. Myers*, 461 U.S. 138, 140 (1983). The Supreme Court has permitted governments to place absolute restrictions on some First Amendment rights of public employees. See *United States Civil Service Commission*

v. National Association of Letter Carriers, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Obviously, the language of this statute does not forbid any discussion regarding abortion issues or any other type of public concern; nor does it reach any private speech or conduct. Thus, it would be inappropriate to conclude that the First Amendment was implicated by reliance upon cases reviewing criminal laws applied entirely to private persons or conduct, such as *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Instead, the only question is whether a woman has a First Amendment right to publicly funded counseling services. Such a right is imaginary. The recent decision of a New York district court concerning the constitutionality of regulations setting standards under Title X of the Public Health Services Act of 1970, 42 U.S.C. 300, et seq., contains an appropriate comment:

> The point here, however, is that HHS's regulations, which merely withhold grants of federal funds from those who wish to counsel women about abortion, refer them to abortion providers, or advocate, encourage or promote abortion in other ways, do not violate the rights of either such persons or their patients. The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech.

New York v. Bowen, 690 F. Supp. 1261, 1273-1274 (S.D. N.Y. 1988).[8]

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8. The constitutionality of the Title X regulations is currently before three courts of appeals. The regulations have been permanently enjoined by two district courts. *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal pending No. 88-1279 (1st Cir.); *Planned Parenthood Federation v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal docketed, No. 88-2251 (10th Cir.). They have been upheld by one district court. *New York v. Bowen, supra*.

The State of Missouri submits that § 188.205 does not implicate or infringe upon any First Amendment rights.

C. The Phrase "for the Purpose of Encouraging or Counseling a Woman to Have an Abortion . . ." Is Not Vague.

In its eagerness to declare the encouraging and counseling language used by the General Assembly of the State of Missouri to be vague, the court of appeals ignored not only the appropriate standard for review but also the "well-established principle that statutes will be interpreted to avoid constitutional difficulties [citations omitted]. *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988). In reaching its decision regarding the second half of § 188.205, the court below decided that the language implicated First Amendment rights, rejected a narrow interpretation offered by the Missouri Attorney General's Office, and ignored the most accepted definitions of the words it declared vague.

Initially, as discussed above, this Court should note that § 188.205 does not explicitly implicate the First Amendment rights of any person. The court of appeals clearly erred in reviewing § 188.205 pursuant to a strict scrutiny standard. The statute has no criminal penalties, and does not forbid anyone from freely discussing abortion.

Reviewing courts have frequently "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-499 (1982). Although the district court in this case acknowledged that "it is clear that these sections do not impose criminal penalties . . . ," *Id.* at 1317, n. 48, each court below concluded that strict judicial scrutiny was warranted in its review of § 188.205

because First Amendment freedoms of expression were "clearly involved."

Since First Amendment freedoms are not implicated here, the court erred in not applying a less restrictive standard of vagueness to determine the validity of this provision regarding the expenditure of public funds. As this Court recently observed, "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 108 S.Ct. 1853, 1858 (1988). Thus, plaintiff's facial challenge is inappropriate.

Even if First Amendment freedoms are somehow implicated, a "strict scrutiny" review of vagueness is not applicable. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), First Amendment freedoms were "implicated." Yet this Court did not apply any "strict scrutiny" test. Likewise, *Village of Hoffman Estates v. Flipside, supra*, does not establish that civil regulations "implicating" free speech are subject to such a standard. Rather, *Flipside*, in dictum, implied merely that *criminal* laws that "interfere with the right of free speech" are subject to "a more stringent vagueness test." 455 U.S. at 499. For this proposition, the court cited *Grayned*, 408 U.S. at 109, involving a *criminal* statute, in which the court did not apply any "strict scrutiny" test.

The State submits that § 188.205 is constitutional and it "delineate[s] [its] reach in words of common understanding." *Grayned*, 408 U.S. at 112. When the Ninth Circuit Court of Appeals examined similar but less specific language, it concluded that the term "counseling for abortion procedures" was not so vague that a reasonable person would not understand what abortion-related

activities Arizona had legislatively decided not to fund. See *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983), appeal after remand, 789 F.2d 1348 (9th Cir. 1986), aff'd, *Babbitt v. Planned Parenthood*, 107 S.Ct. 391 (1986).

The language which must be examined is "[f]or the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." In *Black's Law Dictionary* "encourage" is defined as follows:

> In criminal law. To instigate; to incite to action; to give courage to; to inspirit; to embolden; to raise confidence; to make confident; to help; to forward; to advise.

Black's Law Dictionary, 620 (4th ed. 1957). "Counseling" is defined as:

> 3. Advice given by one person to another in regard to a proposed line of conduct . . . .

Id. at 418.

When one reads the terms "counseling" and "encouraging" in the context of the rest of the sentence, it is clear that the statute has a much narrower and specific reach than suggested by the court of appeals. The courts below read the terms as though they referred to "'encouraging or counseling' women about abortions" generally. The Attorney General of Missouri submits that this restriction is clearly designed to prohibit the expenditure of public funds for the identified *purpose* of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life. The statute does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy.

Contrary to the reasoning of the court of appeals, appellants do not argue that "encouraging" or "counseling" have the same meaning. Obviously, one can encourage an action without the formality normally associated with a counseling session. However, both "encouraging" and "counseling" refer to advocacy in the context of the statute.

Section 188.205 is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds. Under Missouri law, funds cannot be expended unless appropriated by law for that purpose. See §§ 33.170 and 21.260, RSMo 1986. Section 188.205 directs public officials and governing bodies not to expend funds under their control for the purpose of performing abortion services, including counseling women to have elective abortions.

The statute does not forbid *incidental* conduct or the incidental use of funds for counseling, so long as the expenditure has a legitimate *public purpose*. The section refers to "encouraging" and "counseling" for a particular line of proposed conduct. The section is not vague on this score. The purpose of this statute is one which may not be desired by the plaintiffs, but there is nothing vague about it and it provides a reasonable person fair notice of the conduct which will not be subsidized by the state.

A statute is not vague because there exists a potential for a difference of opinion regarding the scope of the statute. See *Arizona*, 718 F.2d at 948. Although there may be disputes regarding the meaning of terms and phrases, one must acknowledge, as this Court has, that "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising

ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest." *Broadrick v. Oklahoma,* 413 U.S. at 608.

The court below mistakenly relies upon one of the Supreme Court loyalty-oath cases of the 1960's which the court understood to establish that the word "counsel" is "fraught with ambiguity." (J.S. App. A68.) *Baggett v. Bullitt,* 377 U.S. 360, 367 (1964), quotes *Cramp v. Board of Public Instruction,* 368 U.S. 278, 286 (1961), which invalidated an oath for teachers. The oath in *Cramp* was very different from the Missouri law because it required an employee to swear that he "has not lent aid, advice, counsel and the like to the Communist Party." 368 U.S. at 285. That language—lent aid, advice, counsel —was very broad *in its context* because the oath takers were required to swear "that they have not in the unending past ever knowingly lent" such aid. *Id.* at 286. In contrast, § 188.205 does not refer to "counsel" in the abstract, as the *Cramp* oath did, but rather "counseling" for a very specific purpose—"to have" a particular type of abortion—one "not necessary to save the life of the mother."

In sum, the State submits that the plain language of § 188.205 forbids the expenditure of public money for the purpose of advising a woman to have an elective abortion. Because the statute "delineates its reach in words of common understanding," § 188.205 is not void for vagueness. *Grayned,* 408 U.S. at 112.

V. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy Because This Court Previously Held in Poelker v. Doe, 432 U.S. 519 (1977), That a Public Hospital Need Not Provide Abortion Services.

In §§ 188.210 and 188.215, the State of Missouri provided in part that it should be unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother or for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother. These provisions were declared to be unconstitutional under *Nyberg v. City of Virginia* (*Nyberg II*), 667 F.2d 754 (8th Cir. 1982), a two-to-one decision of the Eighth Circuit Court of Appeals in which the court refused to remove an injunction previously issued against a municipality entered because of an ordinance prohibiting the performance of abortion in a community hospital.[9]

The Eighth Circuit's decision to rely upon *Nyberg* and declare the performing or assisting language in each of these two statutes to be unconstitutional is contrary to the superior authority of *Poelker v. Doe,* 432 U.S. 519 (1977), wherein this Court upheld a mayor's "directive," *id.* at 550, applicable to both of the two city-owned hospitals in St. Louis, *id.* at 519, which totally "prohibited the performance of abortions in the city hospitals

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9. The *Nyberg* decision has created considerable confusion in the law since 1983. It contributes to a recent trend by federal courts to ignore the holding of *Poelker v. Doe,* 432 U.S. 519 (1977), and to force public hospitals and public programs to support abortion services. See, e.g., *Commonwealth of Massachusetts v. Bowen,* 679 F. Supp. 137 (D. Mass. 1988) (permanently enjoining federal regulations at 53 Fed. Reg. 1922 (Feb. 2, 1988) that preclude federally funded projects from providing abortion counseling or referral); *Planned Parenthood Federation of America v. Bowen,* 680 F. Supp. 1465 (D. Colo. 1988) (same); *Roe v. City of Owensboro and Daviess County,* No. 88-0097 (W.D. Ky. June 22, 1988) (temporary restraining order entered against enforcement of Ky. Ref. Stat. 311.800(1), prohibiting use of pubic facilities to perform abortions). See, contra, *New York v. Bowen,* No. 88-0701 (S.D. N.Y. June 30, 1988) (upholding regulations at 53 Fed. Reg. 2922); *County Executive of Prince George County v. Doe,* 300 Md. 445, 479 A.2d 352 (1984) (challenge to order prohibiting abortions in public hospitals did not raise substantial federal claim).

except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. This Court also upheld a staffing practice whereby one city hospital used doctors only from "a Jesuit-operated institution opposed to abortion." *Id.*[10]

The court of appeals' decision is also in conflict with several decisions of this Court which have broadly held that government may refuse to provide any public assistance for any abortion not necessary to save the life of the mother. In *Maher v. Roe*, 432 U.S. 464 (1977), this Court limited benefits for abortions "to those that are medically necessary," id. at 466, because it placed "no obstacle—absolute or otherwise—in the pregnant woman's path . . . she continues as before to be dependent on private sources for the service she desires." *Id.* at 474. It "imposed no restriction on access to abortions that was not already there" (i.e., the dependency on private sources). *Id.* The court held that the policy was constitutional, even if it made it "impossible" for a woman to have an abortion that was not "medically necessary." *Id.* at 466, 474.

Most recently, in *Harris v. McRae*, 448 U.S. 297 (1980), this Court upheld "the most restrictive version of the Hyde Amendment," id. at 325, n. 27, which withheld funds for abortion "except where the life of the mother would be endangered if the fetus were carried to term." *Id.* at 325, n. 27. Citing *Maher*, the Court held that the most restrictive Hyde Amendment was constitutional even if it made it "impossible" for a woman to obtain an abortion in a case where "the life of the mother would [not] be endangered if the fetus were

10. The dissent of Judge Heaney in *Nyberg II* describes the serious conflicts between the language of *Poelker* and the majority decision of the Eighth Circuit panel. 667 F.2d 759-760 (Heaney, J., dissenting).

carried to term." *Id.* at 315-316, n. 27. See also *Williams v. Zbaraz*, 448 U.S. 358 (1980).

In applying these controlling precedents, the courts below erroneously limited their broad principle to mean merely that the government is not obligated to *fund* abortions. They found *Poelker* uncontrolling where no public funds would be expended. This is a misconstruction. The directive upheld in *Poelker* was not a narrow restriction on "funding" abortions but broadly prohibited "the *performance* of abortions in the city hospitals." 432 U.S. at 520 (emphasis added). As the dissent emphasized, the directive made no exceptions for "paid" abortions, for doctors who "would willingly perform them," or for small communities "where the public hospital is the only health care facility." *Id.* at 523-524 (Brennan, J., dissenting). The court did not require such exceptions, but broadly held that St. Louis could elect "as a policy choice, to provide *publicly financed hospital services* for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521 (emphasis added).

The decision by the court of appeals that the abortion right of a paying customer is violated by a statute forbidding a public medical facility from performing an abortion not necessary to save the life of the paying customer means that every public medical facility must provide abortion services. Clearly, if a state cannot direct a public facility to not provide elective abortion services, the public facility cannot refuse such services of its own accord. In essence, the court below held that the abortion right established in *Roe v. Wade*, requires the State to provide the services of its employees to perform abortions in any existing medical facility to someone willing to pay for the cost of the service.

The court of appeals accepted plaintiffs' reasoning that since *one* public hospital in the State of Missouri purports to charge enough to cover the full expense of an abortion, then the performance of the operation is not being provided as a public service (J.S. App. A76-A78, n. 14). Apparently, the services of a public facility cannot be withheld in compliance with the will of the public if a large enough fee is offered. The error of plaintiffs' contention and the decisions below becomes obvious when one realizes that a service provided by the public to the public remains a public service, no matter how the government derives the funds to build a facility, maintain a facility, or compensate the public employees who work at a facility.[11] Whether the funds come from state taxes, local taxes, or user fees, the public nature of the service does not undergo any fundamental metamorphosis. Thus, this Court was entirely correct when it decided in *Poelker v. Doe* that "the constitutional question presented here is identical in principle with that presented . . . in *Maher v. Roe.*" *Id.* 432 U.S. at 521.

The misapplication of *Poelker* by the courts below was particularly egregious because *Poelker* challenged the local policy as it was applied to a particular woman denied an abortion in St. Louis' public hospitals, whereas

11. A concurring opinion by Circuit Judge Clark in *Greco v. Orange Memorial Hospital Corporation*, 513 F.2d 873 (5th Cir. 1975), cert. denied, 423 U.S. 1000 (1975), succinctly addresses the issue:

> *Doe* and *Roe* teach that a state cannot forbid certain types of abortions but they do not create any duty on Orange County's part to furnish facilities for such operations. Just as the Eagle Coffee Shop in Wilmington's parking garage could not have been forced to furnish kosher food or serve fish on Friday, so the Orange County Hospital cannot be compelled to allow its facilities to be used for elective abortions. 513 F.2d at 883.

plaintiffs' is merely a facial challenge. See *United States v. Salerno,* ..... U.S. ....., 107 S.Ct. 2095, 2100 (1987).

Plaintiffs simply cannot persuasively argue that §§ 188.210 and 188.215 impose any obstacle which would substantially burden the effectuation of a woman's decision to obtain an abortion.[12] Since this Court's decision in *Poelker v. Doe,* and the affirmance by the Eighth Circuit of the district court's decision upholding the Mayor's directive, there have been no public hospitals providing abortions in the City of St. Louis. Despite the unavailability of such public services, there is no evidence whatsoever that any St. Louis woman has been unable to effectuate her decision through the private abortion providers in the St. Louis area, including Reproductive Health Services, Inc.[13]

The appellants respectfully submit that the court of appeals' decision regarding the "performing or assisting" language in §§ 188.210 and 188.215 was erroneous as explained in this section of the argument. Federal courts are obligated to separate constitutional provisions from unconstitutional provisions in a statute "and to maintain the act in so far as it is valid." *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984). Missouri has a general severability clause in its statutes. Section 1.140, RSMo 1986.

12. Only three hospitals in Missouri provide abortions on a regular basis (an average of one per week) (Plf. Exh. 19, Tr. 2-76). Only one of those three hospitals is a public facility, Truman Medical Center in Kansas City, Missouri. No evidence was introduced indicating that any other type of *public* medical facility, i.e. a *public* ambulatory surgical center, provides abortions in the State.

13. Reproductive Health Services, Inc., provided 8,000 abortions in 1985 and projected a total of 7,800 in 1986 (Widdecombe Tr. 2-59 - 2-60). A total of ten private clinics regularly provided abortions during 1988 in the State of Missouri (per Dr. Vicky Pierson, Missouri Department of Health, 1988 health statistics).

The district court relied on this severability clause to sever and uphold the first sentence of § 188.029, and the court of appeals severed and upheld the first sentence of § 188.205. The court of appeals should have likewise severed and upheld the "performing or assisting" language of §§ 188.210 and 188.215. Consequently, the judgment of the court of appeals should be reversed.

CONCLUSION

In conclusion, the courts below were in error when they rendered their decisions. The judgment of the court of appeals, insofar as it invalidated §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215, should be reversed and the injunctions dissolved.

Respectfully submitted,

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FILED

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR APPELLEES

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Eisenstadt v. Baird, 405 U.S. 438 (1972) 2, 6, 9, 23

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Everson v. Board of Education, 330 U.S. 1 (1947) 50

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Maryland Casualty Co. v. Pacific Coal & Oil, 312 U.S. 270 (1941) 33

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Planned Parenthood of Central and Northern Arizona v. State of Arizona, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348, *aff'd mem. sub. nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986) 42, 49

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Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) 5

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Protection Mutual Insurance Company v. Kansas City, 504 S.W.2d 127 (Mo. 1974) 25

Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987) 5

The Queen v. Bayliss and Culleon (1986) 9 Qld Lawyer Reps. 8 (Queensland, Australia) 17

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 30

Rankin v. McPherson, 483 U.S. 378, *reh'g denied*, 108 S. Ct. 31 (1987) 39

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Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 34-35

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Singleton v. Wulff, 428 U.S. 106 (1976) 23

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 2

A.B. Small v. American Sugar Refining Co., 267 U.S. 233 (1925) 41

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State ex rel. Missouri State Board of Registration for the Health Arts v. Southworth, 704 S.W.2d 219 (Mo. banc 1986) 29

Steffel v. Thompson, 415 U.S. 452 (1974) 33

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Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 2, 5, 9, 10, 11 15, 36, 43

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Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)..... 41

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Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 36

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Wainwright v. City of New Orleans, 392 U.S. 598 (1968) 35

Watson v. City of Memphis, 373 U.S. 526 (1963)..... 9

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Zablocki v. Redhail, 434 U.S. 374 (1978) 4, 7

Zorach v. Clauson, 343 U.S. 306 (1952) 16

Books, Articles and Other Publications:

Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984)..... 15

American Medical Association, Current Opinions of the Council on Ethical and Judicial Affairs (1986) 37

Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916 (1988) 33

Burnhill, *Intrauterine Contraception*, in Fertility Control 271 (1985) 22

Court-Ordered Cesareans: A Growing Concern for Indigent Women, 1988 Clearinghouse Review 1064 21

Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Family Planning Perspectives 63 (1979) 15

Henshaw *et al.*, *Abortion Services In The United States 1984 and 1985*, 19 Family Planning Perspectives 63 (1987) 46

PAGE

W. Hern, Abortion Practice (1984) 46

Hirt, *Why the Government Is Not Required To Subsidize Abortion Counseling And Referral*, 101 Harv. L. Rev. 1895 (1988) 33

International Planned Parenthood Federation, Family Planning Handbook for Doctors (6th ed. 1988)..... 22

Law, *Rethinking the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 14

D. Mishell & V. Davagan, Infertility, Contraception & Reproductive Technology (2d ed. 1986)..... 22

J.C. Mohr, Abortion in America: The Origins and Evolution of National Policy (1978).....7, 8, 9

Obstetric-Gynecologic Terminology (E. Hughes ed. 1972)..... 2

Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law (January 1988) 13-14

Royal College of Obstetricians and Gynecologists, Report on Fetal Viability and Clinical Practice (1985) 14

M. Yudoff, When Government Speaks (1983)..... 38

Yuzpe, *Postcoital Contraception*, in Fertility Control 289 (1985)..... 22

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Constitutions, Statutes and Regulations:

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SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973) should be neither reconsidered nor overruled. The right to choose abortion is properly among the fundamental liberties protected by this Court's jurisprudence. It is a right consistent with our concept of ordered liberty, our history, and tradition. Recognition of viability as the point at which a state interest in fetal survival becomes compelling is also consistent with our history, medical reality, and the constitutional principle that a woman's autonomy not be abrogated by state action because of a pregnancy.

The declaration of when life begins is unconstitutional because it is the foundation of an Act that regulates abortion and it has impermissible substantive effect. It requires the abortion regulations in the Act to reach a variety of methods of contraception. Alternatively, this issue should be remanded for consideration of unaddressed questions of state law.

The testing requirement is unconstitutional because it burdens the obtaining of abortions for no legitimate reason. The State's reading of the statute is implausible, and deference is due the statutory interpretation of the Court of Appeals. If this Court believes that construction is obviously wrong, then abstention should be ordered.

There appears no longer to be a case or controversy about the restriction on the use of public funds for the purpose of counseling or encouraging a woman to have an abortion. The State has not appealed and is not challenging the holding invalidating the same restrictions on public employees and anyone in a public facility. This issue should be remanded for consideration of mootness. To reach the merits presumes there is a restriction on the speech of the plaintiffs. Such a restriction violates the first amendment because it is government manipulation of highly important personal communications. It is viewpoint discriminatory and unconstitutionally vague. It violates the fourteenth amendment rights of women to make a choice about abortion in consultation with their physicians.

The public facilities provision is unconstitutional because it imposes a substantial obstacle for women who must obtain an abortion in a hospital owned and operated by the State, even

when no State funds are involved. It will also interfere with and penalize private conduct in private institutions solely because that conduct implicates some asset controlled by the State.

ARGUMENT

I. THE STATE'S AND THE SOLICITOR GENERAL'S SUGGESTION THAT THIS COURT OVERRULE *ROE V. WADE* SHOULD BE REJECTED

Once again this Court has been asked to reconsider and to retreat from its holding in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* is a decision of enduring constitutional significance. It shielded a woman's private choice of whether to terminate or continue a pregnancy from the vicissitudes of the political process, making clear that the fourteenth amendment's guarantee of liberty "extends to women as well as to men." *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). By so doing, the Court enabled millions of American women to enter the work force, continue their education, and escape the spectre of illegal abortions or forced pregnancies which had threatened the lives of countless women before them.

Roe was a logical and necessary outgrowth of the long line of cases preceding it which recognized a fundamental right to privacy in matters of childbearing and family life. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (childrearing). Those cases embodied the principle that the value our society places on individual autonomy demands that decisions with a profound effect on personal identity and destiny be placed largely beyond the reach of government. *Eisenstadt*, 405 U.S. at 453; *Thornburgh*, 476 U.S. at 772. *Roe* arose inevitably out of that principle because this Court recognized that the decision to terminate or continue a pregnancy has the same, if not greater, implications

for altering the course of a woman's life[1] as the decisions on contraception and marriage which it had previously found to be protected by the fundamental privacy right. 410 U.S. at 153.

A. The Values Embodied In The Doctrine of *Stare Decisis* Demand That *Roe v. Wade* Not Be Overruled

A proponent of overruling precedent normally must meet a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). That burden must be especially heavy in this case. Overruling *Roe* has the potential to undermine the values served by *stare decisis* to a greater extent than any such action in the history of this Court.

First, in overruling *Roe*, this Court would, for the first time in its history, withdraw from constitutional protection a previously recognized fundamental personal liberty.[2] Concomitantly, also in an unprecedented manner, constitutionally protected conduct undertaken daily by literally thousands of citizens would be open to abrupt criminalization.[3]

---

1 *Roe* recognized the difficulties of caring for an unwanted child, the stigma of unwed motherhood, the taxing of mental and physical health by child care, and the health risks of pregnancy. 410 U.S. at 153. Studies have documented the profound effect on educational and employment opportunities for women of untimely pregnancies as well as the continued advances in the safety of abortion since its legalization. *See* Brief *Amici Curiae* of Seventy-seven Organizations Committed to Women's Equality In Support of Appellees; Brief *Amicus Curiae* of American Public Health Association In Support of Appellees.

2 Although this Court has modified rights, it has never adjusted precedent so as to withdraw from constitutional protection a fundamental individual liberty. While cases repudiating the principles of *Lochner v. N.Y.*, 198 U.S. 45 (1905), recognized greater governmental power in the area of economic regulation, they in no sense withdrew a fundamental freedom comparable to the right recognized in *Roe*, one that is central to basic life choices.

3 A number of states have already enacted their intention to do so in laws scheduled to take effect should *Roe* be overruled. *See* statutes cited at *infra* note 30.

Second, there can be no assurance that overruling *Roe* will be "like a restricted railroad ticket, 'good for this day and train only.' " *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)). Because *Roe* is a necessary outgrowth of the sixty years of constitutional evolution delineating the right to privacy, overruling it will open to question the fundamental principles of personal autonomy upon which that right rests, principles which continue to be recognized and applied pervasively in American law.[4]

Third, this Court has already twice in the past six years rejected suggestions that *Roe* be overruled, resoundingly reaffirming in each instance the principles of that decision. In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), this Court rejected the argument that *Roe* "erred in interpreting the Constitution," *id.* at 419, and enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*:"

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

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4 *See, e.g.*, this Court's post-*Roe* cases applying the right to privacy: *Carey v. Population Services International*, 431 U.S. 678 (1977) (contraception); *Moore v. East Cleveland, Ohio*, 431 U.S. 494 (1977) (right to make a home with immediate family members); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (pregnancy); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Turner v. Safley*, 107 S.Ct. 2254 (1987) (prisoners' right to marry). *See also* state cases applying the privacy right: *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (right to privacy includes right to decline medical treatment); *Clites v. Iowa*, 322 N.W. 2d 917, 922 (Iowa App. 1982) (forcible injection of psychotropic drugs violates right to privacy); *Owens v. City of Jennings Municipal Fire and Police Civil Service Bd.*, 454 So. 2d 426 (La. Ct. App. 1984) (right to privacy includes right not to be penalized for unwed pregnancy).

Id. at 420 n.1 (citations omitted).

Again, in *Thornburgh*, the Solicitor General urged this Court to overrule *Roe v. Wade*. But, this Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*." 476 U.S. at 759. In doing so, this Court noted that "[t]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Id.*

Given the potential for uprooting legal principles so recently reaffirmed and so pervasively relied upon throughout society, overruling *Roe* strikes at the heart of the value of *stare decisis*: that "bedrock principles," which establish rules of conduct and scope of rights, have continuity and predictability because they are "founded in the law rather than in the proclivities of individuals." *Vasquez*, 474 U.S. at 265. Surely, meeting the burden of convincing this Court to disturb those values in circumstances such as these must encompass factors more enduring[5] than a change in the composition of this Court. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with

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5 This Court has deviated from the rule of *stare decisis* only when special circumstances demanded that course. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 492-94 (1954). Such circumstances include changed factual conditions, *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456 (1851); experience showing that the prior rule has been "unsound in principle and unworkable in practice," *Garcia v. San Antonio Metrop. Transit Auth.*, 469 U.S. 528, 546 (1985); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938); *Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961); and the existence of intervening decisions so inconsistent with the prior rule as to have eroded its force. *See, e.g., Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2808 (1987); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Katz v. United States*, 389 U.S. 347, 353 (1967). As the discussion *infra* will demonstrate, none of these factors is present in this case. Both the factual and legal arguments now offered as grounds for rejecting *Roe* were made at the time of the decision itself. The rule of *Roe* has proved as "workable in practice" as any principled decision conferring hard-won and controversial rights. Finally, intervening decisions have supported, rather than eroded, the holding in *Roe*. *See, e.g., Thornburgh*, 476 U.S. 747; *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron*, 462 U.S. 416.

them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

As shown below, both the State and the Solicitor General have utterly failed to meet their burden of justifying the radical step they propose.[6]

B. The Decision To Terminate Or Continue A Pregnancy Is A Fundamental Right

The State and the Solicitor General argue first that *Roe* should be abandoned because the right to abortion is not a fundamental right. This argument is based on three assertions: that abortion is not an explicit guarantee in the Bill of Rights, that it is not deeply rooted in the nation's history and tradition, and that, because of the presence of the fetus, it is different in kind from any privacy right heretofore recognized by this Court.

In support of his argument that *Roe* should be abandoned because there is no explicit right to abortion in the Constitution, the Solicitor General asserts that *Roe* was this Court's first privacy case *not* based on an explicit guarantee in the Bill of Rights. As an historical matter, this is patently false.[7] There can

6 Notably, the State fails to link its suggestion that *Roe* be overruled to any specific issue in this case. Thus, while it argues that the rational basis test is the correct standard of review for abortion legislation, it does not propose how any provisions of the Act would meet that constitutional test. For example, its defense of the testing requirements (§ 188.029) is based solely in what it alleges to be an error of statutory construction by the Court of Appeals.

The Solicitor General, likewise, only coyly suggests that certain of the provisions "may" run afoul of *Roe*, Solicitor General's Brief at 8 n.5, but offers no explanation of how or why they would fare better under some other mode of analysis.

7 Although in *Griswold v. Connecticut*, 381 U.S. 479, Justice Douglas based the right to privacy on penumbras of the Bill of Rights, five Justices wrote three separate concurrences to emphasize that the holding was not dependent on any explicit constitutional guarantee. *See, e.g., id.* at 502 (White, J., concurring). The Solicitor General similarly mischaracterizes *Eisenstadt v. Baird*, 405 U.S. 438, as simply an equal protection case. In holding that the state may not discriminate between the married and unmarried in access to contraception, the Court said, "[i]f the right of privacy

be no doubt, in any event, that the right to privacy, apart from any right to abortion, exists in this Court's modern day jurisprudence as a fundamental right founded on the fourteenth amendment's "liberty" guarantee alone. *See, e.g., Carey v. Population Services International*, 431 U.S. at 684; *Zablocki v. Redhail*, 434 U.S. at 384; *Turner v. Safley*, 107 S. Ct. at 2265 (citing *Zablocki*).

The State and the Solicitor General next argue that abortion is not a fundamental right because it is not "implicit in the concept of ordered liberty" or "deeply rooted in the Nation's history and tradition," in part because abortion was illegal in many states by the time the fourteenth amendment was adopted. Solicitor General's Brief ("S.G. Brief") at 13; State's Brief at 17. Factually, they give an incomplete view of history; and legally their conclusions are fallacious.

At the time of the founding of our Republic, abortion before quickening was an accepted practice, protected at common law.[8] Early nineteenth century abortion laws, passed in a few states, mirrored the common law.[9] In the mid-nineteenth century, abortion began to be practiced for the first time on a large scale by married middle-class women in order to limit family size.[10] An effort to suppress this practice resulted in a proliferation, between 1860 and 1880, of the laws banning abortion throughout pregnancy which remained in effect into the twentieth century.[11] These laws were not primarily motivated, however, by notions that abortion was immoral because it took fetal

means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. *See also Loving v. Virginia*, 388 U.S. at 12 (right to marry is based on the due process clause of the fourteenth amendment).

8 *See generally* J.C. Mohr, Abortion in America: The Origins and Evolution of National Policy 3-19 (1978); Brief *Amici Curiae* of American Historians In Support of Appellees.

9 Mohr, *supra* note 8, at 43-45.

10 *Id.* at 86-118.

11 *Id.* at 200-201.

life, but rather by a broad combination of desires to protect women from unsafe practices,[12] to secure the role of the emerging medical profession,[13] to enforce a narrow vision of the role of women in society,[14] and to stem the falling birth rate among white native-born women at a time of mass immigration.[15] Thus, the arrival and existence of these statutes at the time of the adoption of the fourteenth amendment is of little relevance to the question of our "nation's history and tradition" when they are considered against the backdrop of abortion as a generally accepted practice and the reasons for their enactment.[16]

Moreover, as a legal matter, the existence of laws at the time of the enactment of the fourteenth amendment does not mean such laws are outside the protection of that amendment. The purpose of the fourteenth amendment was precisely to provide protection against state restrictions on liberty then in effect. *Southwestern Oil v. Texas*, 217 U.S. 114, 119 (1910). If it were otherwise, then much of this Court's twentieth century constitutional jurisprudence would have to be discarded. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954) and *Reed v. Reed*, 404 U.S. 71 (1971) *with Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

Specifically, this Court has never considered the status of state laws at mid-nineteenth century relevant to ascertaining the scope of the right to privacy. *Griswold*, 381 U.S. 479, for example, struck down an 1879 state law forbidding the use of contraceptives. That law was itself part of a nationwide wave of similar "Comstock laws" passed contemporaneously with the

12 *Roe v. Wade*, 410 U.S. at 148-49.

13 Mohr, *supra* note 8, at 147-170.

14 *Id.* at 168-69.

15 *Id.* at 166-67. *See also id.* at 180-81, 207-208.

16 The State's and the Solicitor General's analogy to *Bowers v. Hardwick*, 478 U.S. 186 (1986), is misplaced. In *Bowers*, this Court declined to find a right to engage in sodomy within the right to privacy because laws against sodomy had "ancient roots," *id.* at 192, dating at least to the common law received by the states at the time of the ratification of the Bill of Rights. In contrast, "laws generally proscribing abortion . . . are not of ancient or even of common-law origin." *Roe*, 410 U.S. at 136.

1860-80's abortion legislation discussed above. *See Poe v. Ullman*, 367 U.S. 497, 519-20 n.10 (1961) (Douglas, J., dissenting).[17] In fact, the 1873 federal Comstock Act was passed by a Congress presumably made up largely of the same members who voted to propose the fourteenth amendment to the states seven years earlier.[18]

The Solicitor General's most serious error is his argument that a fundamental right to abortion does not flow logically out of the general right to privacy or personal autonomy which protects matters of procreation and family life, including contraception, because the woman is not "isolated in her privacy" in making the abortion decision. S.G. Brief at 14, citing *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting). Apparently, the Solicitor General believes that the presence of the fetus, rather than going to the nature of countervailing state interests, as acknowledged in *Roe*, undercuts the "fundamental" nature of the right itself.

This line of argument misconceives the nature of the "privacy" right in such cases as *Griswold* and *Eisenstadt*. That right is in no way dependent on whether an individual is "isolated" in his or her privacy. Rather, it is a right, "*as against the Government . . .* to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added), in making the intensely personal decisions regarding the bearing and begetting of children. Such decisions are best left to the individual rather than the state, not because of some abstract value in solitary decisionmaking, but because of the profound effect such decisions have on an individual's destiny.

17 *See* Mohr, *supra* note 8, at 196-99, 220-21.

18 Moreover, regardless of its historical position a hundred years ago, the fact is that abortion, through its nationwide legalization sixteen years ago, has become so assimilated into the fabric of society as to become "deeply rooted." This Court noted just nine years after its decision in *Brown v. Board of Education*, 347 U.S. 483, that the rights recognized in that case had become "long-declared and well-established." *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963). So too the abortion right, exercised by some 20 million women since 1973, has become part of the pattern of American life. Millions of women and teen-age girls today have literally lived their entire childbearing years with the option of safe, legal abortion in the event of an unwanted pregnancy.

Roe, 410 U.S. at 153. In terms of the effect on an individual's future life and the consequent need for personal autonomy, there is little to differentiate such decisions before and after conception.[19] If anything, an individual's privacy interest becomes more weighty after conception. While an individual denied the right to use contraception can avoid pregnancy by avoiding sexual intercourse, a pregnant woman has no alternative beside abortion to avoid bearing a child against her will. *Carey*, 431 U.S. at 713 (Stevens, J., concurring). *See also Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring).

Indeed, if this Court adopts the Solicitor General's proposed analysis of fundamental rights, according to which the countervailing state interests undercut the nature of the right itself rather than guiding the extent to which it can be abridged, it will have set itself on a course which reaches far beyond the narrow issue of proscription of abortion. If the presence of the fetus demotes the pregnant woman's privacy right to less-than-fundamental status, what other incursions on her personal liberty will be allowed? Since she is no longer "isolated in her privacy," will government be able to dictate her lifestyle and working conditions with the only proviso being that such restrictions pass merely a "rational basis" test?[20] Conversely, can government compel abortion to further rational interests in population control or to save society the expenses of caring for unwanted or handicapped children? Clearly, the wholesale derailment of personal liberty entailed in that analysis is not consistent with the Court's recognizing as "fundamental" those rights necessary to a "free, egalitarian and democratic society." *Thornburgh*, 476 U.S. at 793 (White, J., dissenting).

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19 The view that the presence of the fetus changes the nature of the privacy right is difficult not only jurisprudentially, but in practice. Distinctions between some forms of contraception and abortion are increasingly complicated. Under the definitions in the Missouri statute, all fertilized ovum—even before implantation (when pregnancy occurs)—are protected. This definition, should abortion be made illegal, would prohibit those forms of contraception that act post-fertilization but prior to implantation, such as those discussed in Point II.A.2., *infra* pp. 21-23.

20 Surely, a case such as *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) would be overruled by such an analysis.

C. The Compelling State Interest In The Fetus Logically Arises At Viability

The State and the Solicitor General argue that even if there is a fundamental right to decide about abortion, *Roe* was flawed in holding that the State's countervailing compelling interest in fetal life arises only at viability. They argue that conception, not viability, is the compelling point because (1) viability is an "arbitrary" point, and (2) it is an unworkable principle because it shifts with changing medical technology.

There is nothing arbitrary about fetal viability as the point at which the state interest in fetal life becomes sufficiently substantial to justify interfering with a woman's choice about abortion. Prior to viability, the fetus is dependent upon the body of the woman who conceived it, and it cannot survive without her. Any recognition of an overriding state interest in the fetus during the previability phase necessarily eradicates the woman's privacy interest. After viability, by comparison, the fetus is capable of survival outside of the woman's body, and thus, from that point, a state interest in preventing destruction of the fetus may be implemented without necessarily subordinating the woman's ability to make a choice. Of course, as this Court has consistently held, that state interest never overrides the woman's right to protect her health. *Thornburgh*, 476 U.S. at 769.

The balance struck by placing the compelling point at viability is an eminently practical one within a framework of limited government. It allows vindication of the state's interests while leaving this critical life decision, to the maximum extent feasible, in the hands of the person it most affects—the woman. *See Thornburgh*, 476 U.S. at 781 (Stevens, J., concurring) ("it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny").

To hold, as the State and *amici* would have this Court do, that fetal interests are compelling throughout pregnancy would be to say that there is no meaningful distinction between a "freshly fertilized egg" and "a 9 month-gestated fully sentient fetus." *Thornburgh*, 476 U.S. at 779 (Stevens, J., concur-

ring).[21] Not only does this position defy logic, its ramifications are profoundly disturbing. Like the argument that abortion should be stripped of its "fundamental" status, an overriding interest in fetal life throughout pregnancy could justify state intervention in areas of individual autonomy other than abortion. The Illinois Supreme Court foresaw such ramifications recently in rejecting a child's suit against its mother for tortious pre-natal injuries. "Any action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus. Mother and child would be legal adversaries from the moment of conception until birth." *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (1988).[22]

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21 In recognizing viability as the compelling point, the *Roe* Court maintained the historic legal tradition of assigning greater value to fetal life late in pregnancy. As this Court observed in *Roe*, to the extent that limitations on abortion did exist in ancient and common law, they were imposed after quickening or "viability." For example, this Court observed that "[m]ost [ancient] Greek thinkers . . . commended abortion, at least prior to viability," 410 U.S. at 131, and that if abortion was a crime at all at common law, it was only abortion after quickening. *Id.* at 132-36. The earliest American statutes governing abortion applied only after quickening, *id.* at 138, and those that applied throughout pregnancy "dealt severely with abortion after quickening but were lenient with it before quickening." *Id.* at 139.

The significance of quickening at common law "appears to have developed from a confluence of earlier philosophical, theological, and civil and common law concepts of when life begins." *Id.* at 133. It has also been suggested that the "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognize[d] the greater health hazards inherent in late abortion . . ." *Id.* at 151-52.

Thus, throughout history, many religious, legal and philosophical perspectives have assigned greater significance to fetal existence at an indefinite point late in pregnancy. Viability constitutes the modern day, and medically meaningful, equivalent of quickening.

22 Efforts by the states to restrain the liberty of pregnant women in order to advance fetal interests have become commonplace. *See, e.g., In the matter of Steven S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (Cal. Ct. App. 1981) (pregnant woman detained two months because of alleged inability to care for herself or fetus—appeal dismissed as moot); *People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 26, 1987) (woman jailed for "fetal neglect" after taking drugs and failing to follow doctor's orders while pregnant—charges later dismissed); *Reyes v. Super. Ct.*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (charges against woman for prenatal child abuse for taking drugs while pregnant and failing to seek prenatal care dismissed on appeal); *U.S. v. Vaughn*, Crim. No. F-2172 88B, 117 Daily Wash. L. Rptr. 441, Mar. 7, 1989 (D.C. Sup. Ct. Aug. 23, 1988) (woman found guilty of check forging misdemeanor, who tested postive for cocaine, ordered jailed until birth of child despite prosecutor's recommendation of probation).

The State's and Solicitor General's argument that viability is unworkable because it is a "shifting" point is both factually exaggerated and legally unsound.

Contrary to the State's assertion, there is no evidence that viability is moving inexorably toward conception. All available evidence indicates little if any change in this Court's original understanding that viability, a flexible point, arises between the twenty-fourth and twenty-eighth weeks of pregnancy. *Roe*, 410 U.S. at 160. As the District Court found, medical testimony from both defendants' and plaintiffs' experts and recent medical literature "provid[e] clear evidence that 23½ to 24 weeks gestation is the earliest point in pregnancy when a reasonable possibility of viability exists." Jurisdictional Statement ("J.S.") at A32-33.[23] A recent study concludes that this point may well be immutable.

> The increasing ability over the past decade to save progressively younger neonates is primarily due to the ability to support and assist, at an earlier age, the organs already present in the fetus. The developmental biology of the fetus, however, has not changed. After reviewing the developmental biology of several crucial fetal organs, including the brain, the kidneys, and the lungs, the Committee concluded that a point exists before which the fetal organs are too immature to function even with the assistance of sophisticated medical technology. This point in time is 23-24 weeks of gestation; prior to that time, fetal life cannot be maintained outside the womb.

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23 Nevertheless, the average survival rate of fetuses in the 23½–25 week range is only 10%. Tr. 4-49 (Keenan).

Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law 9 (January 1988).[24]

Moreover, as a legal proposition, there is nothing "unworkable" or novel about the fact that the viability of a particular fetus and hence the physician's duties under the criminal law may vary depending on the state of medical technology, the place where the abortion is performed, and the medical facts of the individual woman's pregnancy. The facts and circumstances of each case determine the scope of many other constitutional protections. For example, in order for a state to establish that speech is obscene and outside the protection of the first amendment, it must show that the speech violates contemporary community standards of decency and does not have overriding artistic, literary or social value as defined by a broader reasonable person standard. *Miller v. California*, 413 U.S. 15 (1973). *See also Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (right of access to public property differs depending on the character of the property at issue); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) ("totality of the circumstances" determines whether a person has a reasonable expectation of privacy under the fourth amendment).

Moreover, legal rights and duties change continuously with changes in scientific knowledge. *See, e.g., Katz v. United*

24 *See also* similar conclusions in Brief *Amici Curiae* for American Medical Association and others In Support of Appellees; and Royal College of Obstetricians and Gynecologists, Report on Fetal Viability and Clinical Practice 14 (1985). *See also* Law, *Rethinking the Constitution*, 132 U. Pa. L. Rev. 955, 1023 n.245 (1984) (clarifying sources cited in *City of Akron*, 462 U.S. at 457 and n.15 (O'Connor, J., dissenting)).

The state's suggestion that the testimony presented to the lower court in this case documents its assertion is patently false. The State claims that evidence showed "a woman who appears to be carrying an unborn child of twenty weeks gestional age (LMP) may have a viable unborn child under 1986 technology . . . two months prior to the third trimester time drawn in *Roe v. Wade*." State's Brief at 13. What the record did show is that a woman who *appears* to be twenty weeks pregnant may on further examination and testing be found to be 24 weeks pregnant and therefore possibly carrying a viable fetus. J.S. at A33 n.38. For this reason, the district court upheld the requirement that the physician determine whether the fetus is viable if the woman appears to be twenty weeks pregnant.

States, 389 U.S. 347 (1967) (wiretappping applied to the fourth amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (blood alcohol testing applied to the fifth amendment). Indeed, the wisdom of an abortion regulation tied to viability is that it does not require legislative action in order to adjust to changes in technology. Rather, the physician's obligations under such a regulation change as technology changes, in the same manner as physicians' tort law obligations continuously change to reflect improvements in all areas of medical care.

D. The Precedents Set In *Roe* And Its Progeny Are Neither Complex Nor Difficult To Apply; At Any Rate, Complexity Is Not An Adequate Justification For Abandoning Constitutional Rights

The Solicitor General next contends that *Roe* should be overruled because judicial applications of *Roe* have become "increasingly complex." S.G. Brief at 19-20. Contrary to the Solicitor's assertion, however, application of *Roe* has decreased in complexity. The fine points of the scope and application of *Roe* have been largely resolved by this Court's decisions in *Akron* and *Thornburgh*. Following those decisions, numerous lower courts were able to resolve summarily the question of the constitutionality of the statutes before them.[25] State legislatures have passed fewer legislative measures regulating abortions for adult women,[26] focusing instead on parental notice and consent for minors, an issue not yet entirely resolved by this Court. This

25 *See, e.g., Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983); *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984); *Eubanks v. Collins*, No. C 82-0360 L(A) (W.D. Ky. Sept. 11, 1985); *Munson v. Meierhenry*, No. 80-3043 (D.S.D. Sept. 29, 1983); *Women's Community Health Center, Inc. v. Tierney*, Nos. 79-162-P, 79-165-P (D. Me. Sept. 9, 1983).

26 For example, the year after the enactment of the Akron Ordinance (1979), ten states enacted similar laws. Thereafter, the numbers declined, apparently in response to lower federal court decisions declaring such laws unconstitutional, to four such laws in 1980, three in 1981. Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Family Planning Perspectives 63, 66 (1979). In contrast, in 1984, the year after *City of Akron* was decided, only one state legislature enacted a comprehensive anti-abortion statute. The Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984).

refusal to retreat from the principles established in *Roe v. Wade*, and its consistent application of these principles in subsequent decisions, has plainly clarified the law for both courts and legislatures.

But even if this were not so, "complexity" of any degree has never alone provided a ground for retreat from heightened constitutional protection of fundamental rights. Indeed, the precise contours of equality in education under this Court's seminal decision in *Brown v. Board of Education*, 347 U.S. 483, remain the subject of pending litigation to this day.[27] If mere "complexity" in application could undermine constitutional guarantees, the Bill of Rights itself would be in jeopardy.[28]

Moreover, unless this Court wholly immunizes abortion from judicial review, it will remain in the business of drawing lines. Even a more lenient rational basis test, as advocated by the Solicitor General, will require continued judicial review and line drawing. Only clear reaffirmation of *Roe* will serve to diminish the burden on this Court of repeated litigation, and contribute to quieting the ranks of those who have resisted the right of women to make reproductive decisions in accord with personal conscience instead of majority vote.

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27 *See Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987), *appeal pending*, No. 87-1668 (10th Cir.) (*Brown III*) (deciding whether vestiges of *de jure* segregation remain in Topeka schools).

28 For example, this Court has not retreated from the fundamental principles of religious freedom underlying the Establishment Clause simply because of the often great difficulties of determining when and how to maintain separation between state governments and religious institutions. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977) (upholding state program of providing speech and hearing diagnostic services and off-site remedial services to parochial school students but invalidating loans of secular instructional materials such as maps and science kits and provision of field trip services). *Compare Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding state's released-time program for private religious instruction outside of public school building during school hours) *with Illinois ex rel. McCollom v., Board of Educ.*, 333 U.S. 203 (1948) (invalidating state's released-time program for private religious instruction *in* public school building during school hours).

E. Returning The Abortion Issue To The States Defeats Basic Principles of Constitutional Government

The Solicitor General finally argues that resolution of the conflict between a woman's right to autonomy and the State's interest in fetal life is not amenable to judicial resolution because the only "principled" resolution of this conflict involves "adopting a moral theory of the sanctity of the person, or a theory of when human life begins—neither of which can be derived through ordinary processes of adjudication." S.G. Brief at 20. It is wrong to characterize the resolution of *Roe* as unprincipled. *Roe* has been reaffirmed twice by this Court and continues to command broad respect in our nation[29] and in other nations. *See Morgentaler v. Her Majesty, The Queen*, 1 S.C.R. 30, 40 D.L.R.4th 385 (Canada S. Ct. 1988); *Paton v. United Kingdom* (1980) 3 E.H.R.R. 408, 415 (European Commission of Human Rights); *The Queen v. Bayliss and Culleon* (1986) 9 Qld Lawyer Reps. 8, 10, 49, 54-56 (Queensland, Australia). Moreover, the Solicitor General cannot assert credibly that his proposal to subjugate totally a woman's autonomy to the State's interest in fetal life is somehow more "principled" than *Roe*.

There is no promise and should be no expectation that leaving abortion to the states will result in some acceptable "compromise" of the conflicts between privacy rights and state interests. Such a default will more likely result in many legislatures acting upon the sweeping authority proposed by the Solicitor General to outlaw abortion entirely,[30] resulting in a

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29 Over thirty briefs *amici curiae* have been filed in support of appellees and urging that *Roe* be retained. These briefs represent the interests of hundreds of individuals and organizations, including the American Medical Association, American College of Obstetricians and Gynecologists, American Public Health Association, American Academy of Pediatrics, American Psychological Association, National Association of Public Hospitals, American Nurses Association and Members of Congress.

30 The Solicitor General notes the tendency of some state legislatures to enact "inflammatory" abortion statutes and remarkably blames *Roe* for this phenomenon. S.G Brief at 21 n.15. A more honest assessment would blame

patchwork of state restrictions which allow the affluent to exercise their right of choice, while condemning others, hampered by class, race and economics, to seek out illegal procedures or bear children against their will.

The Solicitor General is even more wrong in principle than he is in logic. Critical to the Solicitor's comparison of the law of this nation to the legislative resolution of abortion rights in others, is the assumption that we are not somehow "radically different." *See* S.G. Brief at 24. But we *are* different. We are a constitutional democracy and we have a Bill of Rights.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and *other fundamental rights* may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

Finally, appellees note that the right of choice in childbearing may be grounded in other constitutional rights in addition to the "liberty" guarantee of the fourteenth amendment: equal protection, the right to be free of involuntary survitude and cruel and unusual punishment, and the rights of the people under the ninth amendment. In the unlikely event this Court decides to abandon the rationale of *Roe v. Wade*, appellees urge this Court to remand this case for consideration of what

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hostility in those legislatures to a woman's right to choose abortion. That assessment indicates that if *Roe* is eliminated, inflammatory legislation will not abate, but will flourish unchecked. Indeed, five states have announced their intention to criminalize abortion (except only to save the life of the mother) if and when this Court permits them to do so: Idaho Code § 18-614 (Michie 1987); Ill. Ann. Stat. ch.38, § 81-21 (Smith Hurd 1977); Ky. Rev. Stat. Ann. § 311.710(5) (Michie 1983); La. Rev. Stat. Ann. § 40:1299.35.0 (West 1989 Supp.); S.D. Codified Laws Ann. § 34-23A-21 (Michie 1986).

other constitutional principles can support the right recognized in *Roe*.

II. SECTIONS 1.205.1(1) and (2), WHICH PURPORT TO DEFINE WHEN HUMAN LIFE BEGINS AND GRANT TO THE UNBORN "PROTECTABLE INTERESTS IN LIFE, HEALTH, AND WELL-BEING," VIOLATE THE UNITED STATES AND MISSOURI CONSTITUTIONS

A. Sections 1.205.1(1) And (2) Violate The United States Constitution

1. Sections 1.205.1(1) And (2) Are Operative Statutory Provisions Which Define The Reach Of The State's Abortion Regulations

Sections 1.205.1(1) and (2) declare that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being." The Court of Appeals held that these sections are "simply an impermissible state adoption of a theory of when life begins." J.S. at A64.

In an attempt to save these sections, the State argues that they inform only the reach of § 1.205 itself, but have no substantive effect on and relation to the other abortion restrictions which are the subject of the Act. State's Brief at 21-23.[31]

The State's claim defies logic. Section 1.205.1 was enacted as part of "AN ACT To repeal [certain sections of Missouri's revised statutes] *relating to unborn children and abortion*, and to enact . . . new sections relating to the *same subject* . . . ."[32] These sections are not identified in the statute as "preamble," nor is there any other textual source for the State's claim that they were intended as mere "prefatory state-

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31 The State contradicts itself as to the effect of §§ 1.205.1(1) and (2). It claims both that these provisions have no substantive effect and that they guide the interpretation of § 1.205. State's Brief at 21.

32 H.B. No. 1596, Mo. Gen. Assem., 2d Sess. (1986) (emphasis added). To the extent the Act relates to subjects other than, or in addition to, unborn children and abortion, as claimed by the State, it is unconstitutional under Missouri law. *See* Point II.B, *infra* pp. 23-24.

ments of fact." State's Brief at 21. Rather, they are the first sections of a comprehensive Act regulating abortion,[33] clearly intended to guide the interpretation of every provision of that Act. The State acknowledges as much when it argues that the legislature may make the findings in §§ 1.205.1(1) and (2) "pursuant to a public policy of protecting the life and health of unborn children to the *fullest extent possible in . . . abortion law.*" State's Brief at 21 (emphasis added). Thus, the Court of Appeals correctly concluded that:

> [T]he declaration of when life begins can only have been intended as an introductory and foundational comment . . . . The only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life. Rather than being abortion-neutral, the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations.

J.S. at A64.[34] *See Roe*, 410 U.S. at 159-62; *City of Akron*, 462 U.S. at 444.[35]

Indeed, these sections already have been given substantive effect. In *Deaconess Hospital v. McRoberts*, No. 874-00172

33 That § 1.205 is located elsewhere in Missouri's revised statutes from Chapter 188 (Regulation of Abortions) does not render meaningless its connection to abortion. *See* State's Brief at 22. To argue otherwise necessarily means that § 1.205 has no effect upon "state tort, property, and criminal law," as claimed by the State, because these subjects are also codified in different chapters of Missouri's revised statutes. It is §§ 1.205.1(1) and (2)'s location in the abortion bill passed by the state legislature, and not its numerical designation in the revised statutes when codified, that is determinative.

34 The Court of Appeals also rejected the State's reasoning that the statute is saved from unconstitutionality by making it subject to the United States Constitution and the decisions of this Court:

> Such a statement cannot . . . validate state laws that are in fact incompatible with the constitution. To accept the state's position would be to hold that every state law is valid as long as it contains a clause subjecting the law to the supremacy clause. We decline to so hold.

J.S. at A64-65.

35 *See* Brief of Distinguished Scientists and Physicians, Including Nobel Laureates, As *Amici Curiae* in Support of Appellees.

(Mo. Cir. Ct. St. Louis County May 21, 1987), a court heard a hospital's petition to perform a cesarean section upon a woman, finding that it had jurisdiction "pursuant to Section 1.205(1)-(2) (sic) . . . [because] the life, health and well-being of the unborn child . . . may be jeopardized" by the woman's refusal to permit the performance of such a procedure upon her body.[36] The court ordered the surgical procedure performed, concluding that "the intrusion involved in the life of [the woman was] outweighed by the duty of the State to protect a living unborn human being . . . ." *Id. Deaconess* thus negates the State's claim that §§ 1.205.1(1) and (2) are "legislative findings without operative effect."

2. Sections 1.205.1(1) And (2) Extend The Meaning Of The Act's Abortion Restrictions To Severely Restrict Access To Some Contraceptives

When viewed as a "backdrop" to the State's abortion regulations, it is clear that §§ 1.205.1(1) and (2) have substantial and far reaching effect. Just as the State recognizes that these provisions "provide guidance in interpreting the operative language of § 1.205," State's Brief at 21, so too will they provide guidance to the state courts in interpreting the operative language of the other challenged provisions of the Act. For example, § 188.215 prohibits the use of "any public facility for the purpose of performing or assisting an abortion." Section 188.015(1) defines abortion as the intentional destruction of "human life" and §§ 1.205.1(1) and (2) establish that protectable human life begins at "conception," which Missouri law defines as the "fertilization of the ovum of a female by a sperm of a male."[37] Thus, by giving a fertilized egg the status of a live

36 The woman had undergone three previous cesarean deliveries, and desired to deliver her fourth baby vaginally. The court issued the surgical order against the woman's wishes and despite her willingness and informed consent to undertake any risk involved in a vaginal delivery. *See Court-Ordered Cesareans: A Growing Concern for Indigent Women*, 1988 Clearinghouse Review 1064, 1065.

37 Section 188.015(3) (definition of "conception"). The Missouri legislature's definition of conception as synonymous with fertilization is contrary

human being, and defining abortion as the intentional destruction of such "life," the Missouri law reaches those methods of contraception which can operate after fertilization but prior to the implantation of the fertilized ovum and the onset of pregnancy: the intrauterine device (IUD), progestogen-only oral contraceptives (the "mini-pill"), and the so-called "morning after" or postcoital contraceptives.[38]

The Act's expansive definition of protectable "life" means that it would be illegal under the public facilities provision (§ 188.215) for a physician in a public facility to insert an IUD, prescribe the "mini-pill," or administer postcoital contraceptives. Additionally, physicians or other health-care providers who are public employees would be forbidden under the "perform or assist" restriction of § 188.210 from prescribing or administering these contraceptive methods. Moreover, if the public funds provision restricts physicians' speech,[39] then publicly-employed physicians will not be able to "encourage or counsel" women to use the IUD, the "mini-pill," or post-coital contraceptives. This means that the statute interferes with the rights of the thousands of women who use methods of birth control which can act after fertilization and subjects to possible

to the accepted medical view. The American College of Obstetricians and Gynecologists (ACOG) defines conception as "the implantation of the blastocyst [fertilized ovum]," and pregnancy as "the state of a female after conception and until termination of the gestation." Obstetric-Gynecologic Terminology 229, 327 (E. Hughes ed. 1972). Conception and the onset of pregnancy occur six to seven days after fertilization, when the blastocyst implants in the uterus. D. Mishell & V. Davagan, Infertility, Contraception, & Reproductive Technology 109-110 (2d ed. 1986).

38 Each of these contraceptive methods is believed to act in part by interfering with implantation of the fertilized ovum in the uterus. *See* Burnhill, *Intrauterine Contraception*, in Fertility Control 271, 280 (1985) (IUD); International Planned Parenthood Federation, Family Planning Handbook for Doctors 62 (6th ed. 1988) ("mini-pill"); Yuzpe, *Postcoital Contraception*, in Fertility Control 289 (1985) (postcoital contraceptives).

39 *See infra* Point IV.B.

sanction those health care providers who prescribe such methods.[40]

Thus, rather than prefatory statements without operative effect, §§ 1.205.1(1) and (2) impact directly upon the other challenged provisions of the Act. By defining the fertilized ovum as a human being with protectable interests in life, health, and well-being, the Act's restrictions reach the right to contraception, which this Court has held is protected by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Services International*, 431 U.S. 678, 687-91 (1977).[41]

B. Sections 1.205.1(1) And (2) Violate The Missouri Constitution

This Court has enunciated a strong policy of "avoiding the unnecessary adjudication of federal constitutional questions" where state law might provide "independent support" for the judgment below. *City of Mesquite v. Aladdin's Castle, Inc.* 455 U.S. 283, 294-95 (1982). Moreover, this Court has recognized that the federal courts of appeal are in a better position than it to resolve state law issues. *Id.* at 293. There are at least two provisions of Missouri's constitution which provide independent support for the judgment of the Court of Appeals. Plaintiffs urge this Court to affirm the judgment below or remand this issue for consideration of alternative state grounds to support that judgment.[42]

If this Court agrees that § 1.205 "expands existing state tort, property, and criminal law protection for unborn children,"

40 Plaintiff health care providers and facilities offer abortion counseling and services as well as contraceptive services and thus have standing to challenge §§ 1.205.1(1) and (2). *See, e.g., Doe v. Bolton*, 410 U.S. 179, 187-89 (1973); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). *See also* 851 F.2d at 1075-76, J.S. at 62-63; 662 F. Supp. at 412, J.S. at A13.

41 *See* Brief *Amici Curiae* of the Association of Reproductive Health Professionals And Others In Support Of Appellees, at Point I.

42 Because the Court of Appeals affirmed the district court's judgment that §§ 1.205.1(1) and (2) were unconstitutional under the United States Constitution, it stated that it need not address the argument that these sections violated the state constitution. J.S. at A65.

State's Brief at 22, then it should remand the issue of § 1.205's constitutionality to the Court of Appeals to consider whether that statutory provision violates the Missouri constitution. Article 3, § 23 of the constitution prohibits a bill from containing more than one subject and requires that the subject be clearly expressed in the bill's title.[43]

In *In re Ray*, 83 B.R. 670 (Bankr. E.D. Mo. 1988), the court held unconstitutional a statutory provision because the provision had no relationship with the rest of the bill's contents, which dealt only with the subjects encompassed in the title. *Id.* at 672. *See also In re Bowen*, 82 B.R. 102 (Bankr. E.D. Mo. 1988) (holding unconstitutional the same statute); *Berry v. Majestic Milling Co.*, 223 S.W. 738, 741 (Mo. 1920) (holding unconstitutional a section of an act because "it [did] not come within the subjects expressed in the title of the act.")

Here too, tort, property, and criminal law are not subjects encompassed by the title of the Act.[44] Nor do these various subjects have any relation to the rest of the bill's contents, which deal with abortion. Section 1.205 thus violates Art. 3, § 23 of the Missouri constitution.

Additionally, consideration of the constitutionality of § 1.205 should be remanded to the Court of Appeals because the statute violates another section of the State constitution. Section 1.205 purports to amend all the laws of the State so as to grant "rights, privileges, and immunities" to the unborn from the moment of conception without including "the words to be inserted [in the various statutes]. . . together with the act or section set forth in full as amended," as required by Article

43 Mo. Const. Art. 3, § 23 states:

> No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.

44 *See supra* p. 19.

3, § 28 of the Missouri constitution.[45] The purpose of this constitutional limitation on statutory amendment is to apprise legislators and the public of the changes in the law and to prevent ambiguities and uncertainties in legislative enactments. *State ex rel. McNary v. Stussie*, 518 S.W.2d 630, 632-34 (Mo. banc 1974).

In *Stussie*, the Missouri Supreme Court held unconstitutional an act which lowered the age of majority in the state to eighteen years and gave persons attaining that age "all the privileges, rights, and immunities . . . of adulthood." *Id.* at 631. The court held that:

> If . . . [the Act] is construed to require substitution of "age of eighteen" for "age of twenty-one" whenever the latter appears, then we are going beyond what [the Act] literally states and directs and we would be amending statutes based on what we believe the General Assembly intended by their attempted blanket amendment. This is what Art. III, § 28 was designed to avoid. Statutory amendments should set out the statute as amended and not leave us to guess as to whether and in what respect an existing statute was amended.

Id. at 634. *See also Protection Mutual Insurance Company v. Kansas City*, 504 S.W.2d 127, 130 (Mo. 1974) (statute held unconstitutional under Art. 3, § 28; absent a legislative act amending a particular law, statute revisors have no authority to change the substantive meaning and application of a law).

Here too, we are left guessing as to whether and in what respect the various laws of the State of Missouri are amended by § 1.205. None of the words to be inserted are included, and the laws as amended are not set forth in full. When the legislature's intent is unclear, as it is here, the statute's codifiers have

45 Article 3, § 28 of the Missouri constitution provides, in relevant part:

> No act shall be amended by providing that words be stricken out or inserted but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

no authority to revise the substantive meaning of the law. Section 1.205 is invalid under Article 3, § 28 of the State constitution.

III. SECTION 188.029, REQUIRING PHYSICIANS TO MAKE FINDINGS OF GESTATIONAL AGE, FETAL WEIGHT AND LUNG MATURITY, IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW

A. Section 188.029 Advances No Legitimate State Interest

Mo. Rev. Stat. § 188.029 requires a physician to make a determination of viability whenever a woman who appears to be twenty weeks pregnant requests an abortion. The District Court upheld this requirement, J.S. at A35-36, and plaintiffs do not challenge that holding. Section 188.029 further provides:

> In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

J.S. at A90. The Court of Appeals and District Court struck this requirement because it unduly constrains physicians' judgment by requiring medical procedures which are expensive and dangerous in order to make "findings" which are irrelevant to determining viability. J.S. at A59-60 and n.5; *id.* at A37.

The facts supporting the lower courts' decisions are not in dispute. The State concedes in its brief that prior to thirty weeks of pregnancy, the only one of the required "findings" relevant to determining viability is the finding of gestational age[46] and the standard medical procedure for ascertaining it is ultrasonography.[47] The State has not disputed that "findings" of fetal weight are accomplished by using more sophisticated ultrasound equipment than is used to determine fetal age alone,[48] and would unnecessarily add approximately $125-250 to the cost of an abortion. J.S. at A36. Neither has the State disputed the finding of the District Court, concurred in by the State's own witness, Dr. Keenan,[49] that the only known test to determine fetal lung maturity is amniocentesis.[50] Amniocentesis is an invasive procedure which would add hundreds of dollars to the cost of an abortion, pose risks to both the woman and the fetus, including risks resulting from delays required to schedule the procedure, and yet yield no information useful to the determination of viability until *at least* the twenty-eighth to thirtieth week of pregnancy. J.S. at A36, A37 n.41.[51]

The State has never argued that § 188.029 is constitutional if it requires any of the tests described above—either additional ultrasonography to determine fetal weight or amniocentesis to make a finding of lung maturity. The reasons are obvious, regardless of the constitutional "standard of review" which is utilized. Even under the most lenient "rational basis" test advocated by the State and the Solicitor General for reviewing

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46 The State says: "[t]he undisputed evidence further indicated that no current test other than measurements which can be performed with the use of ultrasound provide information necessary to determine viability prior to at least thirty weeks gestational age (Keenan Tr. 4-78; Maulik Tr. 1-55; Crist Tr. 1-98, 1-117; Pearman Tr. 1-139; Widdicombe Tr. 2-65)." State's Brief at 32. The ultrasound tests alluded to by the cited witnesses are ultrasound tests used to determine gestational age.

47 Ultrasound is a process using sound waves to create a visual image.

48 Tr. 1-99-100 (Crist). The more sophisticated equipment is required because, while fetal age requires only linear measurements of the diameter of the fetal skull or length of the femur, weight estimations require three-dimensional measurements of the girth of the fetal abdomen and/or chest. *Id.*

49 Tr. 4-81.

50 Amniocentesis involves inserting a hollow needle into the uterus to extract amniotic fluid. The fluid is then analyzed for the presence of certain chemicals which indicate the presence of surfactant in the fetal lungs. Surfactant is the substance which indicates that the lungs are mature. J.S. at A36 n.39.

51 The reason amniocentesis yields no useful information until that point is that, while fetuses may be "viable"—able to survive with artificial aid—at twenty-four weeks of gestation, their lungs do not mature until thirty or more weeks of pregnancy. Tr. 1-41, 42 (Maulik). Immature lungs make the fetus more prone to hyaline membrane disease, a leading cause of morbidity and mortality in premature infants.

abortion legislation, legislative enactments must "bear a rational relation to valid state objectives." S. G. Brief at 11, *quoting Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). *See also* State's Brief at 18. Assuming the statute is intended to insure protection of viable fetuses, there is simply no rationality to requiring expensive and intrusive tests to make "findings" which do not become relevant to the determination of viability until at least eight to ten weeks later in pregnancy. Of course, such an overbroad effort to protect fetal life also violates the principles of strict scrutiny applicable to abortion legislation, *Roe*, 410 U.S. at 155, as well as this Court's holdings that the manner in which viability is determined must be left to the discretion of the attending physician. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

B. The State's Statutory Interpretation Is Too Implausible To Represent An Acceptable Saving Construction

The State's sole defense of this provision is an attempt to interpret the statutory language so as to avoid constitutional infirmities. This interpretation, however, is utterly illogical, denying both the plain meaning of the language of the statute and established rules of statutory construction. This Court should defer to the Court of Appeals, which rejected it.

The State argues that the challenged "tests" and "findings" provision must be read in light of the sentence which precedes it, requiring physicians determining viability to exercise "that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician . . ." State's Brief at 33 (quoting J.S. at A89-90). According to the State, this means that, under the challenged provision, a physician must utilize only "such medical examinations or tests as are necessary to make *appropriate* findings in the case before him or her. An unnecessary test should never be utilized . . ." State's Brief at 34 (emphasis added). The physician need only "record his findings regarding viability and the findings derived from such tests as he deems necessary to render a decision." *Id.* Although somewhat self-contradictory on this point, the State seems to be saying that neither specific tests, nor any findings at

all on fetal age, weight or lung maturity are necessary:[52] the physician need only exercise reasonable care in determining viability and record what he finds about *viability* on the patient's chart.

This interpretation simply wishes the challenged language out of existence. Except for the requirement to record findings regarding viability, the Act would have exactly the same meaning if the challenged language were excised as it has under the State's interpretation. This alone violates a basic principle of statutory construction: "Each 'word, clause, sentence and section' of a statute should be given meaning." *State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 225 (Mo. banc 1986) (citing *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc 1983)). Moreover, the State's construction is simply at odds with the plain meaning of the provision and was for that reason rejected by the Court of Appeals. As the Court of Appeals said, it is not tests necessary to determine *viability* the statute requires, but tests necessary to make specific *findings* regardless of their relevance to viability. J.S. at A60 n.5. *See also* J.S. at A38.

The State's interpretation of the statutory language is nonsensical and this Court should reject it for that reason alone. Moreover, this Court should reject it for the independent reason that a federal court sitting in Missouri has done so. This is in keeping with the practice of "deferr[ing] to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Frisby v. Schultz*, 108 S. Ct. 2495, 2500

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52 *Cf.* State's Brief at 32: The General Assembly "has specified *three* factors—consistent with medical science—for which a finding must be made." (emphasis in original). The State has been similarly inconsistent in the position it has taken on the meaning of this statute to the District Court and the Court of Appeals. To the District Court it argued that all findings had to be made but no tests were necessary; to the Court of Appeals, it argued, as it does here, that neither findings nor tests are necessary. *Compare* J.S. at A37-38 *with* J.S. at A60 n.5. This inconsistency is yet another reason to reject the State's proffered interpretation as implausible.

(1988) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

C. If This Court Is Inclined To View § 188.029 As Fairly Susceptible To The State's Proposed Construction, It Should Abstain From Federal Jurisdiction

Implausible as it is, the construction the State suggests for § 188.029 virtually eliminates the constitutional issue in this case. Yet, although this Court has a duty to construe state laws so as to avoid constitutional infirmities, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 (1983), it is powerless to adopt a limiting construction which is neither obvious from the face of the statute, nor proposed by an authoritative source. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Kolender v. Lawson*, 461 U.S 352, 355 (1983). This is the case here, as the State's interpretation results not from any obvious reading of the statute but from a wholesale excision of its substance, *cf. Ashcroft*, 462 U.S. at 493; moreover, the Attorney General is not an authoritative source of statutory interpretation, as he has no power to bind the state courts or law enforcement authorities. *Virginia v. American Booksellers Ass'n Inc.*, 108 S. Ct. 636, 644 (1988).[53] Therefore, if this Court is inclined to read § 188.029 as "fairly susceptible" to the State's proposed construction (although not obviously so), the proper course is for it to abstain from federal jurisdiction in order to allow the state courts to render the saving construction the State has proposed. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). *See also Brockett v. Spokane Arcades Inc.*, 472 U.S. at 508 (O'Connor, J., concurring).

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53 Missouri law is clear that the Attorney General's opinions are not binding interpretations of state law. *Mesker Brothers Industries, Inc. v. Leachman*, 529 S.W.2d 153, 158 (Mo. 1975).

IV. THE BAN ON THE USE OF PUBLIC FUNDS FOR "ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION" SHOULD BE REMANDED FOR CONSIDERATION OF MOOTNESS; IF THIS ISSUE IS NOT MOOT, THE RESTRICTION MUST BE FOUND UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

A. There Appears No Longer To Be A Case Or Controversy

The Act contains three provisions relating to "encouraging or counseling a woman to have an abortion not necessary to save her life." Section 188.205 states that no public funds can be used for that purpose; section 188.210 states that no public employees can, within the scope of their employment, engage in that speech; and section 188.215 forbids such speech in so-called "public facilities."

These provisions would restrict the speech of the named plaintiff doctors and other health care professionals,[54] who counsel women with problem pregnancies about abortion. The restrictions would have occurred either when these individuals were acting as public employees or when, although acting in a private capacity, they were doing so in a so-called public facility. Additionally, the public funds provision appeared to pose an overlapping restriction, because when the plaintiffs acted as public employees they would be paid with public funds; and as the District Court observed, the public funds provision "certainly is broad enough to make 'encouraging or counseling' unlawful for anyone who is paid from [public funds]." J.S. at A46.

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54 The District Court certified this as a class action with two classes: (a) facilities and Missouri-licensed physicians, or other health care professionals, which offer abortion counseling and services; and (b) pregnant women seeking abortion services or pregnancy counseling within Missouri. These broadly defined classes were appropriate because many of the provisions of the Act affected all doctors and their patients. *See, e.g.*, section 188.029. Only subsets of the certified classes are affected by the public employees, public facilities, and public funds provisions; and it is unclear which subset, if any, is affected by the public funds provision as it is presented on this appeal.

Both lower courts essentially considered these three provisions together, and found them to be unconstitutional because they restrict the speech of physicians, are vague, and interfere with a woman's right to make an informed choice about abortion.

The State did not appeal the Court of Appeals' holdings with respect to the public employee and public facility provisions. J.S. at I-II ("Questions Presented"), State's Brief at I-II ("Questions Presented"). It has stated that it does not challenge these holdings. State's Brief at 9.

It has, however, appealed the holding with respect to the public funds provision, arguing that "the court of appeals did not separately focus on the 'encouraging and counseling' language of [this provision]," State's Brief at 37;[55] and that the public funds provision is different from the public employees and public facilities provisions. The public funds provision "directs officials not to expend public funds under their control for the purpose of . . . encouraging or counseling. . . ." *Id.* at 38. "[It] is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds." *Id.* at 43. By comparison, the public employees and public facilities provisions "sought to forbid speech by employees and in public facilities." *Id.* at 38.

The public funds provision—isolated and distinguished from the other two provisions, as the State has chosen to present it on this appeal—appears not to affect Plaintiffs adversely. They are protected by the unchallenged holdings of the Court of Appeals declaring their rights as public employees or as private practitioners in public facilities. The State here seems to disavow any interpretation of the public funds provision that would allow it to function as an overlapping restriction; for example, as a basis for withholding a physician's salary because he counseled a woman to have an abortion. And plaintiffs are neither grant-

55 The State posits that the "court below was primarily concerned with the more restrictive language" of the public employees and public facilities provisions. State's Brief at 38. In fact, the language of all three provisions is the same; and the Court of Appeals was obviously concerned that none of the provisions be used to censor speech and manipulate information.

ees nor employees of programs—if such exist—facing possible discontinuation because the purpose of the program is to counsel or encourage women to have abortions.

Article III of the Constitution requires the presence of an "ongoing controvers[y] between litigants" even at this advanced stage of litigation; and mootness as to an issue can arise because of a decision made by one litigant subsequent to the final ruling of the court of appeals. *Deakins v. Monaghan*, 108 S. Ct. 523, 528 (1988).

Here, the State has made such a decision. It states that it does not challenge the holding of the Court of Appeals that it cannot prevent public employees or individuals speaking in public facilities from encouraging or counseling a woman to have an abortion. It disavows any such purpose for the public funds provision, and defends it as being instead a legislative directive to public officials responsible for making funding choices.

Thus, as to the public funds provision, there appears no longer to be " 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Steffel v. Thompson*, 415 U.S. 452, 460 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

This Court should note that the constitutional issues connected to governmental funding decisions about abortion counseling, and to efforts to justify impermissible suppressions of speech as governmental funding decisions, are the subject of evolving litigation and legal debate.[56] Given the "gravity and delicacy" of these constitutional questions, this Court should adhere to its tradition of "rigid insistence" upon an actual case

56 *See, e.g., Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1465 (*prelim. inj.*), 687 F. Supp. 540 (*final judgment*) (D. Colo. 1988), *appeal pending* No. 88-2251 (10th Cir.); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending* Nos. 88-6204, 6206 (2d Cir.); *Massachussets v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending* No. 88-1279 (1st Cir.). *See also* Brief *Amicus Curiae* of National Family Planning and Reproductive Health Association in support of Appellees; Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916 (1988); Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 Harv. L. Rev. 1895 (1988).

or controversy, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), before undertaking to resolve them.[57]

"When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness." *Sosna v. Iowa*, 419 U.S. 393, 402 n.12 (1975). Similarly, earlier this term, this Court remanded an issue in a case involving significant constitutional concerns when it could not "resolve [an] ambiguity on the basis of the record before [it]." *Treasury Employees v. Von Raab*, U.S. Docket No. 88-1879, slip op. at 20 (March 21, 1989).

That is the appropriate disposition for the public funds provision. On such a remand the parties will be able to develop an appropriate record[58] to clarify the scope of the public funds provision standing alone in the light of the unchallenged holdings declaring the public employees and public facilities restrictions unconstitutional. That record may confirm what appears here—that there is no longer a case or controversy as to the public funds provision—or it may uncover a constitutional problem neither apparent nor capable of discovery through the exchange of briefs before this Court. If a controversy remains, then there can be an orderly "reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." *Kremens v. Bartley*, 431 U.S. 119, 129-36 (1977). Then, that controversy can be addressed specifically. If no controversy remains, then the litigation on this issue will end. In either event, the remand will avoid the problem presented now: that this dispute is, "so unfocused as to make informed resolution of [it] almost impossible." *Id.* at 134. *See also Rescue Army v. Municipal Court of*

57 "The availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous *amici curiae* ready to assist in the decisional process . . . does not dispense with the requirement that there be a live dispute . . . before we decide such a question." *Kremens v. Bartley*, 431 U.S. at 134 n.15.

58 For example, pleadings can be amended to address specifically this issue; if necessary, discovery can be undertaken; and stipulations can be negotiated.

Los Angeles, 331 U.S. 549, 575 (1947) (appeal dismissed because "constitutional issues come to us in highly abstract form"); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring) (writ of certiorari dismissed because "record too opaque to permit any satisfactory adjudication . . .").

B. If There Is a Case or Controversy, Then The Public Funds Provision Is Unconstitutional

If there is a case or controversy here—that is, if plaintiffs are adversely affected by the public funds provision—then that must be because, contrary to the State's assertions, the public funds provision does restrict the speech of physicians and health care professionals paid with public funds.[59] Any such restriction violates first amendment rights of the physicians and health care professionals and first and fourteenth amendment rights of their patients.

1. The Public Funds Provision Violates The First Amendment

This Court recognized in *Griswold v. Connecticut*, 381 U.S. at 482, that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Even the dissent in *Griswold* recognized that had the doctor there only "express[ed] opinions [to patients] . . . that certain contraceptive devices, medicines or practices would do them good and would be desirable, . . ." his conviction would have violated the first amendment. *Id.* at 507-508 (Black, J., dissenting). Indeed, as Justice Douglas observed, "The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting).[60]

59 It is also possible that the restriction will reach private speech in a government owned and operated public facility. This is the sort of ambiguity that argues for a remand of this issue.

60 The dissent was from a standing decision which did not discuss the first amendment question one way or the other.

Although this is not a commercial speech case, this Court has recognized that, even in that context, government is strictly limited in its ability to regulate communications when there are " 'substantial individual and societal interests' " in the information being communicated, and when that information relates to activity protected from unwarranted government interference. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 69 (1983) (*quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976)). *See also Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). This Court has consistently underscored that, for a woman considering continuation or termination of a pregnancy, the unimpeded advice and counsel of her physician is precisely that kind of substantial individual interest. *Colautti v. Franklin*, 439 U.S. at 387 ("central role of the physician . . . in consulting with the woman . . ."); *City of Akron*, 462 U.S. at 427 (woman's right that her physician be free to "assist . . . in the decision-making process . . ."); *id.* at 443 ("primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances").[61]

In the light of these constitutional principles, a restriction upon the ability of physicians, when they are being paid with public funds, to speak as candidly and, if need be, emphatically as they choose cannot stand. Such a restriction will "officially structure . . . the dialogue between the woman and her physician;" and impose upon her the "state medicine" condemned in *Thornburgh*, "not the professional medical guidance she seeks." 476 U.S. at 763.[62]

This restriction will impact in instances where professional guidance is most significant. These circumstances include seri-

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61 Of course, the first amendment protects the right to receive "information and ideas." *Virginia State Board of Pharmacy*, 425 U.S. at 756-57; *Griswold*, 381 U.S. at 482.

62 The restriction here is more damaging than the one invalidated in *Thornburgh*. There, no restriction was placed upon what a physician could say; he was, however, required to give certain information in all circumstances. 476 U.S. at 759-61. Here, the physician is restricted in his ability to provide advice. Thus, unlike *Thornburgh*, the quantum of information made available is reduced. *See also infra* at p. 43.

ous, even lethal, fetal abnormalities, or severe health threats to the mother which will be exacerbated by pregnancy, such as cardiac disease, stroke, or diabetic retinopathy.[63] Although even in these circumstances physicians do not dictate one course of treatment over another, they will frequently be guided by their professional responsibility to their patients to recommend or urge a particular course of treatment, including abortion. J.S. at A71 n.12.[64] *See also* American Medical Association, Current Opinions of the Council on Ethical and Judicial Affairs § 8.07 (1986) (physician's obligation "to present the medical facts accurately to the patient . . . and to make recommendations . . .").

A central tenet to this Court's first amendment jurisprudence is the protection of the individual's capacity for informed and autonomous choice. *Cohen v. California*, 403 U.S. 15, 24 (1971) (right of free expression "comport[s] with the premise of individual dignity and choice upon which our political system rests"). That concept is totally undermined by the prospect of government manipulation of the advice and information provided by government funded professionals to individuals relying upon that advice and information in making choices central to their well-being.[65]

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63 Additionally, the restrictions will threaten the ability of physicians and health care professionals to provide counseling about contraceptive choices. For example, federal law requires that before an intrauterine device (IUD) is prescribed for a woman, she must be counseled that should she become pregnant with it in place, severe complications are possible and she should be prepared to consider an abortion. 21 C.F.R. § 801.427(b)(2) (1988). *See also Amici Curiae* Briefs in Support of Appellees of the American Medical Association and of the Association of Reproductive Health Professionals.

64 The Court of Appeals noted the evidence showing that the ambiguity of the words "counsel" and "encourage" would force physicians to steer wider than the unlawful zone and refrain from most comments relative to abortion. J.S. at A68-69 n.11.

65 "A theory of freedom of expression that ignores the communicative powers of the public sector may fail to protect the liberal democratic values it

This manipulation of information is particularly egregious because it is viewpoint biased. As Circuit Judge Arnold recognized in his concurring and dissenting opinion, "a physician, for example, could discourage an abortion, or counsel against it . . . but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment . . . ." J.S. at A83. Judge Arnold's conclusion is mandated by this Court's holding that:

> [T]he State may sometimes curtail speech when necessary to advance a significant and legitimate state interest . . . . [T]here are some purported interests—such as a desire . . . to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule.

City Council v. Taxpayers For Vincent, 466 U.S. 789, 804 (1984) (citations omitted).

The State argues that it is not required to subsidize the exercise of constitutional rights and that therefore the first amendment is not violated by this restriction on the use of public funds. State's Brief at 36, 38. If there is a case or controversy here, then the State's argument misperceives the dispute: the question is not whether government can be forced to subsidize an activity; the question is whether government can manipulate or censor the medical information or advice provided to patients by doctors paid with public funds. This is not a choice about allocation of resources. This is an attempt to manipulate private behavior of citizens by censoring information they receive from state funded advisors.

The applicable standard of review, therefore, is whether the State has demonstrated a compelling state interest that could not be achieved through a narrower restriction. *Boos v. Barry*, 108 S. Ct. 1157, 1164-65 (1988). The State has made no serious effort to meet this test.

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is designed to serve. Government has the potential to engineer public consent by . . . selectively disclosing or revealing information." M. Yudoff, When Government Speaks 145 (1983).

The State's reliance on *Rankin v. McPherson*, 483 U.S. 378, *reh'g denied*, 108 S. Ct. 31 (1987), and *Connick v. Myers*, 461 U.S. 138 (1983), is misplaced. Those cases balance the competing interests of public employees in commenting upon matters of public concern with the interests of government employers in operating an efficient public service. Efficiency is not the issue here. At issue, instead, is what state interest, if any, justifies manipulation of advice and information given by publicly-paid health care professionals when the subject matter involved is central to their professional responsibilities, and when the hearer of the advice and information is dependent upon it for the purpose of making a profound personal decision.

The State's invocation of *Rankin* and *Connick* implies an unrealistically one-dimensional view of the first amendment considerations that bear upon the speech of publicly paid speakers. This Court has repeatedly recognized that applying the first amendment to regulations of government employee speech will involve balancing different considerations in different contexts. *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410, 415 n.4 (1979); *Connick*, 461 U.S. at 154.

Primary among those considerations in this case is the interests of the recipients of the speech. Those recipients are individual members of the public with indisputable concerns about the uncensored content, advice, and information they receive from their physicians. *See supra* p. 37. The interests of the speaker in the speech in question is another significant consideration. Surely a physician's interest in giving complete and conscientious medical advice to a patient is at least as important as the interest of the clerk in *Rankin* who commented upon the attempted assassination of President Reagan. When these interests are considered, and "balanced" against the notably absent assertion of a significant state interest, the restrictions on speech imposed by the public funds provision must be rejected.[66]

The analogy to public education found in *Maher v. Roe*, 432 U.S. 464, 477 (1977) is more instructive. State's Brief at 36-37.

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66 *See* Brief *Amici Curiae* of American Civil Liberties Union and others in Support of Appellees.

The dispute here is not analogous to a dispute over whether government must fund private schools equally with public schools, or must fund a particular curriculum. Rather, the dispute here is analogous to a dispute over the power of government, once a curriculum is set, to dictate the content of discourse in the classrooms of its public universities. The Constitution has unswervingly protected freedom of communication between teachers (even in public universities) and their students. "The First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' " *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). *See also Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

These cases recognize that the fact that government pays the speaker does not justify government manipulation of the speaker's message when doing so undermines and is antithetical to the core values of the relationship and communication involved. In the universities, those core values relate to open-mindedness and critical inquiry. *Sweezy*, 354 U.S. at 261-63 (Frankfurter, J., concurring). In the medical profession the core values relate to individual choice based on full disclosure of information and access to unfettered professional advice. *See, e.g.*, Brief *Amici Curiae* of the American Medical Association and others In Support of Appellees. State imposed limitations on such information and advice when the physician is paid with public funds is equivalent to restrictions on the speech of professors in public universities. Both restrictions undermine and are antithetical to the core values at stake. Thus, as the "pall of orthodoxy" is not tolerated in the public university, neither should it be tolerated in publicly-funded medicine.

Finally, the State's freedom of subsidy position also entirely fails to address the fact that the public funds provision imposes a viewpoint discriminatory restriction on speech. The opinions of this Court make clear that even when a subsidy is at issue, "a more stringent, prophylactic rule" is appropriate, "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern." *Arkansas Writer's Project v. Ragland*, 107 S. Ct. 1722, 1731 (1987) (Scalia, J., dissenting). *See also Regan v. Taxation With Representation*, 461 U.S. 540,

548 (1983), *id.* at 551 (Blackmun, J., concurring); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), *id.* at 406-408 (Rehnquist, J., dissenting).

2. The Phrase "Counseling and Encouraging" Is Unconstitutionally Vague

"The most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally-protected rights." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). As pointed out above, and as the Court of Appeals recognized, J.S. at A67, a restriction on the ability of a publicly-paid physician to speak freely to a patient about abortion threatens to inhibit the exercise of both first and fourteenth amendment rights, and is therefore subject to rigid vagueness analysis.[67]

Under such an analysis, the public funds provision must fall. Phrases such as "counsel" or "encourage" have a long history of being viewed as unconstitutionally vague. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964). It seems self-evident that physicians of "common intelligence" will have to "guess" at their meaning, and in particular at which words, gestures, expressions, or tones of voice pass beyond the permissible. *Baggett*, 377 U.S. at 367.

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67 The State says that "First Amendment freedoms are not implicated here." State's Brief at 41. That is true if the public funds provision is not used to restrict the speech of publicly-paid physicians and other health care professionals, in which case, as pointed out above, there is no case or controversy here and this issue has become moot. If the provision does restrict such speech, then obviously first amendment freedoms are implicated.

The State also emphasizes that these sections are civil, not criminal, in nature. Civil statutes are subject to invalidation for vagueness. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925). Moreover, civil and criminal labels are not necessarily dispositive of the vagueness standard question. Nominally civil statutes that nonetheless threaten to exact penalties are treated as criminal statutes. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). *See also Alsager v. Polk County*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976). That is the case here because of the threat that by acting "unlawfully" in "encouraging or counseling," a physician stands to lose his license. Mo. Rev. Stat. § 334.100.

How is a physician who is counseling a patient to know when he or she, when referring to abortion, has transgressed the boundaries of these sections? Given the entirely subjective nature of these two words and borrowing the words of this Court, it is inevitable that physicians and counselors will steer far wider than the "unlawful" zone, in order to be certain not to run afoul of its vague boundaries. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).[68]

This dilemma is not solved by the State's proposed "narrow-[ing]" construction of "affirmative advocacy." State's Brief at 42.[69] As the Court of Appeals noted, this interpretation is unacceptable because it seeks to merge two separate restrictions ("encourage" or "counsel") under one label. J.S. at A67. The State's construction thus runs afoul of the basic canon of statutory construction that every part of a law be given significance or effect. *Lisbon v. Henry*, 204 S.W.2d 310, 315 (Mo. 1947). This Court cannot indulge such a construction when it is neither readily apparent from the language of the statute, *see Grayned v. City of Rockford*, 408 U.S. at 110, nor an "authoritative" construction rendered by the state courts or responsible enforcement agency. *See Kolender v. Lawson*, 461 U.S. at 355.

68 The Court of Appeals noted the evidence that the counseling and encouraging restrictions would have had precisely this effect. J.S. at A68 n.11.

69 The State also repeats here its argument, rejected by the Court of Appeals, that this provision is no more vague than the term "counseling for abortion procedures" found not vague by the Ninth Circuit Court of Appeals in *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938 (1983), *appeal after remand*, 789 F.2d 1348, *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). There, however, the Court relied upon an existing Arizona Attorney General's Opinion that strictly limited the phrase and specifically directed that the phrase, " 'not be construed to interfere with the doctor-patient privilege.' " 718 F.2d at 918 (quoting Arizona Att'y Gen. Op. No. 179-252). The Ninth Circuit added that if the Arizona phrase was not limited by the opinion then the "vagueness claim would have been stronger." *Id.* There is no such interpretive opinion here, only the various arguments offered in the State's several briefs.

3. The Public Funds Restriction Violates The Fourteenth Amendment

This Court has unswervingly recognized that a woman's right to choose abortion encompasses the right to the unimpeded advice and counsel of her physician. *Roe v. Wade* identified many of the factors (which also were established in the trial before the District Court here) which would bear on a woman's choice, and recognized that these were factors "the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153. *Colautti v. Franklin*, 439 U.S. at 387, reiterated that "*Roe* stressed repeatedly the central role of the physician." *City of Akron* also emphasized repeatedly the centrality of a physician's unencumbered consultation and advice to the woman's right of choice. In rejecting government efforts to "influence the woman's informed choice," this Court held: "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. . . ." 462 U.S. at 443. *See also id.* at 427, 429-30.

Most recently in *Thornburgh*, this Court rejected Pennsylvania's attempt to require that certain information be given by the physician to his patients because it came "close to being state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician." *Id.* at 763.

Neither *Thornburgh* nor *City of Akron* involved restrictions on speech. They involved statutes which required the giving of information intended to manipulate the woman's choice. These restrictions left the physician free, however, to add whatever additional information or advice he deemed appropriate. That is not the case here where the restriction limits advice and information. Thus the public funds restriction here is a more egregious state interference with the professional medical guidance to which the woman is entitled, because it reduces the quantum of information available.

Maher v. Roe, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980), do not excuse the public funds restriction.

Maher and *Harris* held that a state's choice not to pay for abortions even when it paid for childbirth was constitutionally permissible because it left "indigent wom[en] with . . . the same range of choice in deciding whether to obtain [an abortion]." *Harris*, 448 U.S. at 317. The restriction here, by comparison, restricts that "range of choice" by limiting the physician's ability to provide advice to his patient.

Maher and *Harris* distinguished what they permitted—affirmative encouragement of an activity through allocation of funds—from what they would not permit—state efforts to place "obstacles" or to impose "restriction[s] . . . not already there." *Harris*, 448 U.S. at 314-15 (quoting *Maher*, 432 U.S. at 474, 475-76). *City of Akron* characterized government attempts to influence doctor-patient communications as "unreasonabl[e] . . . 'obstacles'," 462 U.S. at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)), and noted that such attempts to "influence . . . informed choice" were different from what *Maher* and *Harris* permit. 462 U.S. at 444. Thus, the Court of Appeals was on firm ground when it held that there could be "few obstacles more burdensome to the right to decide" than a restriction on publicly-paid physicians' right to give full advice and guidance to their patients. J.S. at A73.

V. THE BAN ON ABORTIONS IN PUBLIC FACILITIES IS UNCONSTITUTIONAL BECAUSE IT AFFECTS TOTALLY PRIVATE CONDUCT

Section 188.215 bans the use of so-called "public facilities" for performing or assisting abortions. In declaring this provision unconstitutional, the Court of Appeals focused on its impact upon the access of women and their physicians to public institutions, *i.e.*, publicly owned and governmentally operated institutions. The Court of Appeals held that, in such instances, this provision goes beyond the restriction upheld in *Poelker v. Doe*, 432 U.S. 519 (1977), because it does more than elect, "as a policy choice, to provide publicly financed hospital services for childbirth" without doing likewise for abortion. *Id.* at 521. It bans all access to public institutions for abortions, even when

neither public funds nor publicly-paid physicians are involved. J.S. at A74-77.

This holding, while correct, does not address the staggeringly broader reach of the public facilities provision. The provision reaches not only governmental institutions such as the "city-owned" hospital in *Poelker*, 432 U.S. at 519, but also purely private, otherwise legal activities wherever "any physical asset"[70] of the government is involved, regardless of the actual role, which may be none, of the government in the conduct of that activity, or the public or private status of the institutions and individuals involved, or the sources, public or private, of payment for the services. Thus, even if this Court believes *Poelker* could be expanded to shut the door on all use of governmentally operated institutions for abortion, the public facilities restriction must fall because it reaches so much further.

A. The Public Facilities Provision Unconstitutionally Interferes With Wholly Private Medical Treatment In Government Owned and Operated Institutions

Poelker found no constitutional violation in a government choice "to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." 432 U.S. at 521. This Court reached that conclusion because the constitutional question was "identical in principle" with the question resolved in *Maher*, 432 U.S. 464, regarding the government's choice to provide Medicaid reimbursement for childbirth expenses but not for abortion expenses. *Poelker*, 432 U.S. at 521.

The central holding in *Maher* was that government may "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474. *Maher* circumscribed this holding by recognizing the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activ-

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70 The Act defines a public facility as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof." Section 188.200(2).

ity . . ." *id.* at 475, and by noting that the latter "places no obstacles . . . in the pregnant woman's path to an abortion." *Id.* at 474. *See Harris*, 448 U.S. at 314-15.

These principles also limit *Poelker*, and explain why the public facilities provision, just in terms of its impact on governmentally operated institutions, is unconstitutional. As the Court of Appeals stated, " '[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.' " J.S. at A75 (*quoting Nyberg v. City of Virginia*, 667 F.2d 754, 758 (8th Cir. 1982), *cert. denied*, 462 U.S. 1125 (1983)).

Where a woman and her doctor decide that an abortion should be performed in a hospital,[71] and the doctor has staff privileges only at a governmentally operated hospital, the public facilities provision will force the woman either to undergo the procedure with her doctor outside the hospital, or to locate a different doctor with privileges at some other, non-governmental hospital. This will happen even though no public subsidy is involved. Closing the door of the public hospital to private physicians and their patients is therefore a direct and unconstitutional intervention in the abortion decision.[72] *See City of Akron*, 462 U.S. at 434-35 (hospitalization requirement

71 There are some situations where abortions should be performed in a hospital setting to insure maternal health and safety. Tr. 2-17 (Hern). For instance, abortions of molar pregnancies should be performed in a hospital operating room because of the increased risk of severe hemorrhage and "in case of pulmonary embolism and acute respiratory embarrassment." W. Hern, Abortion Practice 198-99. Other factors such as a maternal history of anemia, chronic infection or diabetes also increase the risk that a major hemorrhage will occur, which could require blood transfusions. *Id.* at 176.

72 In many smaller communities, hospitals are the only location where an abortion can be obtained. Henshaw, *et al.*, *Abortion Services In The United States 1984 and 1985*, 19 Family Planning Perspectives 63, 67 (1987). Frequently, the only hospital in such communities is a government owned or operated hospital, or at least a public facility within the broad meaning of the provision here. *See, e.g., Nyberg v. City of Virginia*, 667 F.2d 754. In all of these communities, the dislocation caused by the public facilities provision will be multiplied by the absence of nearby alternatives and the vicissitudes of travel.

unconstitutional because it imposed significant obstacles of travel, increased cost, and additional health risk, and was not justified by State's interest in maternal health).

These problems will not be solved by other hospitals stepping in to fill the breach. The unchallenged evidence at trial showed that private hospitals do not step in to expand abortion services if they become less available in a community, J.S. at A25 n.20, and Missouri has statutorily imposed limits on the ability of health care institutions to offer new health services or open new facilities. Mo. Rev. Stat. Chap. 197.

The State and the Solicitor General both argue that if government cannot ban abortions at government hospitals, this means government must go into the abortion business. State's Brief at 47; S.G. Brief at 28. The holding of the Court of Appeals means nothing of the kind. It means government cannot close the doors of an otherwise suitable facility to private physicians who seek to provide abortions to their patients at that facility if those physicians are otherwise qualified to practice at that facility.[73] It does not require the government to undertake any affirmative step.

B. The Public Facilities Provision Unconstitutionally Interferes With Wholly Private Medical Treatment In Private Institutions And Other Private Settings

Even if government can close the doors of its own facilities, the public facilities provision undertakes to close many more doors as well. Private institutions or individuals located on

73 The Court of Appeals also invalidated the restriction on public employees performing or assisting abortions. Section 188.210. J.S. at A78-9. Plaintiffs had challenged this provision as violating the eighth amendment, *see* J.S. at A51-54; but the Court of Appeals interpreted the phrase "perform or assist" in a narrow way that resolved plaintiffs' eighth amendment concerns. J.S. at A79-82. The Court of Appeals found, nonetheless, that the restriction on public employees was invalid because it "would be totally incongruous to hold that the state cannot deny use of public facilities for paid abortions but may forbid public employees from assisting in those surgical procedures." J.S. at A78 n.15. Plaintiffs agree that the public employees provision is unconstitutional insofar as it prevents private physicians and their patients from obtaining access to suitable government owned and operated facilities for the purpose of abortion procedures.

property "owned, leased, or controlled" by the government will also be barred from providing abortions.

Contrary to the State's bald assertion that this provision will not "impose any obstacle which would substantially burden the effectuation of a woman's decision to obtain an abortion," State's Brief at 49, the impact of this provision in Missouri will be devastating. In 1985, 97 percent of all hospital-based abortions at 16 weeks or greater gestation in Missouri were performed at a hospital that will be forced to cease providing that service because it is housed on property that it leases from a political subdivision of the State. J.S. at A51 n.57.

That hospital is not a publicly owned or government operated institution.[74] It is a private Missouri corporation. Its employees are not public employees; they are employees of the private corporation. Its physicians are not, for the most part, public employees; they are employees of a second private corporation that provides physician services to the hospital corporation pursuant to a contract.[75] Moreover, no public funds are involved in the abortion services provided at the hospital.[76] J.S. at A76 n.14.

Moreover, it is not true, as the State suggests, that there are no other instances in Missouri where this provision will prevent access to abortion services. State's Brief at 49. Wherever, for example, a physician's office is located on property "owned, leased, or controlled" by the government, that physician will be barred from providing an abortion to patients in his or her office.

Presumably the State's interests are related to a policy choice to promote childbirth and to disengage itself from the provision

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74 The hospital is commonly thought of as a "public" hospital because it provides care to indigent residents of the city and county in which it is located.

75 Letter from G. Wilcher, General Counsel, Truman Medical Center, to Roger Evans, dated February 29, 1989.

76 The State says that this hospital is the only hospital in Missouri that provides abortions on a regular basis and is a public facility. State's Brief at 49, n.12. This assertion is not supported by the record; we do not know which other non-governmental hospitals would fall within the broad reach of this provision.

of abortion services.[77] *Maher* and *Harris* recognize the right of government to make this choice; but they do not recognize the right of government to implement that choice as the State has done in the public facilities provision. In those cases the government decisions to fund childbirth while not funding abortion provided affirmative incentives. They did not impose obstacles to private conduct. Here, by comparison, the public facilities provision—both as it applies to government institutions, and as it applies more broadly to other institutions and individuals on property owned, leased, or controlled by government—is an obstacle, not an incentive.

The public facilities provision is likewise not rescued by the State's interest in disengaging itself from the provision of abortion services. While it can disengage itself, it must do so in a way that is narrowly tailored so as not to penalize protected private conduct. *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 944-45 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348, *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). Here, protected private conduct will be made "unlawful" in the State's far-reaching efforts at disengagement.

In *Maher* and *Harris*, this Court found the funding incentives rationally related to the legitimate objective of promoting childbirth. Here, even a rational basis test cannot be met. The principle the State seeks to vindicate here goes far beyond its right affirmatively to encourage childbirth; it is seeking vindication of its choice to become an adversary to private institutions and individuals seeking to provide abortions.

To uphold the public facilities provision would be to constitutionally enshrine a principle of far-reaching consequences. The State ban on the use of "any physical asset" it owns, leases, or controls for the performance of abortions seemingly reaches such public facilities as water and sewage lines which

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77 Presumably, also, the State seeks to demonstrate its opposition to abortion. As Justice Scalia observed earlier this term in a different context, "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point . . . ." *Treasury Employees v. Von Raab*, U.S. Docket no. 86-1879, slip op. at 8 (March 21, 1989) (Scalia, J., dissenting).

are involved in the provision of abortions. Upholding the State's power to withdraw such facilities is to uphold the power of government to drive underground otherwise legal activity. That power can reach beyond abortion to other legitimate but disfavored activities. Could the State, for example, next ban the utilization of contraceptives in publicly owned housing? Abortion is a fundamental constitutional right, but, as Justice Stevens observed in a related context,[78] one need not posit a constitutional right to characterize the public facilities restriction as irrational and perverse.

CONCLUSION

Acceding to the State's and the Solicitor General's request that this Court overrule *Roe v. Wade* would strike at the heart of the values embodied in the rule of *stare decisis* and the role of this Court as a guardian of individual liberties, above the political fray. This Court should reaffirm its sixteen years of consistent rulings protecting the right to choose an abortion by affirming the judgment of the Court of Appeals.

78 Justice Stevens observed, "It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse." *Carey v. Population Services International*, 431 U.S. at 715 (Stevens, J., concurring). *See also Everson v. Board of Education*, 330 U.S. 1, 17 (1947).

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March 30, 1989

REPLY

BRIEF

FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In The

Supreme Court of the United States

October Term, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

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M. A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987) 1, 2

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ARGUMENT

I. The Standard for Reviewing Abortion-Related Legislation Should be Reconsidered and Modified.

It is a common assumption of many of the briefs filed by appellees and their amici that the alternative to the regime of abortion rights established by *Roe v. Wade*, 410 U.S. 113 (1973), is the automatic and total criminalization of abortion. That is clearly not the case. The alternative to the Court's continuing effort to oversee virtually all aspects of the abortion controversy is to leave that controversy "with the people and to the political processes the people have devised to govern their affairs." *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). It will then be up to the legislatures of each state to determine the extent, if any, to which abortion should be prohibited or regulated.

It is not clear how individual states will respond to this challenge. If the experience of other countries is any guide, however, it is unlikely that widespread criminalization of abortion in early pregnancy will result if *Roe v. Wade* is overruled. See M. A. Glendon, *Abortion and divorce in Western Law: American Failures, European Challenges*, 13-15, 49 (1987). Indeed, the Court in *Roe* acknowledged that the states had begun a "trend toward liberalization of abortion statutes." 410 U.S. at 139-140. That trend was preempted by the Court's own action on the issue. Given the chance, there is no reason to believe that the political processes in the individual states will not be able to resolve this issue in a responsible manner, as other western democracies have done. But "[t]o a greater extent than in any other country, our courts have

shut down the legislative process of bargaining, education, and persuasion on the abortion issue." Glendon, *supra*, at 2.[1]

The Missouri statutes at issue in this case are illustrative of what would happen if the regime of strict judicial review mandated in *Roe v. Wade* were abandoned. Contrary to appellees' assertion (Br. 21-22), abortion would not be automatically criminalized under existing Missouri statutes. Nor would methods of birth control that operate after conception but before implantation (such as the IUD or the "morning after" pill) be unlawful. Missouri's declaration that life begins at conception is limited in its effect by "specific provisions to the contrary in the statutes and constitution of this state." § 1.205.2, RSMo 1986. Under current Missouri law, only post-viability abortions are unlawful, and even after viability an abortion may be performed "if necessary to preserve the life or health of the woman." § 188.030, RSMo 1986. That would continue to be the law of Missouri if *Roe* were overruled, absent an affirmative change by the legislature. Thus, a decision by this Court to overrule *Roe v. Wade* would not have the draconian effect suggested by appellees and supporting amici.

Appellees (Br. 3) and various amici (see, e.g., Brief for Certain Members of the Congress of the United States, 14-18) suggest that constitutional adjudication works as a

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[1] Although the Canadian Supreme Court struck down its abortion law on grounds of procedural due process, see *Morgentaler v. Her Majesty the Queen*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988), that court has since made clear that the ultimate issue of the legality of abortion is one for legislative, not judicial, determination. See *Borowski v. The Attorney General of Canada*, No. 20411 (March 9, 1989). *Morgentaler* itself can at most be read as subjecting abortion restrictions to an "undue burden" analysis; only one Justice would have gone further to adopt the reasoning in *Roe*.

sort of one-way ratchet, whereby precedents may be overruled in order to expand, but never to contract, constitutional rights. That is clearly not the case. See e.g., *Daniels v. Williams*, 474 U.S. 327, 330-331 (1986); *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976); *Solorio v. United States*, 483 U.S. 435 (1987). In any event, at issue in this case is not the "abolition" of a constitutional right but rather a modification of the standard of review. The Court has previously made such modifications to property and contract rights (e.g., *Ferguson v. Shupka*, 372 U.S. 726 (1963)), to equal protection rights (*New Orleans v. Dukes*, *supra*), to First Amendment rights (*Hudgens v. NLRB*, 424 U.S. 507 (1976); *Miller v. California*, 413 U.S. 15 (1973)), and to double jeopardy rights (*United States v. Scott*, 437 U.S. 82 (1978)). There is no reason inherent in constitutional adjudication or the doctrine of *stare decisis* why the Court should not similarly adjust the standard of review governing a woman's right to choose an abortion under the Fourteenth Amendment to bring its rulings in line with the general requirement that state regulations affecting a liberty interest protected by the due process clause need only be procedurally fair and bear a rational relation to valid state objectives.[2]

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[2] Tacitly acknowledging the incongruity – under general due process jurisprudence – of the standard of review chosen by the Court in *Roe v. Wade*, various amici attempt to find other provisions of the Bill of Rights that will generate the same result. See, e.g., Brief Amicus Curiae for American Jewish Congress, et al. (free exercise clause of First Amendment); Brief for Organizations and Named Women as Amicus Curiae Supporting Appellee (prohibition on involuntary service in Thirteenth Amendment); Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees (equal protection). These arguments, however, to the extent they have not already been rejected by the Court, see *Harris v.*

(Continued on following page)

Appellees' reliance upon the barrier of *stare decisis* is particularly weak because the trimester framework announced in *Roe v. Wade* has proven to be inherently difficult to apply in any consistent or principled manner. Far from settling the issue of abortion in American law, *Roe* and its progeny have fostered confusion and generated unrelenting controversy.[3]

Appellees (Br. 9) contend that "a fundamental right to abortion . . . flow[s] logically out of the general right to privacy or personal autonomy which protects matters of procreation and family life, including contraception" and that "the presence of the fetus" is not sufficient to "undercut[] the 'fundamental nature' of the right itself." The life of the fetus, appellees claim, only comes into play in judging the extent of the State's countervailing interest, not in determining whether the fundamental right to privacy is broad enough to encompass a woman's decision to have an abortion. That contention is plainly incorrect. The existence of the fetus alters the fundamental nature of the decision in question. A woman deciding to have an abortion is not simply choosing a method of

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McRae, 448 U.S. 297, 318-327 (1980), all suffer from the same flaws that infect the decision in *Roe*.

Other amici abandon any attempt to find a constitutional basis for the decision and instead present pure policy arguments to the Court. See, e.g., Brief for Population-Environment Balance, et al., as Amici Curiae Supporting Appellees (overpopulation); Brief Amici Curiae of the National Council of Negro Women, Inc., et al. (plight of poor women). While these policy concerns are not insubstantial, they are properly to be considered by the legislative branch, not the judiciary.

[3] See Brief of Hon. Christopher H. Smith, Hon. Alan B. Mollohan, Hon. John C. Danforth, and Other United States Senators and Members of Congress, as Amici Curiae in Support of Appellants, which addresses at length the inappropriateness of *stare decisis* as a justification for refusing to reconsider *Roe v. Wade*.

contraception. She is choosing "the purposeful termination of a potential human life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Such a choice is different in kind from choices concerning marital privacy and the use of contraceptives.

The flaw in appellees' argument is apparent. Choices concerning the raising of one's children are clearly encompassed within the sphere of personal autonomy and family choice recognized in such cases as *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It does not follow, however, that parents have a fundamental right to abuse their children – a "right" overcome only by the State's compelling and countervailing interest in protecting the victims of such abuse. The infliction of serious physical injury by a parent on a child is simply not included within the relevant right to privacy. It is different in kind from the sorts of decisions and activities traditionally embraced by that right. Cf. *Prince v. Massachusetts*, 321 U.S. 158, 164-171 (1944) (rejecting claim that child labor laws are unconstitutional under *Meyer* and *Pierce*).[4]

Similarly, the fact that abortion involves the purposeful termination of a potential human life takes it altogether outside the bounds of the right to privacy recognized in this Court's decisions prior to *Roe v. Wade*. Decisions concerning marital privacy and the use of contraceptives bear no logical relationship to – and should provide no precedential support for – a decision that involves, not the woman alone, but also the potential life

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[4] Appellees' version of the historical regulation of abortion is extremely distorted as exhaustively discussed by Professor Joseph W. Dellapenna in the Brief of the Association for Public Justice and The Value of Life Committee, Inc., in Support of Appellant, William L. Webster; see also Brief of Certain American State Legislators as Amici Curiae in Support of Appellants.

of the fetus. It is certainly true "that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting). But the presence of this liberty interest should be accommodated, like other liberty interests, by the requirement that any state regulation affecting that interest must be procedurally fair and must bear a rational relationship to valid state objectives. For example, if a state "were to prohibit an abortion even where the mother's life is in jeopardy," there would be little doubt that "such a statute would lack a rational relation to a valid state objective." *Roe v. Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting).[5] Heightened scrutiny, however, is neither necessary nor warranted.

A similar flaw infects the Amicus Brief of the American Medical Assoc., et al. (at 25-35), which argues from the premise that "individuals have a fundamental right to make decisions about their medical care" to the conclusion that " a woman's choice whether or not to terminate her pregnancy should be deemed a fundamental liberty interest protected by the Due Process Clause." The conclusion does not follow from the premise for an obvious reason already recognized by this Court: "Abortion is inherently different from other medical procedures,

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[5] The AMA asserts (Br. 37) that the rationality review proposed by appellants and the United States "leaves no room for the woman to terminate a pregnancy to protect her own health or even to save her life." We do not understand the United States to make such an argument; in any event, it is not the position of the State of Missouri. Such a case, of course, would implicate not just a generalized liberty interest, but life itself.

because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. at 325. The Constitution does not grant to physicians the ultimate say on all questions of policy related to medicine. Nor are medical choices constitutionally protected merely because a doctor is involved in implementing them. Otherwise, euthanasia could also "be deemed a fundamental liberty interest protected by the Due Process Clause," as could the use of laetrile and other nonapproved drugs. Cf. *United States v. Moore*, 423 U.S. 122, 131-133 (1975) (physicians may be prosecuted for unlawfully dispensing narcotics).

Appellees (Br. 13-15) and their supporting amici (e.g., 167 Distinguished Scientists Br. at 8-16; AMA Br. at 5-8) also take issue with our contention that *Roe's* selection of viability as the point at which the state may intervene to protect fetal life is arbitrary and unworkable. They contend that there is in fact a fixed "floor" in terms of weeks of gestation below which it is impossible to sustain the life of a fetus outside the womb with artificial support. Nevertheless, appellees acknowledge, as they must, that changes in medical technology have resulted in an "increasing ability over the past decade to save progressively younger neonates" (Br. 13, quoting Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law, 9 (January, 1988)). Moreover, as both the record in this case and the various amicus briefs demonstrate, there is no agreement between experts as to exactly what the current lower limit may be. Compare AMA Br. 6 (23-24 weeks) with American Assn. of Prolife Obstetricians and Gynecologists, et al., Br. 6 (22 weeks). And of course, notwithstanding the confident assertions of certain amici to the contrary (see 167 Distinguished Scientists Br. 8), it is impossible to predict the future development of medical technology. In 1973, when *Roe* was decided, no one had heard of the possibility of in vitro fertilization; today,

over 5,500 in vitro babies have been born in the United States alone. *Experts Assess a Decade of In Vitro Fertilization*, N.Y. Times, Tuesday, April 11, 1989, at C5. Similar breakthroughs may occur in the medical technology for bringing a fertilized ovum to gestation.

But *Roe's* selection of viability as the critical point in the State's power to regulate abortion is arbitrary not only because viability is a shifting point. Perhaps even more serious is the uncertainty over how viability is to be determined. The evidence in this case, as the district court acknowledged (J. S. App. A33), reveals that determining the number of weeks of gestation is difficult, and that "inaccuracies of up to four weeks are not uncommon." Given these uncertainties, the *Roe* framework creates the following dilemma: either the State must adopt legislation instructing physicians regarding the determination of viability (as Missouri has done here in § 188.029), or the State must relegate any control over whether abortions are performed on viable fetuses to the sole discretion of private physicians.

This dilemma is entirely the creation of the framework established by *Roe v. Wade*, and illustrates why that framework is unworkable. This Court has on several occasions been required to revisit questions about the proper role of the states in defining viability and the methods for determining viability, and whether those judgments comport with the views of the medical and scientific communities. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434-438 (1983); *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 64 (1976). These decisions have taken the Court far afield from the traditional sources that are used to resolve questions of constitutional entitlement. Although it is true that advances in science and technology may present issues about the application of established constitutional rights in new contexts that could not have been contemplated by the

framers (e.g., *Katz v. United States*, 389 U.S. 347 (1967) (telephone wire tap)), it is not true that in any other context the very dimensions of the constitutional right turn on disputed issues of technical fact. Because this Court's *Roe v. Wade* framework has required its "continued functioning as the nation's *'ex officio* medical review board with powers to approve or disapprove medical and operational practices and standards throughout the United States,'" *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting), it should be reconsidered, and upon reconsideration, overruled.[6]

II. The State of Missouri May Make Legislative Findings That "the Life of Each Human Being Begins at Conception" and That "Unborn Children Have Protectable Interests in Life, Health, and Well-Being."

The appellees argue that §§ 1.205.1(1) and (2), RSMo 1986, violate the right to privacy because they are operative statutory provisions which define the reach of the State's abortion regulations and may restrict access to some contraceptives. Appellees initially contend that the subsections in question are not identified as prefatory statements. How else can one characterize a statute which begins "1. The general assembly of this state finds . . . "? A "finding" is not a directive. Granted, Missouri does not label its findings as a preamble. But there is no conceivable basis for considering the General Assembly's "findings" as anything but prefatory.

Appellees' contention that it is impermissible for Missouri to preface an act pertaining to unborn children

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[6] Of course, it would always be possible to render the *Roe* framework more workable by abandoning the concept of viability and declaring by fiat that the states have no power to regulate abortion until a fixed number of weeks of gestational age. But this would achieve greater workability only at the expense of dropping any pretense of constitutional legitimacy.

and abortion with a declaration that life begins at conception is plainly incorrect, even assuming the continued validity of *Roe v. Wade*. In *Akron*, 462 U.S. at 444, this Court did say that "a state may not adopt one theory of when life begins to justify its regulation of abortions." But the Court's point was simply that, in balancing the competing constitutional interests at stake and setting the boundaries of permissible regulation of abortion by the states, the Court would not take into account a state's assertion as to when life begins. The Court did not suggest that it was improper for a state to express its views on this issue in the course of passing otherwise constitutional law.

Appellees continue to overlook the substantive language of § 1.205.2, which follows the prefatory findings declared invalid by the court below. § 1.205.2 states as follows:

> Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, *subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.* (Emphasis added.)

Appellees' argument that the findings of §§ 1.205.1(1) and (2) somehow interfere with access to abortion or contraceptives clearly ignores the explicit limiting language of § 1.205.2. As we explained in our opening brief (at 27-29), § 1.205.2 has significant – and perfectly permissible – effects on state tort, criminal, and property law. But the provision has no effect on the availability of abortion in Missouri because Missouri law makes abortion illegal only after viability. § 188.030, RSMo 1986. See

Argument I, *supra*. It is equally fallacious to wildly hypothesize that § 1.205 will interfere with access to contraceptive materials.

The constitutionality of the substantive language of § 1.205 has never been challenged by the appellees. It is operative law today. Contrary to the court of appeals' opinion (J.S. A64-A65), the limiting language of § 1.205.2 is very meaningful. The language explicitly incorporates existing state and federal law. The court of appeals' construction is directly contrary to the "well-established principle that statutes will be interpreted to avoid constitutional difficulties" [citations omitted]. *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988).

To the extent that the findings of the General Assembly have relevance to Missouri's abortion laws, they simply explain why the State of Missouri chooses to regulate abortion to the full extent permitted by this Court's abortion precedents. Provided the State's substantive restrictions on abortion remain within the limits set by those decisions, however, the state's motivation in fashioning such restrictions is irrelevant. Missouri is not precluded from viewing abortion as the purposeful termination of an actual human life; nor is it required to pledge agnosticism on the subject of when life begins as a prerequisite to any and all regulations of abortion. The court of appeals' blatant intolerance of the expression of a moral viewpoint with which it simply disagrees (see J.S. A64-A65) has no place in constitutional adjudication.

Appellees devote four pages of their argument (Br. 23-26) to an alternative contention that the General Assembly's findings violate the Missouri Constitution. This argument concerning state law was not raised in the district court or passed on by the courts below, and we agree with appellees, *id*. at 23 n. 42, that this Court need not address it. However, since the appellees' arguments are blatantly incorrect under Missouri law, a remand would be inappropriate.

Appellees argue that since the operative language of § 1.205 will impact upon existing tort, property, and criminal law protection for unborn children, then the statute violates Art. III § 23 of the Missouri Constitution because tort, property, and criminal law are not subjects encompassed by the title of the act (J.A. at A22). The quick and easy response is that appellees never challenged the operative language set forth in § 1.205.2. But, it is also very clear under controlling case law that the title of the act in question provided sufficient notice to interested persons of its subject matter, which is the purpose of Art. III § 23 of the Missouri Constitution. *Blue Cross Hospital Service, Inc. v. Frappier*, 681 S.W.2d 923 (Mo. banc 1984). "The test is whether all provisions of the bill fairly relate to the subject expressed in the title, have natural connections therewith, or are incidents or means to accomplish the express purpose." *Id.* at 929, 930. See also *Westin Crown Plaza Hotel Company v. King*, 664 S.W.2d 2 (Mo. banc 1984), wherein the Missouri Supreme Court noted that "[t]he title to a bill need only indicate the general contents of the act," *id.* at 6, and that Art. III § 23 is to be "liberally construed." *Id.* Clearly, all provisions of the act in question fairly relate to the general subject expressed in the title, "Unborn children and abortion."

Appellees' reliance upon Art. III § 28 is equally misplaced because their argument that various statutes affected by the adoption of § 1.205 should have been set forth in the act was rejected by the Missouri Supreme Court in *Century 21 v. City of Jennings*, 700 S.W.2d 809, 812 (Mo. banc 1985), wherein the court held that Art. III § 28 does not require a "detailed cross-referencing of . . . related statutes. 'The fact [an act] has consequences for other statutes does not bring it into conflict with Art. III § 28.' *Boyd-Richardson Company v. Leachman*, 615 S.W.2d 46, 53 (Mo. banc 1981)." By its own terms, § 1.205.2 states that its provisions are fully subject to "specific provisions to the contrary in the statutes and constitution of this

state." So § 1.205 does not amend any specific language of any other Missouri statute. Neither the substantive nor prefatory language of § 1.205 are subject to attack under the Missouri Constitution.

III. The State of Missouri Has a Compelling Interest in Requiring a Physician Determining Viability to Cause to be Performed Such Examinations and Tests as are Necessary to Make a Finding of the Gestational Age, Weight, and Lung Maturity of the Unborn Child

The State's position regarding this issue is fully addressed in the opening brief. A thorough discussion and refutation of appellees' contention that § 188.029 facially requires dangerous or unnecessary medical tests is set forth in the Brief of the American Association of Prolife Obstetricians and Gynecologists (AAPLOG) and the American Association of Pro-Life Pediatricians (AAPLP) as Amici Curiae in Support of Appellants. Under *Roe v. Wade* the State has a compelling interest in protecting a viable unborn child, but that interest is mere verbiage if a physician cannot even be required to make and record the findings which cause him to conclude whether an unborn child is viable.

IV. The State of Missouri May Constitutionally Refuse to Support Abortion Services by Declaring Unlawful the Expenditure of Public Funds for the Purpose of Encouraging or Counseling a Woman to Have an Abortion Not Necessary to Save Her Life.

Appellees contend (Br. 31-35) that the controversy over the ban on the use of public funds to encourage or counsel a woman to have an abortion is "moot." This is incorrect. As appellees note, appellants did not appeal the court of appeals' judgment insofar as it held invalid

those portions of §§ 188.210 and 188.215, RSMo 1986, that forbid public employees from encouraging a woman to have an abortion and that forbid public facilities from being used for that purpose. Appellants only sought review of the judgment insofar as it held invalid the ban in § 188.205 on the use of state funds to encourage or counsel a woman to have an abortion. Appellees now suggest (Br. 31-35) that the funding ban in § 188.205 "appears not to affect Plaintiffs adversely," since "public employees" and "private practitioners in public facilities" may counsel women to have an abortion under the judgment below that §§ 188.210 and 188.215 are invalid (Br. 32), and since "plaintiffs are neither grantees nor employees of programs" whose state funding may be discontinued if they encourage women to have an abortion, *id.* at 32-33.

Appellees' assertion that the funding ban does not "affect Plaintiffs adversely" does not mean, however, that this issue is now "moot." Appellees have confused mootness with standing. If appellees are not affected by the funding ban, then they lack standing to challenge it, and the judgment below should be reversed for that reason, since injury-in-fact is a requirement of standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Appellees have no less standing to challenge § 188.205 than they had at the outset of this litigation.[7]

The funding ban forbids state officials from appropriating public funds to counsel or encourage women to have abortions. Thus, state and local agencies and officials may not establish programs for abortion counseling, print brochures that advocate abortion, or hire persons to

[7] Appellants' construction of § 188.205 has never altered. The distinct effect of the funding ban was expressed at length in defendants' post-trial memorandum (see J.S. A45-A46), and it was raised in the appellants' brief in the court of appeals.

serve as abortion counselors. Pregnant women can challenge a law limiting the use of public funds in this manner, since they can allege an injury from it, and the plaintiff class certified by the district court included "pregnant women seeking abortion services or pregnancy counseling within Missouri," J.S. App. A57 n. 1; J.A. A13-A14 (appellees' proposed class).[8] Moreover, appellees' complaint alleged that the funding ban "interfere[s] unconstitutionally with the privacy rights of pregnant women seeking abortions or seeking professional advice and assistance as to their pregnancies." J.A. A17. Appellees' complaint thus alleged that the funding ban concretely injured an identifiable category of persons, which is sufficient to establish appellees' standing to challenge the constitutionality of the funding ban.

On the merits, appellees clearly err in claiming that the funding ban, properly understood, is facially unconstitutional under the First and Fourteenth Amendments. Generally, a law may not be held facially invalid unless its every application is unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). A statute can be held facially invalid under the First Amendment, however, if it poses a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *New York State Club Ass'n, Inc. v. New York*, 108 S.Ct. 2225, 2233 (1988). Neither is true here. Appellees fail to distinguish between a state restriction on the ability of a private party or state employee to counsel a woman to have an abortion – something which is no longer at issue here – and a state restriction on the uses to which its own funds may be put. It is this latter

[8] Appellees imply that the plaintiff class consists only of "public employees," "private practitioners in public facilities," and "grantees [and] employees" of programs whose funds may be discontinued. Br. for Appellees 32-33. The class certified by the district court, however, was far broader, as appellees themselves elsewhere point out. Br. for Appellees 31 n. 54.

issue that is presented by the funding ban. As we explained in our opening brief (at 35-44), neither the First nor Fourteenth Amendment requires a state to supply or to underwrite abortion counseling or any other abortion-related service. See also U.S. Br. 26-27. This Court expressly held in *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae, supra*, that due process guarantees no such right, and the Court reaffirmed that principle this term in *DeShaney v. Winnebago County Dept. of Social Services*, 109 S.Ct. 998, 1003 (1989) ("the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"). It is also clear that there is no constitutional requirement that the government subsidize the private exercise of First Amendment rights, *Lyng v. International Union*, 108 S.Ct. 1184, 1190 (1988); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), much less that the government must itself become an advocate for any point of view. In sum, the funding ban only limits the uses to which the state's own funds may be put. As such, it is facially valid under this Court's precedents.

V. The Court of Appeals Erred in Holding That Civil Statutes Forbidding the Performance of Abortion Services by a Public Employee or in a Public Facility Violate a Woman's Right to Privacy.

The court of appeals also held facially unconstitutional Missouri's prohibition on the use of public facilities and public employees to perform or assist in abortions that are not necessary to save the life of the mother. Appellees attempt (Br. 44-50) to defend that ruling by

noting that the prohibition will prevent a private physician, with staff privileges at a public hospital, from performing an abortion at that hospital and thereby make it more difficult for women to have abortions because there may be no private facilities readily available for that purpose. It is clear, however, that the State is no more required to make up for a lack of private facilities to perform abortions than it is required to make up for a lack of private funds for abortions. As long as there is no "direct state interference," *Maher v. Roe*, 432 U.S. at 475, with the performance of abortions by private physicians in private hospitals and clinics, the State may freely implement "its policy choice to favor normal childbirth," *id.* at 477, through its allocation of public facilities and the services of public employees. That such an allocation "may make it difficult . . . for some women to have abortions is neither created nor in any way affected by [Missouri's prohibitions]." *Id.* at 474.

In any event, as already noted, a law may not be held facially invalid unless its every application is unconstitutional. Appellees do not even suggest that the prohibition is unconstitutional as applied to the performance of abortions by public employees in public facilities.[9] The statute cannot therefore be facially invalid. And the statute is certainly not rendered facially invalid by appellees' speculation (Br. 45) that the statute might be applied to prohibit purely private conduct in a private setting simply

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[9] Thus, appellees do not attempt (see Br. 47 n. 73) to defend the court of appeals' conclusion that the restriction on public employees is constitutionally invalid because "it would be totally incongruous to hold that the state cannot deny use of public facilities for paid abortions but may forbid public employees from assisting in those surgical procedures." J.S. A78 n. 15. Nor is that conclusion in any way defensible. Not only is its premise incorrect – as this Court's decision in *Poelker v. Doe, supra*, demonstrates – but the court of appeals' singular concept of what might be incongruous has no bearing on the constitutional issue before this Court.

because some "physical asset" owned by the government was involved. If the State were ever, for example, to extend the reach of the statute by providing for a state monopoly on certain types of medical equipment essential to abortions and by making that equipment available only through lease agreements, then – assuming the continued validity of *Roe v. Wade* – a prohibition on the use of such equipment in performing abortions would be unconstitutional as a "direct state interference with a protected activity." *Maher v. Roe*, 432 U.S. at 475. But nothing approaching that sort of "direct interference" is in question here.

Appellees point out (Br. 48) that Truman Medical Center is a "public facility" within the meaning of § 188.215, see § 188.200(2), RSMo 1986, even though it is run by a private Missouri corporation. The Court should also note that almost one-third of Truman Medical Center's yearly operating revenue is provided by the State of Missouri and political subdivisions of the State; that the Board of Directors of the corporation must include at least fourteen city or county officers and five state employees representing the University of Missouri-Kansas City; and that all facilities of the Truman Medical Center are owned by and the legal title of the land sites is vested in the political subdivision of Jackson County, Missouri. The Truman Medical Center West facility is leased by Jackson County to Truman Medical Center, Inc., for one dollar.[10] Under these circumstances, it is surely natural to regard Truman Medical Center as a "public facility" and surely constitutional for the State to place restrictions on the use of that facility in accordance with public policy. The policies of Truman Medical Center will

[10] Truman Medical Center, Inc., Financial Statements and Schedules, April 30, 1988 and 1987.

naturally and properly be viewed as those of the State of Missouri and the State of Missouri may set those policies accordingly. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (discrimination by restaurant that leases space from the state government is attributable to the government as state action).

The statistical evidence presented during the trial of this action established that only 710 of a total of 19,482 abortions performed in Missouri in 1985 were performed in hospitals. (Pl. Exh. 17, Tr. 2-73, 2-76). Truman Medical Center provided 507 of the abortions which were performed in hospitals. (Pl. Exh. 18, Tr. 2-73, 2-76.) There was no evidence in the record that any clinic providing abortions was a public facility as defined by § 188.200(2). Clearly, appellees' own evidence proved that women do not obtain abortions in small community hospitals in the State of Missouri. (Pl. Exh. 18, Tr. 2-73, 2-76.) Further, the record provides no basis for asserting that private hospitals and clinics cannot meet the demand for abortions by women in Missouri. Finally, appellees provide absolutely no justification for asserting that the provisions of Chapter 197, RSMo, will be utilized to prevent private health care institutions from offering needed health services or opening new private facilities. In fact, the parties stipulated that Chapter 197 was not applicable to Reproductive Health Services or Planned Parenthood of Kansas City. (J.A. at A-53, ¶ 16.)

CONCLUSION

In conclusion, the courts below were in error when they rendered their decisions. The judgment of the court of appeals, insofar as it invalidated §§ 1.205.1(1) and 1.205.1(2), the second half of § 188.029, the second half of § 188.205, and the first half of §§ 188.210 and 188.215, should be reversed and the injunctions dissolved.

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BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

(13)

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET AL., APPELLANTS

v.

REPRODUCTIVE HEALTH SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 11

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M.A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987) 23-24

Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817 11

J. Mohr, *Abortion in America* (1978) 13, 16-17

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Wardle, *Rethinking* Roe *v.* Wade, 1985 B.Y.U. L. Rev. 231 20

Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973) 11

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INTEREST OF THE UNITED STATES

Appellants have asked this Court to reconsider its decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). The United States has previously filed briefs as amicus curiae in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), questioning the regime of judicial review established by *Roe* v. *Wade*. The United States continues to believe that *Roe* v. *Wade* unduly restricts the proper sphere of legislative authority in this area and should be overruled by this Court.

In addition, the United States has a direct programmatic interest in the disposition of this case. The court of appeals struck down provisions of a Missouri statute that forbid the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. §188.205) and that prohibit the use of public facilities and public employees "for the

purpose of performing or assisting an abortion not necessary to save the life of the mother" (§§188.210, 188.215). The United States has placed similar restrictions on federally funded programs. Title X of the Public Health Services Act of 1970, 42 U.S.C. 300 *et seq.*, authorizes the federal government to make grants to public and private nonprofit entities for family planning projects, but expressly provides that "[n]one of the funds appropriated under this [title] shall be used in programs where abortion is a method of family planning" (42 U.S.C. 300a-6).[1] Similarly, the Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.*, provides funds for demonstration projects designed to discourage adolescent pregnancy, but specifies that grants may be awarded only to "programs or projects which do not provide abortions or abortion counseling or referral" (42 U.S.C. 300z-10(a)).[2] The Court's ruling with respect to the funding and public facilities provisions of the Missouri statute may affect the outcome of pending constitutional challenges to these analogous federal provisions.

STATEMENT

In 1986, the State of Missouri passed a statute regulating abortions. The first section of the statute contains a general

[1] The Department of Health and Human Services promulgated regulations in 1988 setting standards for compliance with Title X of the Public Health Services Act. See 53 Fed. Reg. 2922 (1988). Under the regulations, both "counseling concerning the use of abortion as a method of family planning" and "referral for abortion as a method of family planning" are forbidden. 53 Fed. Reg. 2945 (1988) (to be codified in 42 C.F.R. 59.8(a)(1)). The Title X regulations have been enjoined on constitutional grounds by two district courts, *Massachusetts* v. *Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal pending, No. 88-1279 (1st Cir.); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.), but have been upheld by a third, *New York* v. *Bowen*, No. 88-701 (S.D.N.Y. June 30, 1988), appeal pending, No. 88-6204 (2d Cir.).

[2] This Court recently upheld the funding provisions of the Adolescent Family Life Act against a facial attack under the Establishment Clause in *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988).

"finding" by the state legislature that "[t]he life of each human being begins at conception," and a requirement that all state laws be interpreted to provide unborn children with all the rights of other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court" (Mo. Stat. Ann. §1.205.1-2). Among its various other provisions, the statute requires that, prior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician must determine whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child" (§188.029). The statute also provides that no public funds, employees, or facilities may be used for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life or for "performing or assisting" an abortion not necessary to save the life of the mother (§§188.205, 188.210, 188.215).

Five publicly employed physicians and nurses and two nonprofit corporations brought a class action challenging the constitutionality of these and other provisions of the Missouri statute. The district court held the challenged provisions unconstitutional (J.S. App. A1-A55) and the court of appeals affirmed (*id.* at A56-A84). The court of appeals concluded (*id.* at A64) that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." The court of appeals rejected (*ibid.*) Missouri's reliance on the declaration's caveat requiring compatibility with the Constitution and Supreme Court precedent on the ground that a mere recitation of the Supremacy Clause "cannot * * * validate state laws that are in fact incompatible with the constitution."[3]

[3] Judge Arnold dissented (J.S. App. A83-A84) from this aspect of the decision below, contending that Missouri's declaration of when life begins

The court further concluded (J.S. App. at A59-A60) that the requirement that physicians perform viability tests is an unconstitutional legislative intrusion on a matter of medical skill and judgment. The court found that tests to determine fetal weight at 20 weeks are unreliable, inaccurate, and would add $125 to $250 to the cost of an abortion. And the court determined that "amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28-30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus." *Id.* at A60 n.5.

The court of appeals also invalidated the provision prohibiting the use of public funds for "encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. §188.205), finding that provision both overly vague and inconsistent with the right to abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973).[4] "[T]he statute is vague," the court stated (J.S. App. A68), "because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." In addition, the court held (*id.* at A70), the prohibition "is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." The court rejected as "completely inapt" (*id.* at A72) the analogy to the bans on the use of public funds to

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should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or bringing fetuses within the protection of the criminal law.

[4] In addition to banning the use of public funds to encourage or counsel a woman to have an abortion, the Missouri statute also forbids any public employee acting within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life and forbids the use of any public facilities for that purpose. See Mo. Stat. Ann. §§ 188.210, 188.215. Although the court of appeals also struck down those provisions (J.S. App. A47-A51), the State of Missouri has not appealed from this aspect of the judgment below.

perform or assist abortions upheld in *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Maher* v. *Roe*, 432 U.S. 464 (1977). "Missouri," the court concluded (J.S. App. A72), "is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth."

Finally, the court of appeals struck down Missouri's prohibition on the use of public facilities and public employees "to perform or assist an abortion not necessary to save the life of the mother." Mo. Stat. Ann. §§188.210, 188.215. The court distinguished this Court's cases holding that the government need not provide funding for elective abortions on the grounds that "'[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.'" J.S. App. A75 (quoting *Nyberg* v. *City of Virginia*, 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, cert. denied, 462 U.S. 1125 (1983)). The court noted (J.S. App. A79) that all of the public facilities' costs in providing abortion services, including the costs of employees' services, are recouped from funds provided by the patient. Hence, the court stated (*id.* at A75), the question at issue is not whether the State is required to fund abortions but whether "the state creates an undue burden or obstacle to the free exercise of the right to choose an abortion" when it prohibits the use of public facilities and public employees to perform or assist abortions.

SUMMARY OF ARGUMENT

Roe v. *Wade*, as the Court is well aware, has been intensely controversial from the day it was decided. That controversy is more than simply a reflection of the deep divisions in American society over the underlying question of abortion. Rather, the controversy has, in substantial

measure, been a product of the decision itself. *Roe* rests on assumptions that are not firmly grounded in the Constitution; it adopts an unworkable framework tying permissible state regulation of abortion to particular periods in pregnancy; and it has allowed courts to usurp the function of legislative bodies in weighing competing social, ethical, and scientific factors in reaching a judgment as to how much state regulation is appropriate in this highly sensitive area. In similar circumstances, the Court has "not hesitated" to overrule a prior interpretation of the Constitution. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). It should do so here as well.

The Court's decision in *Roe* v. *Wade* rests upon two key premises—that there is a fundamental right to abortion and that the States do not have a compelling interest in protecting prenatal human life throughout pregnancy. Neither premise, however, is supportable. The fundamental right to abortion can draw no support from the text of the Constitution or from history. Even assuming that the various "privacy" cases relied upon by *Roe* establish a generalized right to privacy, it does not follow that the abortion decision is encompassed within such a right. Abortion involves the destruction of the fetus, and is therefore "different in kind from the decision not to conceive in the first place" (*Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 792 n.2 (1986) (White, J. dissenting)). *Roe*'s other critical assumption—that a State that wishes to regulate abortion does not have a compelling interest in protecting prenatal life throughout pregnancy—is similarly lacking in any logical or historical foundation. "[*P*]*otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Akron*, 462 U.S. at 461 (O'Connor, J. dissenting) (emphasis in original).

Roe's flaws are both illustrated and compounded by the manner in which the Court sought to implement its unfounded premises. The Court in *Roe* erected a framework

for reviewing abortion regulations based on the division of pregnancy into three trimesters, with different types of state regulation permitted in each trimester. The dividing lines were grounded not in any principle of constitutional law, but rather in medical findings. As a consequence, the lines must either become increasingly arbitrary over time or change as medical technology changes. Debate over these and other issues has spawned extensive litigation and has put the Court in the position of reviewing medical and operational practices beyond its competence.

We therefore believe that the time has come for the Court to abandon its efforts to impose a comprehensive solution to the abortion question. Under the Constitution, legislative bodies cannot impose irrational constraints on a woman's procreative choice. But, within those broad confines, the appropriate scope of abortion regulation "should be left with the people and to the political processes the people have devised to govern their affairs." *Doe* v. *Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). Other Western countries have, through the legislative process, reached reasonable accommodations of the competing interests involved in the abortion controversy. There is no reason to believe that American legislatures, if basic decision-making responsibility were returned to them, would not similarly arrive at humane solutions.

Even if the Court is not inclined to reconsider *Roe* v. *Wade*, we believe that the court below erred in striking down provisions of the Missouri statute prohibiting the use of public funds to counsel a woman to have an abortion and the use of public facilities and public employees to perform abortions. Through these provisions, the State of Missouri has placed no obstacles in the path of women seeking to obtain an abortion. The State has simply chosen not to encourage or assist abortions in any respect. That is a permissible choice even assuming the continued vitality of *Roe* v. *Wade*.

ARGUMENT

I. *ROE* v. *WADE* SHOULD BE RECONSIDERED AND, UPON RECONSIDERATION, OVERRULED

Appellants have asked the Court (J.S. II) to reconsider the approach to determining the constitutionality of abortion regulations established in *Roe* v. *Wade*, 410 U.S. 113 (1973). We think this case presents a proper occasion for such a reconsideration. As we argue below (see Part II, *infra*), those provisions of the Missouri statute related to abortion counseling and the use of state facilities and personnel to perform abortions should be upheld even assuming the continued validity of *Roe*. But other provisions of the Missouri statute appear to reflect legislative choices foreclosed by *Roe*. In particular, the provision mandating the performance of certain viability tests when a woman is 20 or more weeks pregnant and the declaration that human life begins at conception are in tension with the severe limitations imposed by *Roe* on the ability of the States to adopt any measures to protect prenatal life prior to viability.[5] We accordingly agree

[5] The mandated viability tests (Mo. Stat. Ann. §188.029) are aimed at promoting the State's interest in the life of the unborn child rather than in maternal health. To the extent that these tests add to the cost of an abortion prior to the end of the second trimester, they may run afoul of the rigid trimester approach mandated in *Roe*. See *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 434-438 (1983). They may also run afoul of the Court's repeated admonition that the determination of viability is to be left wholly to "the judgment of the attending physician on the particular facts of the case before him." *Colautti* v. *Franklin*, 439 U.S. 379, 388-389 (1979). See also *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 64 (1976). The provisions of the statute setting forth a general "finding" by the state legislature that "[t]he life of each human being begins at conception," and a requirement that all state laws be interpreted to provide unborn children with all the rights of other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court" (Mo. Stat. Ann. §1.205.1-2), may run afoul of the Court's assertion that "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444. It may also—to the extent it provides unborn children with property rights and the protection of state tort and criminal laws—place a burden of uncertain scope on the performance of abortions by supplying a general principle that would fill in whatever interstices may be present in existing abortion precedents.

with the State of Missouri that a consideration of the constitutionality of these provisions raises the question whether *Roe* v. *Wade* should be reconsidered.

A. We recognize of course that the principle of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Those considerations must be given due weight in this as in any other area of the law. See *Akron*, 462 U.S. at 420 n.1.

Nonetheless, as Justice Frankfurter explained, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). Furthermore, it is well settled that *stare decisis* has less force in constitutional litigation, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. *Monell* v. *Department of Social Services*, 436 U.S. 658, 696 (1978); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962). For that reason, "[i]t is * * * not only [the Court's] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974) (Powell, J., concurring). See also *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.30 (1977); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

Although this Court has never adopted a "rigid formula" for determining when a prior construction of the Constitution should be overruled (*Vasquez*, 474 U.S. at 266), it has identified several factors that bear on this inquiry. One question of obvious importance is whether the prior ruling is inconsistent with basic assumptions about the nature of the Constitution or established methods for giving effect to its key provisions. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. at 547-555; *New Orleans* v. *Dukes*, 427 U.S. 297, 306 (1976); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943); *Erie R.R.* v. *Tompkins*, 304 U.S. at 78-80. Another factor that is clearly relevant is whether the prior rule has proved to be unworkable, has bred confusion, or has led to unforeseen or anomalous results. See *Solorio*, slip op. at 12-14; *Garcia*, 469 U.S. at 537-547; *Erie R.R.* v. *Tompkins*, 304 U.S. at 74-78. Finally, the Court has stated that prior decisions, even if of fairly recent vintage, should be reconsidered if they "disserve[] principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Taken together, these factors strongly suggest that the regime of judicial review established by *Roe* v. *Wade* should be abandoned.

B. The decision in *Roe* v. *Wade* rests on two crucial but highly problematic premises: that a woman has a fundamental right to decide whether or not to terminate her pregnancy and that the States do not have a compelling interest in protecting prenatal human life throughout the term of a woman's pregnancy. See *Thornburgh*, 476 U.S. at 796 (White, J., dissenting). The first premise—that the right to an abortion is fundamental—means that abortion regulation is subject to strict scrutiny and, thus, that the State must demonstrate that it has a compelling interest before it may burden that right. The second premise—that the State does not have a compelling interest in protecting fetal life throughout pregnancy—yields the conclusion that, except for regulations designed to preserve the health of the mother, the Constitution prohibits any effort by the State to regulate

or discourage abortion in the early months of pregnancy. Neither of those essential premises, however, is tenable.

1. All Members of this Court who have addressed the issue agree "that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Thornburgh*, 476 U.S. at 790 (White, J., dissenting). See also *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting). The presence of such a liberty interest, however, ordinarily means only that any state regulation affecting that interest must be procedurally fair and must bear a rational relation to valid state objectives. See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955). In order to subject state regulation to the far more demanding requirements of strict scrutiny, it is necessary to show that it interferes with a "fundamental" constitutional right. The abortion decision, however, cannot be counted as a "fundamental" constitutional right under any of the traditional means used to identify such rights.[6]

The primary source for fundamental rights lies in the provisions of the Constitution other than the Fourteenth Amendment itself. "[T]he Court is on relatively firm ground when it deems certain of the liberties set forth in the Bill of Rights to be fundamental and therefore finds them incorporated in the Fourteenth Amendment's guarantee that no State may deprive any person of liberty without due process of law." *Thornburgh*, 476 U.S. at 790 (White, J., dissenting). All of the "privacy" cases that preceded *Roe* v.

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[6] This judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, A. Cox, *The Court and the Constitution* 322-338 (1987); J. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); A. Bickel, *The Morality of Consent* 27-29 (1975); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973).

Wade—and upon which the Court relied in *Roe*—are explicable in terms of some other constitutional command beyond the generalized interest in "liberty" secured by the Fourteenth Amendment. They were rooted in accepted principles, whether of equal protection,[7] or of freedom of expression at the core of the First Amendment,[8] or of freedom from unreasonable searches assured by the Fourth Amendment.[9] In contrast, the right to abortion identified in *Roe* was grounded only in the liberty clause of the Fourteenth Amendment. As this Court recently reaffirmed,

[7] *Skinner* v. *Oklahoma*, 316 U.S. 535, 538 (1942) (criminal sterilization act violated equal protection by distinguishing without an adequate basis between persons convicted of larceny and embezzlement); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages involved "invidious racial discriminations"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446-455 (1972) (statute prohibiting distribution of contraceptives violated equal protection by treating married and unmarried women differently without a rational basis).

[8] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (invalidating law prohibiting the teaching of foreign languages in private elementary schools because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute requiring all children to attend public schools); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) (prosecution of Jehovah's Witness under statute prohibiting sale by minors of periodicals implicates but does not violate freedom of religion); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (invalidating criminal conviction for mere possession of obscene films in defendant's home).

[9] As one commentator has explained, this Court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), invalidating a statute regulating the *use* of contraceptives, as opposed to their manufacture or sale, indicated an underlying concern that enforcement of the statute *"would have been virtually impossible without* the most outrageous sort of governmental prying into the privacy of the home." Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 Yale L.J. 920, 929-930 (1973) (emphasis in original). A statute limiting a medical procedure performed by a doctor in a clinic or hospital is simply not analogous; abortion statutes could obviously be enforced without the necessity of repulsive searches. Fourth Amendment policies accordingly provide no support for the holding in *Roe* v. *Wade*.

"[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986).

In addition to rights secured by specific provisions of the Constitution, the Court has indicated that an interest will be deemed to be constitutionally fundamental if it is "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)) or "deeply rooted in this Nation's history and tradition" (*Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)). See *Bowers*, 478 U.S. at 191-192. It cannot be credibly argued, however, that the abortion decision forms a part of any historically recognized right that is fundamental in this sense. As the Court in *Roe* acknowledged in its review of the history of abortion regulation (410 U.S. at 129-141), and as Justice Rehnquist emphasized in his dissent (*id.* at 174-176 & n.1), state laws condemning or limiting abortion were very common at the time the Fourteenth Amendment was adopted.[10] "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today." *Id.* at 174-176 (Rehnquist, J., dissenting).[11] Against this background, the right to abortion cannot be described as one that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Compare *Bowers* v. *Hardwick*, 478 U.S.

[10] Indeed, the period between 1860 and 1880 witnessed "the most important burst of anti-abortion legislation in the nation's history." J. Mohr, *Abortion in America* 200 (1978).

[11] Prior to the mid-Nineteenth Century, the legal status of abortion was more uncertain. It is clear, however, that the abortion of a fetus after "quickening" was regarded as a crime at common law. *Roe*, 410 U.S. at 132-136. And the earliest English abortion statute, adopted in 1803, made abortion a criminal offense throughout pregnancy. *Id.* at 136.

at 192-194 (rejecting claim that there is a fundamental right to engage in homosexual sodomy based in part on discussion of criminal sodomy laws existing "[i]n 1868, when the Fourteen Amendment was ratified").

The most plausible source of support for a fundamental right to abortion lies in the Court's "privacy" decisions that antedate *Roe*. But even assuming that cases like *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), establish a general right to privacy or personal autonomy under the Fourteenth Amendment, see *Carey* v. *Population Services International*, 431 U.S. 678, 684-686 (1977), it does not follow that the abortion decision is encompassed within such a right. "The pregnant woman," this Court acknowledged (*Roe*, 410 U.S. at 159), "cannot be isolated in her privacy." Her decision to seek an abortion is "inherently different" from decisions concerning marital privacy and the use of contraceptives because it "involves the purposeful termination of a potential life" (*Harris* v. *McRae*, 448 U.S. at 325). As Justice White has observed (*Thornburgh*, 476 U.S. at 792 n.2):

> That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself. For if the liberty to make certain decisions with respect to contraception without governmental constraint is "fundamental," it is not only because those decisions are "serious" and "important" to the individual, * * * but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of the government's business. The same cannot be said where, as here, the individual is not "isolated in her privacy."

If a woman does not have a fundamental constitutional right to choose an abortion, then the *Roe* framework collapses. Absent such a right, abortion regulations, like other forms of regulation that affect general liberty interests, should be upheld as long as they are procedurally fair and bear some rational relationship to a permissible governmental goal.

2. Equally central to the *Roe* holding was the Court's determination that a State that chooses to regulate abortion does not have a compelling interest in preserving fetal life throughout the term of pregnancy. The Court acknowledged (410 U.S. at 154) that a woman's right to terminate her pregnancy "is not unqualified and must be considered against important state interests * * * in safeguarding health, in maintaining medical standards, and in protecting potential life." But the Court concluded that these interests are not present in the same degree from conception to birth; instead, the court found (*id.* at 162-163) that they "grow[] in substantiality as the woman approaches term." Especially critical in this regard was the Court's conclusion that "the State's important and legitimate interest in potential life" does not become "compelling," *i.e.*, sufficiently weighty to overcome the fundamental right to abortion, until the fetus has reached the point of viability (*id.* at 163).

The assumption that a State's asserted interest in protecting prenatal life is qualitatively different at different periods of pregnancy is debatable at best. As Justice O'Connor has observed, "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis in original). See also *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). But even if there is a core of common sense in the notion that a State's legitimate interest in prenatal life "grows in substantiality" along with the development of the fetus, it does not follow that this interest should not be regarded as

compelling throughout pregnancy. An interest may be sufficiently weighty to be compelling in the constitutional sense even if subsequently it takes on even greater urgency.

The problem with the Court's treatment of the State's interest in fetal life is that it is not rooted in any analysis of what interests have been historically recognized as compelling. Deciding what is a "compelling" state interest is a little like deciding whether or not a particular value is "fundamental." Judges have not been left "free to roam where unguided speculation might take them." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). See *New York* v. *Ferber*, 458 U.S. 747, 756-758 (1982) (citing prior judicial decisions, legislative findings, and the enactment of legislation by "virtually all" States and the United States as relevant factors in identifying a compelling interest). The historical record here is clear (see pp. 13-14, *supra*). The tenor and contemporaneous understanding of the anti-abortion laws enacted from the mid-Nineteenth Century up to the time of the decision in *Roe* v. *Wade* leave little doubt that they were directed not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or nascent human life. See J. Mohr, *Abortion in America* (1978). Moreover, the historical record reveals that this interest has been consistently asserted by the States *throughout* the term of pregnancy, not just after viability or "quickening" or some other arbitrary line of demarcation.[12]

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[12] Prior to concluding that a State does not have a compelling interest in prenatal life throughout pregnancy, the Court in *Roe* observed that Nineteenth Century English and American law typically treated abortion after quickening as a more serious crime than an abortion performed before quickening. 410 U.S. at 136-139. Obviously, however, the fact that an abortion performed in the early months of pregnancy was regarded as "only" a misdemeanor, rather than a felony, does not support the conclusion that the State has no compelling interest in preventing abortion in the earlier period. See Mohr, *supra*, at 200 ("most of the legislation passed between 1860 and 1880 explicitly accepted the [regular physicians'] assertions that the interruption of gestation *at any point in pregnancy* should be a crime and that the state itself should try actively to restrict the practice of abortion") (emphasis supplied). That conclusion is further undermined by the Court's observation that, "[b]y the end of the 1950's, a large majority of the jurisdictions banned abortion, however and *whenever* performed, unless done to save or preserve the life of the mother." *Id.* at 139 (emphasis supplied).

If a State that wishes to regulate abortion has a compelling interest in protecting prenatal life throughout pregnancy, then *Roe*'s framework cannot survive. For even if there is a fundamental right to abortion, that right may be overridden by the State's compelling interest in protecting prenatal life. Laws that impinge upon fundamental rights are not automatically invalid; rather, they will survive strict scrutiny if they are "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 155 (citing cases). If a State's interest in protecting prenatal life is compelling throughout pregnancy, then abortion regulation designed to advance that interest in a rational manner should be permissible throughout pregnancy.

C. The untenable nature of *Roe*'s premises is demonstrated and compounded by the unworkable framework the Court adopted to implement those premises. To provide a framework for delimiting the permissible scope of abortion regulation, *Roe* divided pregnancy into three trimesters, with radically different consequences for state regulatory power in each. During the first trimester, both "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (410 U.S. at 164). During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health" (*ibid.*). After viability, the State "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (*id.* at 165).

This analytical framework has proved to be "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." *Akron*, 462 U.S. 454 (O'Connor, J., dissenting). For example, it is difficult to grasp why the compelling quality of a State's interest in safeguarding maternal health should undergo a radical change at the end of the first trimester. Indeed, "[t]he fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible" (*id.* at 460 (emphasis in original)).

The Court in *Roe* chose the end of the first trimester as a crucial point based on its determination—basically one of legislative fact—that "in the light of present medical knowledge * * * until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 149, 163). However, "developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, * * * have extended the period in which abortions are safer than childbirth" (*Akron*, 462 U.S. at 429 n.11). The fact that the Court in *Akron*, despite this evidence, found it "prudent" to retain the end of the first trimester as the sharply determinative point demonstrates the essential arbitrariness of the framework: the Court "simply concluded that a line must be drawn * * * and proceeded to draw that line" (*Garcia*, 469 U.S. at 543).

It was similarly arbitrary for the Court in *Roe* to determine that the State's legitimate interest "in protecting prenatal life" (410 U.S. at 150, 153-154) undergoes a constitutionally significant transformation at the point of fetal viability. The Court defined "viability" as the point when

the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160; see *Colautti*, 439 U.S. at 387. There is no obvious constitutional connection between the ability of a fetus to survive outside the womb with artificial support and the magnitude of a State's lawful concern to protect future life. As Justice O'Connor said in her *Akron* dissent, "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. * * * The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward" (462 U.S. at 461 (emphasis in original)). "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

The "viability" standard is particularly unworkable as a constitutional reference point because, as the Court has acknowledged, the point when a fetus may survive outside the womb with artificial aid changes with "advancements in medical skill" (*Colautti*, 439 U.S. at 387). The "increasingly earlier fetal viability" demonstrated in recent scientific studies (462 U.S. at 457 (O'Connor, J., dissenting)) is the product of improvements in medical techniques, not of any change in our perceptions about how fully developed or worthy of life a fetus is at any point in time. It is disturbing to attribute constitutional significance to a point which, besides being in motion rather than being fixed, moves in response to advances in medical science rather than in response to forces more familiar to traditional judicial analysis. And it is troubling to contemplate a constitutional doctrine that would permit the State's power to regulate to vary from community to community—or from hospital to hospital—depending on the availability of sophisticated medical technology.

The arbitrary nature of *Roe*'s analytical framework is also reflected in the increasingly complex linedrawing of its

progeny. A State may require that certain information be furnished to a woman by a physician or his assistant (*Akron*, 462 U.S. at 448), but it may not require that such information be furnished to her by the physician himself (*id.* at 449). A State may require that second-trimester abortions be performed in clinics (*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983)), but may not require that they be performed in hospitals (*Akron*, 462 U.S. at 437-439). As each set of these subtle distinctions has been crafted, still more unanswered questions have been posed. During the decade and a half since *Roe* v. *Wade*, the adversaries in the abortion debate have come back again and again, asking this Court to spin an ever finer web of regulations.[13] The adversaries are back again today, and they are sure to return.

D. At the heart of the abortion controversy lies a divisive conflict between a woman's interest in procreative choice and the State's interest in protecting the life of an unborn child and promoting respect for life generally. This is not the kind of conflict that is amenable to judicial resolution. If a "principled" resolution of this conflict is to be reached, it can only be by adopting a moral theory of the sanctity of the person, or a theory of when human life begins—neither of which can be derived through ordinary processes of adjudication.[14] Failing such a resolution, it will be necessary to

[13] Between the decision in *Roe* and 1985, state legislatures enacted more than 250 statutes regulating abortion. Wardle, *Rethinking* Roe *v.* Wade, 1985 B.Y.U. L. Rev. 231, 247.

[14] *Roe* specifically declined to adopt either type of theory. The Court stated (410 U.S. at 154): "it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U.S. 200 (1927) (sterilization)." And the Court declined to address the question of when life may be said to begin (410 U.S. at 159): "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

reach an accommodation among the competing interests involved. Under our democratic system of government such an accommodation can be reached only through the political process. As long as the various factions continue to look to the courts, however, a constructive dialogue will be impossible.[15]

The proper role of a court in reviewing abortion legislation is neither to substitute its judgment for that of the legislature, nor to abdicate. Instead, as long as such legislation is procedurally fair and does not violate any of the specific prohibitions of the Bill of Rights, a court should simply ask whether the resolution reached by the legislature is rational—whether it is reasonably related to the advancement of legitimate governmental objectives. That standard of review is deferential, but it is not toothless. Compare, *e.g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). The important point is that the resolution of the abortion controversy, including

[15] The Court's continuing effort to oversee virtually all elements of the abortion controversy has seriously distorted the nature of abortion legislation. Because *Roe* and its progeny have resolved most of the central questions about the permissible scope of abortion regulation, legislative action in this area has been relegated to relatively peripheral issues. And because legislators know that whatever they enact in this area will be subject to de novo review by the courts, they have little incentive to try to moderate their positions. The result, all too often, has been statutes that are significant primarily because of their highly "inflammatory" symbolic content—such as fetal description requirements and humane disposal provisions. *Thornburgh*, 476 U.S. at 762 n.10. This process has undermined the accountability of legislative bodies, and has disserved the courts and the Constitution. As James Bradley Thayer once observed, the "tendency of a common and easy resort" to the power of judicial review "is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." J.B. Thayer, *John Marshall* 106-107 (1901). See also *Plyler* v. *Doe*, 457 U.S. 202, 253-254 (1982) (Burger, J. dissenting); *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

any compromise, must come from the legislature; it cannot be imposed by the courts from above.

It is possible to envision a standard of review more deferential than that adopted by *Roe* v. *Wade*, yet more stringent than rationality review, such as the "undue burden" analysis thoroughly delineated by Justice O'Connor in her separate opinions in *Akron* and *Thornburgh*, and urged in our brief in *Akron*. On reflection, however, we believe that any such intermediate standard would inevitably fall prey to the same difficulties that have beset the *Roe* framework. The concept of an "undue burden" obviously is not self-defining; in giving effect to such a concept, the Court would be required to develop a new regime of substantive abortion rights. Like the regime it would replace, this new system would lack any moorings in the Constitution and would quickly reintroduce the arbitrary linedrawing characteristic of *Roe*. And because it would hold forth the promise of continued and intensive (albeit not strict) judicial arbitration of the competing interests, it would undermine the attempts of the legislative branch to negotiate a compromise among those interests. If such a political resolution of the abortion controversy is ever to become a reality, the Court must unequivocally announce its intention to allow the States to act "free from the suffocating power of the federal judge, purporting to act in the name of the Constitution." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. at 93 (White, J., dissenting).[16]

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[16] If the Court does adopt an "undue burden" analysis, we think the appropriate characterization of the liberty interest that must not be burdened is not a "right to abortion," but rather an interest in procreational choice—"whether or not to beget or bear a child" (*Carey* v. *Population Services International*, 431 U.S. 678, 685 (1977)). Thus, in asking whether any particular state regulation imposes an undue burden, the relevant question would be whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking into account all of the options available to her, including abstinence and contraception. Under this type of analysis, a regulation that prohibits the use of abortion as a form of routine family planning might not be regarded as imposing an undue burden, because it could not be said in this context that a woman lacks a meaningful opportunity to exercise procreational choice. On the other hand, a regulation that prohibits abortion in cases of rape or incest presumably would entail an undue burden, because in such cases, where the pregnancy is the result of coercion, a woman has not been afforded a meaningful opportunity to avoid pregnancy through alternative means. We reiterate, however, that these judgments are more appropriately drawn by legislatures rather than courts.

In a recent study of the abortion laws of 20 Western countries, a leading comparative law scholar reported two striking conclusions. M.A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987). First, under the abortion regime established by *Roe*, "we have less regulation of abortion in the interest of the fetus than any other Western nation * * *." *Id.* at 2.[17] The fact that the regime established by *Roe* is out of step with the legislative judgment of virtually every other country with which we share a common cultural tradition by itself suggests that the decision ought to be reconsidered. Second, and more fundamentally, "[t]o a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue." *Id.* at 2.[18] The survey indicates that

[17] Professor Glendon reports that two countries (Belgium and Ireland) have blanket prohibitions against abortion in their criminal law, subject only to the defense of necessity. Four countries (Canada, Portugal, Spain, and Switzerland) permit abortion only in early pregnancy and only in restricted circumstances, as where there is a serious danger to the pregnant woman's health, a likelihood of serious disease or defect in the fetus, or where the pregnancy resulted from rape or incest. Eight countries (England, Finland, France, West Germany, Iceland, Italy, Luxembourg, and the Netherlands) permit abortion in early pregnancy in a wider variety of circumstances that pose a particular hardship for the pregnant woman. Five countries (Austria, Denmark, Greece, Norway, and Sweden) permit elective abortions in early pregnancy, though abortions are strictly limited thereafter. Glendon, *supra*, at 13-15 & Table 1. Only in the United States is elective abortion permitted until viability. *Ibid.*

[18] After the publication of Glendon's book, the Canadian Supreme Court struck down its abortion law on grounds similar to those stated in *Roe* v. *Wade*. See *Morgentaler* v. *Her Majesty the Queen*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988). The West German high court, by contrast, had earlier struck down a law liberalizing access to abortion on the grounds that "life

democratic legislatures are fully capable of reaching a resolution of the competing interests in the abortion controversy. Indeed, the fact that this issue touches or can touch nearly everyone's life—not just those representing a special interest or defending a discrete and insular minority—means that it should be capable of resolution through the process of political dialogue. In short, unless the American political culture is somehow radically different from that of other countries with which we share a common heritage, it would appear that there is nothing inherent in the abortion controversy, or the sharply conflicting interests and viewpoints in this area, that makes it uniquely resistant to legislative resolution.

Under the Constitution, legislative bodies cannot impose irrational constraints on a woman's procreative choice. But within those broad confines, the proper scope of abortion regulation "should be left with the people and to the political processes the people have devised to govern their affairs." *Doe* v. *Bolton*, 410 U.S. at 222 (White, J., dissenting). The effect of the decisions in *Roe* and its progeny has been "to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." *Poe* v. *Ullman*, 367 U.S. at 546 (Harlan, J., dissenting). The time has come to end this "difficult and continuing venture in substantive due process." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. at 92 (White, J., dissenting).

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developing within the womb is constitutionally protected." See *Judgment of Feb. 25, 1975*, 39 BVerfGE 1 (quoted in Glendon, *supra*, at 26).

II. THE STATE OF MISSOURI IS NOT REQUIRED BY THE CONSTITUTION EITHER TO FUND PRO-ABORTION COUNSELING OR TO USE PUBLIC EMPLOYEES AND PUBLIC FACILITIES TO PERFORM ABORTIONS

The State of Missouri has chosen not to encourage or assist abortions in any respect. We believe that is a permissible choice, even assuming the continued vitality of *Roe* v. *Wade*. Missouri's prohibitions on the use of public funds to counsel a woman to have an abortion and on the use of public facilities and public employees to perform abortions should therefore be upheld even if this Court's abortion precedents remain intact.

A. Missouri's prohibition on the use of public funds to encourage or counsel a woman to have an abortion not necessary to save her life is not unconstitutionally vague. This Court has stressed that civil statutes are not to be held to the same standards of precision as criminal statutes, *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). Missouri's prohibition on the use of public funds does not impose any criminal penalties and can be enforced only by injunctive action. See J.S. 3; Mo. Stat. Ann. §188.220.[19] In any event, it cannot be said that the statute is "so vague that 'men of common intelligence must necessarily guess at its meaning.'" *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973) (citation omitted).

As the State of Missouri explains (J.S. 25), the statute "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Rather, the statute forbids only the use of public funds to advise a woman that she should have an abortion that is not

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[19] The court of appeals suggested (J.S. App. A67) that Missouri's prohibition must meet a higher standard of precision because it "implicates both first and fourteenth amendment rights of both physicians and their patients." As explained below, however, the law does not in fact burden any fundamental rights and, thus, no heightened scrutiny is appropriate.

necessary to save her life. See Mo. Stat. Ann. §188.205. "[A]lthough [that prohibition] may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC* v. *Letter Carriers*, 413 U.S. 548, 579 (1973). See *Planned Parenthood* v. *Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983) (state prohibition on the use of state funds for "counseling for abortion procedures" not unconstitutionally vague).

The court of appeals was also mistaken in holding that the Missouri statute violates the right of pregnant women to have an abortion. Missouri has merely decided not to encourage abortions in any respect, and this Court has already held that the States are not precluded from making "a value judgment favoring childbirth over abortion, and * * * implement[ing] that judgment by the allocation of public funds." *Maher* v. *Roe*, 432 U.S. at 474. The State of Missouri is not "erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth" (J.S. App. A72). While the State has chosen not to urge women to have elective abortions, women in Missouri are still free to make a contrary choice and to seek out medical advice and encouragement consonant with their decision.

In a separate opinion, Judge Arnold suggested (J.S. App. A83) that Missouri's prohibition violated the First Amendment because it "sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it." See also Mot. to Aff. 13. The State of Missouri does not, however, impose any restrictions on speech by private parties. Nor does it impose any limitations on the type of counseling or advice that a pregnant woman may receive from private sources. It is simply implementing its legislative preference for childbirth over

abortion by declining to devote public resources to encouraging or counseling women to have abortions.

"Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher* v. *Roe*, 432 U.S. at 476. A State may thus spend state funds to encourage activities deemed to be in the public interest without simultaneously funding activities that are inconsistent with state policy. *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). "The Constitution presumably does not engraft an 'equal time' requirement onto the dispensation of state funds for the encouragement of matters reflecting a legitimate state interest." *Planned Parenthood Ass'n of Chicago* v. *Kempiners*, 700 F.2d 1115, 1128 (7th Cir. 1983) (Cudahy, J., concurring).[20] "There is a basic difference," this Court has noted (*Maher* v. *Roe*, 432 U.S. at 475), "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

B. The court of appeals also held (J.S. App. A79) that "the state's desire to discourage abortions" is an insufficient justification for Missouri's prohibition on the use of public facilities and public employees to perform or assist abortions that are not necessary to save the life of the mother. The court concluded that as long as the patient pays for the

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[20] Recipients of federal funding under Title X are required to counsel clients concerning various methods of birth control. As a consequence, Catholic organizations have largely refused to participate in the Title X program. No one suggests, however, that Title X therefore violates the First Amendment. Catholic organizations are still free to counsel against the use of any artificial method of birth control, and they are not "penalized" in any respect for doing so. They are simply unable to take part in a government-sponsored program with a different purpose. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980). See also *Maher* v. *Roe*, 432 U.S. at 474-475 n.8.

services in question, the State has no legitimate grounds for not providing them. In effect, the court of appeals has held that the Constitution compels Missouri to go into the abortion business, provided the State can break even or turn a profit in doing so. But there is no legal basis for the rule that what the government cannot ban, it must sell if it can do so profitably. This Court has stressed (*Maher* v. *Roe*, 432 U.S. at 474) that a woman's "freedom to decide whether to terminate her pregnancy * * * implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." The same principle applies when the State chooses to implement its value judgment by the allocation of public facilities and the services of public employees.

The court of appeals' decision on this question cannot be reconciled with *Poelker* v. *Doe*, 432 U.S. 519 (1977) (per curiam), in which the Court upheld a decision by the City of St. Louis not to perform abortions in city hospitals. Although the suit in *Poelker* was filed by an indigent who could not afford to pay for her abortion, the prohibition at issue in that case applied whether or not the pregnant woman was able to pay. 432 U.S. at 520; *id.* at 524 (Brennan, J., dissenting). Furthermore, the suit was brought by the plaintiff "on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies."–497 F.2d 1063, 1065 (8th Cir. 1974). The complaint sought general relief from the City's policy against providing abortion services, not simply relief for indigents. 515 F.2d 541, 542 (8th Cir. 1975). In rejecting this broad challenge, this Court stated (432 U.S. at 521) that, whatever other medical services it provides, the City of St. Louis has no constitutional

obligation to provide "services for nontherapeutic abortions."

The court of appeals' conclusion that Missouri's refusal to perform abortions creates an "undue burden or obstacle to the free exercise of the right to choose an abortion" is unfounded. The State is not placing restrictions on the right of women to seek abortions from private sources. It is simply refusing to provide abortion services itself. We are informed by the State of Missouri that there are more than 9,000 licensed physicians practicing in the State; only 292 (or less than 4%) work full-time or part-time for the State of Missouri. There are more than 160 private hospitals and clinics in the State, and only 19 state hospitals. Under these circumstances, the State's decision to stay out of the abortion business cannot be said to erect an impermissible obstacle to a woman's effort to seek an abortion.

Furthermore, the court of appeals' conclusion (J.S. App. A79) that Missouri's prohibition on the use of public facilities and public employees to perform or assist abortions must be supported by a "compelling state interest" runs directly counter to this Court's statement that it is "abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth" (*Maher* v. *Roe*, 432 U.S. at 477). Whether that policy choice is implemented by the State's allocation of public funds, public facilities, or public employees acting within the scope of their employment is constitutionally irrelevant.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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FEBRUARY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00119

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 13 1989

(5)

Case No. 88-605

Supreme Court Of The United States

October Term 1989

WILLIAM L. WEBSTER, STATE OF MISSOURI

Appellants,

vs.

REPRODUCTIVE HEALTH SERVICE: Planned Parenthood of Greater Kansas City; Howard I. Schwartz, M.D.; Robert L. Blake, M.D.; Carl C. Pearman, M.D.; Carroll Metzger, R.N.C.; Mary L. Pemberton, B.S.W,

Appellee.

On Appeal from
the United States Court of Appeals
For the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF JAMES JOSEPH LYNCH, JR. AS *AMICUS CURIÆ* IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

As Rephrased by *Amicus Curiæ*:

(1) Do physicians or other medical personnel have standing to contest the constitutionality of state regulation of abortion?

(2) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, and therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

(4) Is state statute facially unconstitutional that attempts to regulate an abortion, not necessary to save the life of the mother?

As framed by the parties (57 LW 3315):

(1) Do physicians or other medical personnel have standing to contest the constitutionality of state legislative preamble in abortion statute?

(2) Are legislative findings in preamble to state abortion bill that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well being" facially unconstitutional?

(3) Where statute requiring determination of fetal viability when physician "has reason to believe" that fetus is "of 20 or more weeks gestational age" has been held to be constitutional, is it facially unconstitutional to require that, in making this determination, physician shall cause to be performed such "medical examination and tests as are necessary to make finding of gestational age, weight, and lung maturity of unborn child . . . ."?

(4) Is state statute facially unconstitutional that makes it "unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life."?

(5) Is state statute facially unconstitutional that makes it "unlawful for any public employee within scope of his employment to perform or assist an abortion, not necessary to save the life of the mother."?

(6) Is state statute facially unconstitutional that makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother."?

(7) Should *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting test by which state regulation of abortion services is reviewed be reconsidered and discarded in favor of a rational basis test?

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Appellee.

On Appeal from
the United States Court of Appeals
For the Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIÆ* BRIEF*

James Joseph Lynch, Jr., respectfully moves this Court, pursuant to Rule 36, for leave to file the accompanying brief of *amicus curiæ* in support of appellant.**

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar

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* A table of contents and table of authorities follows at pages (vi) and (viii) respectively.

** Appellants Attorney General William L. Webster and the State of Missouri have consented to the filing of this brief. Appellees have not so consented, and therefore it is necessary to request leave to file.

of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He is a professor of Law, University of Northern California, Lorenz Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copy righted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and as such, a decision herein will affect not only the Laws of the State of Missouri, but the State of California wherein *amicus* resides, and effects what public funds and resources a state may, or may not expend, on abortions, which in *amicus*' belief constitutes the destruction of human life. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.[3] If, as contended here, a fetus is a human life, then *amicus* has an interest as a taxpayer to insure that no public funds or resources are utilized for purposes which are *contra bono mores*, or illegal.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses, have been unrepresented or under-represented in any court

[3] It is certain that the atrocities began at least as early as 1938. 6 Enclopædia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8, 1941 and then only because of events in Hawaii. 22 Id 681b, following.

in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced that the court was misled as to the meaning of personhood in that arguably a fetus is a member of posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of posterity, but due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

It is *amicus*' desire, *pro bono publico*, to present to this court, from the fetus' point of view, the rights of the fetus, as it appears to be found in the term Posterity in the Preamble of the Constitution of the United States of America.

Dated: February 12, 1989

Respectfully submitted,

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Farrand, Max, The Constitutional Debates, vol. 2, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651 15
Halbury's Laws of England (1st ed, 1911), vol. 17, Infants ¶¶ 132, 135 ..... 16, 17, 18
Hobb, Leviathan (1651) 15
International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 19
Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health &

Medical Guide (1979), page 93 17
Landmark Briefs and Arguments of the Supreme Court of the United States, vol. 75 6
Laqueur, The Human Rights Reader 15
Locke, Second Treatise of Government (1690) 15
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Appellee.

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For the Eighth Circuit

BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIÆ*

The Interest of the *Amicus* is set forth *ante* in the Motion for leave to file this brief.

STATEMENT OF THE CASE

Health care professionals and facilities offering abortion counseling and services and pregnant women seeking abortion services or pregnancy counseling brought a class action seek-

ing declaratory and injunctive relief challenging constitutionality of several sections of Missouri's statute relating to regulation of abortions. The trial court declared several portions of the statue unconstitutional and permanently enjoined their enforcement. 662 F.Supp. 407.

Appellants herein appealed to the Eighth Circuit. 871 F.2d 1071. The court of appeals held that (1) section of statute requiring abortions performed at 16 weeks gestational age or later to be performed at hospital was unconstitutional; (2) state could not dictate either test or findings which enter into physician's decision whether fetus is viable; (3) section which declared that life began at conception was unconstitutional; (4) section which prohibits public funds, employees, and facilities from being used for "encouraging or counseling" women to have abortions not necessary to save mother's life was unconstitutional; (5) section prohibiting use of public facilities for abortion not necessary to save life of mother was unconstitutional when no public moneys were expended; (6) section prohibiting public employees from performing abortions not necessary to save mother's life was unconstitutional when no public moneys were expended; and (7) section prohibiting use of public funds for performing or assisting abortion not necessary to save life of mother did not violate Eighth Amendment rights of pregnant female inmates.

SUMMARY OF ARGUMENT

1. It is clear from precedents in this court that health care professionals have standing in cases such as that here where the asserted state action regulates the patient-doctor relationship.

2. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in

fact should be rejected for reasons set forth hereinafter.

3. While the Preamble of the Constitution does not create any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be reversed as unsound and contrary to the intent of the framers.

4. Because a fetus is human life and a person in the constitutional sense, and the state has a valid and legitimate right to protect human life, recognized as an international duty, and imposed as a duty in the Constitution of the United States, the abortion regulations under scrutiny are constitutional.

Conclusion. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, affirm the decision of the Eighth Circuit at 871 F.2d 1071 as to standing, reverse the decision as to the constitutionality of the Missouri Statutes, and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

THE APPELLEES HAVE STANDING TO CHALLENGE THE REGULATIONS UNDER SCRUTINY

This court has made it clear that medical personnel have standing by virtue of their economic stake in their relationship with patients to challenge contraceptive and abortion statutes. *Generally, Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Singleton v. Wulff*, 428 U.S. 106 (1976), and their *progeny*. Because standing is nothing more than this Court's self imposed rules

of restraint that "one to whom application of the statute is constitutional will not be heard ...." (Ibid), and not a constitutional question on the merits, there is no reason in this case to depart from *stare decisis*. Therefore, clearly, appellees have standing, and therefore this court should affirm that portion of the opinion found at 871 F.2d, at 1076, as to standing.

II

STARE DECISIS IN LESS BINDING ON THIS COURT ON CONSTITUTIONAL QUESTIONS EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court overruled, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown III*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown III*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 289, 294, 298 (Nature of remedy to be utilized).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country, abortion controversy has led to disorder in the streets.[1]

This court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively, and remand for further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

III

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th

[1] It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the privacy of their own bedroom to engaged in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). There is no case that has ever reported that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse of taking the life of a fetus in violation of state law.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7. That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[2] *Cruikshank*, *supra*, 92

[2] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus en-

U.S. (2 Otto), at 549.

C. The Constitution was Established "By The People"[3]

The Constitution,[4] in the Preamble, declares that "We the People" do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain

large the class of persons who are citizens.

[3] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

[4] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

every thing they have no need of particular reservation, 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A8.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[5] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen.

[5] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

532, 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were secured. Webster's Dictionary of the English Language, 1968.

"Ourselves" is a pronoun, the plural of "ourself", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

Posterity, as it appears in the Preamble, has not been defined by the Supreme Court, therefore we must turn to what

the framer's understood it to mean at the time the constitution was adopted in 1789. *Ante*, footnote 3, and the citations therein.

"Posterity", at the time of the Framers, was defined as "1. The descendants collectively of any person; all who have proceeded from a common ancestor. 2.+.a. A later generation (with plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523.

The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 3, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can

the issue of the womb." Milton, John, "Aeropagitica" (1644).[6] At common law, it was understood that certain members of future generations, fetuses,[7] were a life in being for the purposes of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[8] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law concepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

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[6] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[7] That a fetal has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press, 1965). The Old Testiment provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[8] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "our selves", it is necessary to determine whether the framer's[9] intended that the rights be vested. Ante, footnote 3, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[10] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650. Therefore, the framer's must have had a different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the

[9] Of the 39 signers of the constitution, at least 8 were lawyers (of which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[10] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable** Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

rule against perpetuities because there would be members of the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore, another meaning consistent with the framer's intent must be found. *Ante*, footnote 3, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349; 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 3, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409; *Haward v. Howe*, 12 Gray (Mass.) 49; *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162; *Gay v. Scates*, 37 Pa 31; *Larew v. Larew*, 146 Va. 134, 135 S.E. 819. Such a situation commonly arises if a conveyance[11] or devise in fee has been made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was in-

[11] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amendment IV (Secure in their persons, houses); Amendment V (nor be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation ....).

tended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925; *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164, 32 S.Ct. 50, 56 L.Ed. 144 (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[12] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1. Y.B. 12 Edw. IV, Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 3, and the citations therein.

H. Posterity, including a fetus, has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from "posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

[12] 13 Edw. I, c. 1.

Implicit in the Preamble is the concept that the Constitution is to be a social contract. Eg, Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, op cit, p. 663, note 1. Thus it is implicit that acceptance could only be by those not suffering from a disability, ie., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[13] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

As persons who have not reached the age of capacity[14] could not consent, Chitty, op. cit., it would appear that adults are of the class "our selves," and all others of the class "Posterity."

[13] Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id*, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966).

[14] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925; *17* Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. As already noted, ante p. 10-11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)!. The unborn was a life in being for purposes of the rule against perpetuities. Gray, op.cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framer's that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

I. A fetus is life within the meaning of the 5th Amendment

The Constitution provides, in relevant part:

"No person shall be, ... deprived of life ... without due

process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *Eg, Flash v. Cohen*, 392 U.S.83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135, to be heard on the question as to whether its life should be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

It would appear that a fetus has all of the characteristics of life:[15] excretion,[16] ingestion,[17] respiration,[18] irritation,[19] and reproduction.[20] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[21] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[22] Finally, the

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[15] Biology: Observation & Concept by Case & Steirs (1971), p. 110.

[16] Id, pp. 122, 141, 143, 149-150.

[17] Id, pp. 70, 80.

[18] Id, pp. 8, 51, 64, 77.

[19] Id, irritation, pp. 267, 329, 330.

[20] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329.

[21] Id, pp. 324-327.

[22] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gyne-

courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generation, with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135. Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[23] *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

IV

A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id*, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person from due process in American Jurisprudence is derived from the *Magna Carta* (1215). McK-

cology, Family Health & Medical Guide (1979), page 93.

[23] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

echnie,[24] *Magna Carta*; the Great Charter of King John. The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, Missouri has a legitimate interest in providing for the protection of fetal life. It's citizens, and the citizen's of every state has an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. Eg, International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).

This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. And it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for

[24] McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

Based on the foregoing, Missouri's statutes which do nothing more than to regulate abortions is a legitimate governmental function imposed by international law and the U.S. Constitution. It does not absolutely bar abortions, but does insure that life is not arbitrarily taken.[25]

CONCLUSION

Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) prospectively, affirm the decision of the Eighth Circuit at 871 F.2d 1071 as to standing, reverse the decision as to the constitutionality of the Missouri Statutes, and remand for further proceedings not inconsistent with this Court's opinion.

Dated: February 12, 1989

Respectfully submitted,

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a

[25] Indeed, arguably Missouri, misled no doubt by *Roe*, has not gone far enough in the protection of fetal life because it appears not to attempt to regulate pregnancy before the 20th week. But that issue is not now before the court, although under *Brown I* and *Brown II*, this Court could, land probably should, consider that issue as well.

EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitilization is exactly as found in Farrand's which faithfully follows the manucript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parenthese represent parts crossed out. Italics represent later insertions."

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Franics Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report ofthe Committee of detail as follows: < a printed copy being at the same time

furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer thereport to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceeding Constitution be laid before the United States in Congress assembled,and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine thereport respecting the 22nd and 23rd --- 9; noes --- 1.] Ayes

*****

To strike out the word "to" before establish justice --- 8; bites --- 2,] Ayes

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled inorder to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

AMICUS CURIAE

BRIEF

No. 88-605

In The Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL., APPELLANTS

v.

REPRODUCTIVE HEALTH SERVICES, ET AL., APPELLEES

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR LARRY JOYCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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(312) 282-5398

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TABLE OF AUTHORITIES

Cases:

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Buel v. United Railways Co., 248 Mo. 126, 154 S.W. 71 (1913)...	12
Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 887 (1972).....	10
Campbell v. U.S., 365 U.S. 85 (1961).....	57
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Furman v. Georgia, 408 U.S. at 309..... 17

Jones v. Mayer, 392 U.S. 409 (1968)..... 44

Keeler v. Superior Court, 2 Cal.3d 619, 87 CalRptr. 481, 470 P.2d 617 (1970)..... 10,12

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Levy v. Louisiana, 391 U.S. 68 (1968)..... 7, 8, 53, 54

Lilienthal's Tobacco v. U.S., 97 U.S. 237 (1877)..... 57

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McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D. Pa.1972)..... 9

Mills v. Commonwealth, 13 Pa. 630 (1850)..... 33, 35, 45

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Montana v. Rogers, 278 F.2d 68 (CA7 1960), aff'd sub nom. Montana v. Kennedy, 366 U.S. 308..... 10

Nugent v. Brooklyn Heights R. Co., 154 App.Div. 667, 139 N.Y.Supp. 367 (1913)..... 13

People v. Chavez, 77 C.A.2d 621, 176 P.2d 92 (1947)..... 12

Roe v. Wade, 410 U.S. 113 (1973).... 4, 6, 8, 9, 17, 20, 25 30, 34, 35, 38, 39, 47, 48

Sierra Club v. Morton, 405 U.S. 727 (1972)..... 18, 19

Scott v. McPheeters, 33 C.A. 2d 629, 92 P.2d 678 (1939)... 12, 15, 51

Slaughter-House Cases, 16 Wall. 36, 21 L.Ed. 394 (1973). 46

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State v. Cooper, 22 N.J.L. 52 (1849)..... 34, 35, 45

State v. Dickinson, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971)..... 10, 12

State v. Jones, 2 Miss. (1 Walker) 39 (1820)..... 33

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U.S. v. Price, 383 U.S. 787. 44

U.S. v. Vuitch, 402 U.S. 62 (1971)..... 8, 10

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Webster v. Fall, 266 U.S. 507 (1925)..... 8

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29 Am.Jur.2d Evidence sects. 122, 124-126, 130-131..... 57

63A Am.Jur.2d Property sects. 1-3..... 49

Biological Sciences Curriculum Study (BSCS), Biological Science: Molecules To Man (Blue Version) (1963)..... 28

Black's Law Dictionary (5th ed.)..... 49

Blackstone, Commentaries *129-130..... 17

Brown, Biology (2d ed.) (1961). 28

California Medicine (now known as The Western Journal of Medicine), Sept. 1970 at 67..... 29

Cong. Globe, 39th Cong., 1st Sess. 1089, 2766 (1866)..... 41, 42

3 Cong. Rec. 1794 (1875). 42

Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U.Pitt. L.R. 359 (1979)..... 13, 34

Dukeminier and Krier, Property, 5 & 58 (1981)... 49

E. Gardner, History of Biology, (1972).....24, 26, 27, 28

Gorman, A Balancing Act of Life and Death, Time, Feb. 1, 1988 at 49..... 47

Greep and Weiss (eds.), Histology (3d ed.) (1973).. 24

Hafez and Kenemans (eds.), Atlas of Human Reproduction By Scanning Electron Microscopy (1982)..... 24

3 Inst. 50 21

D. Kraemer, Intra- and Intra-Specific Embryo Transfer, Journal of Experimental Zoology, Nov. 1983, vo. 228, at 363..... 58

L. Magner, A History of the Life Sciences, (1979)..... 24, 26, 27, 28

E. Mayr, The Growth of Biological Thought: Diversity,

Evolution, and Inheritance (1982)..... 26

New York Times, Jan 8, 1984, sect. 6, at 42, col. 1..... 58

Note, 21 Ariz.L.Rev. 755 (1979)..... 58

1 P.Wms. 345..... 21

Planned Parenthood pamphlet (1963)..... 28

H. Ratner, Is It a Person or a Thing? (1966)..... 28

C. Rice, The Dred Scott Case of the Twentieth Century, 10 Houston L.Rev. (1973)..... 28

Simpson, Life: An Introduction to Biology, (1957).... 28

R. Taton (ed.), History of Science: Science in the Nineteenth Century (Vol. 3) (1964)..... 26

The Western Journal of Medicine (See California Medicine)..... 29

H. Tiefel, The Cost of Fetal Research: Ethical Considerations, The New England Journal of Medicine, Jan 8, 1976 at 86..... 49

12 Trans. of the Am.Med. Assn. 75-76 (1859)..... 25

von Frisch, Biology (1964).. 28

Webster's Ninth New Collegiate Dictionary (1987)..... 49

INTEREST OF LARRY JOYCE

The amicus is a pharmacist and an attorney who wishes to ensure that the issues pertaining to the relationship between personhood in biology and personhood in law are adequately discussed. Most of the research for this brief was done while the amicus was completing six units of independent study on Roe v. Wade while in law school.*

SUMMARY OF ARGUMENTS

The Court need not reach Roe v. Wade before considering the personhood status

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* Special thanks to Bill Anderson, Ronald E. Harbut, M.D., Dan Joyce, and Rev. Jerry Peyton for their assistance in the preparation of this brief.

Special thanks also to Prof. Roy G. Spece, Jr., College of Law, University of Arizona, and to my classmates in the Law and Medical Technology seminar, Fall Semester, 1984, for their help and constructive comments and criticisms, without which this brief would not have been possible.

of prenatal human life. The basic premise of Roe is that a woman has a constitutional right to terminate her pregnancy. Personhood status for prenatal human life would only affect the de facto applications of Roe; it would not affect the validity of Roe de jure.

Prenatal human life must be afforded personhood status within the meaning of the Fourteenth Amendment. The cases cited in Roe for the contrary conclusion are not precedents for the proposition that prenatal human lives are not persons. Those cases were decided either on the basis that prenatal human lives are not persons in locus standi or on the basis that defendants' rights prevented the application of Tort and Criminal law in most cases.

Scientists of the 1860's thought we would literally change species in our mothers' wombs, starting life perhaps as a fish, then becoming a bird, and then an

ape before finally becoming a human being only at the very end of pregnancy. That being the case it is not likely that a court would have been willing to recognize a presumption of personhood that would have brought under the scope of federal law an area that had always been left to the states. But a finding can be made by this Court today that the facts are sufficient to establish the presumption, for a presumption is established or rebutted according to the facts as they are known. And since this is a finding of whether the facts are sufficient to establish the presumption, rather than a finding of fact per se, this Court would not be saying that it is a fact of science---or of any other discipline---that human life begins at conception.

The holding sought by this brief will not alter the role of the judiciary viz a viz the legislature. The fact-find-

ing powers of the legislature will still be needed, and the mere provision of different penalties and liabilities for abortion will not suffice to establish a denial of equal protection or due process. The legislature will be able to treat pregnancies resulting from rape or incest different from other pregnancies. And matters pertaining to birth control methods which work after conception will still be almost entirely legislative questions.

ARGUMENT

I. THE COURT NEED NOT REACH ROE v. WADE IN ORDER TO CONSIDER THE PERSONHOOD OF PRENATAL HUMAN LIFE WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

The basic premise of Roe v. Wade[1]

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1. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

is that a woman has a constitutional right to terminate her pregnancy. A holding that prenatal human life must be afforded personhood status for purposes of the Fourteenth Amendment will not require overruling this basic premise. It would only mean that the states could not allow a woman a right to terminate her pregnancy in a manner which would cause such right to constitute a denial of Due Process and Equal Protection on the part of the state. Granted, in the context of present medical technology, this would place much of Roe temporarily on hold in its applications; for it would probably mean that unless self-defense were applicable, a woman could terminate her pregnancy only after the child became viable, and that the pregnancy could be terminated only in a manner reasonably calculated to produce a live birth (i.e. by induced la-

bor or by Cesarsean section). Nevertheless, artificial gestational technology is on the rise,[2] and the day may be near when the important interests of Roe can be vindicated early in pregnancy without threatening prenatal human life. Thus, though the question of prenatal personhood is central to the de facto application of Roe, it is not central to the validity of Roe de jure.

Granted, this Court said in Roe that the State of Texas could not, by adopting one theory of life, override the right to terminate a pregnancy. But by that point in Roe this Court had already found that prenatal human life would not be afforded personhood status within the meaning of the Fourteenth Amendment.[3] Thus, this Court was not saying that the constitu-

2. See infra note 45 and text.
3. 410 U.S. at 162.

tional status of personhood, if separately established, could not override the interests of the mother; rather, it was only saying that a mere theory of personhood, which it had already found to be of less than the constitutional status of personhood, could not override such interests. Later cases based on Roe assumed this nonpersonhood status.

In considering whether to overrule this nonessential point of Roe, this Court should bear in mind what it has already recognized: stare decisis plays a different role in constitutional law than it does in the common law.[4]

The Court should adhere to the wisdom of an earlier case, Levy v. Louisiana, in which this Court said,

> "We start from the premise that illegitimate children are not 'nonper-

4. See note 14 of Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662, 667 (1974).

> sons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." [5]

The Missouri statute itself raises the issue of personhood. In light of the context in which it was enacted, it is evident that this was intended to raise the issue of this Court's holding of the non-personhood of prenatal human life under the Fourteenth Amendment rather than to be merely a finding of state law.

---

5. 391 U.S. 68, 70, 88 S.Ct. 1509, 1510-1511, 20 L.Ed.2d 436, 439 (1968). This Court noted in Roe that a finding of prenatal personhood would seem to overrule an implicit part of its holding in U.S. v. Vuitch, 402 U.S. 62 (1971). See 410 U.S. at 159. But this Court has recognized that prior cases are not precedents for points decided sub silencio. Webster v. Fall, 266 U.S. 507, 511 (1925). Further, Roe overruled a different part of Vuitch: the implicit statement that there is no constitutional right to terminate a pregnancy.

ARGUMENT

II. PRENATAL HUMAN LIFE MUST BE AFFORDED PERSONHOOD STATUS FROM THE MOMENT OF CONCEPTION ON FOR PURPOSES OF THE FOURTEENTH AMENDMENT.

In Roe this Court wondered why it was that, if prenatal human life must be afforded personhood status under the Fourteenth Amendment, no court at or near the time of the adoption of that amendment had extended a full recognition of personhood to prenatal human life either for purposes of its own state law or for purposes of the Fourteenth Amendment.[6]

6. 410 U.S. at 157-158. The Court cited a line of cases to support its conclusion that a prenatal life is not a person. The court in McGarvey based its decision on the fear that great confusion in the law could result otherwise, apparently not realizing that being a person is not the same thing as being a person in locus standi. (See infra, notes 8 to 14 and text accompanying

This reading of the history of prenatal personhood was basically correct, though there were some exceptions which this Court apparently was unaware of. But in any event, this question which the Court posed is no mystery at all. First, with respect to common law, the hesitancy of the courts to hold that prenatal human life must be afforded personhood status reflects nothing more than the reluctance of the courts to charge someone with an offense which, prior to the act itself, had not been clearly considered an offense by the law. The courts felt them-

---

and immediately following.) The court in Bryn employed a conclusory analysis. In determining whether a prenatal human life is a person, the court said that such life has the potential to become a full-fledged human being. Thus, the court's conclusion was built into its analysis. The court in Abele made the same incorrect assumption regarding Vuitch as is mentioned in note 5, supra. (Cheaney, as indicated, supported the opposite conclusion.) Montana is inapposite; the issue there was citizenship, not personhood. Keeler is discussed in note 7, infra, as is Dickinson.

selves bound by stare decisis with respect to their own law, and by the rules of precedent generally with respect to cases of first impression, where they would look to the law of other states. Thus, the courts recognized their role viz a viz the legislature. A case in point: The Supreme Court of Kentucky said, "The limit of our duty is to determine what the law is, and not to enact or declare it as it should be." The court said further, "...the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation." The court also noted the discrepancy between personhood for purposes of civil law and personhood for purposes of criminal law, and said that the prosecutor should address this matter to "the law-making department of the government", and not to the court.[7]

7. Mitchell v. Commonwealth, 78 Ky. 204,

The appellate court of California would later come to note that the practical effect of the common law's general lack of recognition of the personhood of prenatal human life for purposes of crimes (or torts) against its person was that a presumption which operated in favor of the defendant had arisen in the law to the effect that at the time of the alleged injury, the prenatal life was either dead or would be stillborn.[8] Apparently this presumption was not expressly stated earlier, but the California court's insight does help illustrate the point that in the absence of legislation, the courts

209-210 (1879). See Scott v. McPheeters, 33 C.A.2d 629, 633-637, 92 P.2d 678, 680-682 (1939) and the authorities cited therein; also Buel v. United Railways Co., 248 Mo. 126, 154 S.W. 71 (1913), and Keeler v. Superior Court, 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970), and State v. Dickinson, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971).

8. People v. Chavez, 77 C.A.2d 621, 626, 176 P.2d 92, 95 (1947). Note: This was a different appellate district from McPheeters, supra note 7.

were not going to take from a defendant a right which he otherwise had in the law.

There were five other reasons for those courts to adhere to stare decisis. First, in claims based on a contractual relationship, there would have been no duty to the prenatal life.[9]

Second, there would have been evidentiary problems. This point, and many others which this Court considered important in Roe, are discussed by Professor Joseph Dellapenna in an excellent law review article.[10] The article is of great help in any comprehensive review of abortion.

With respect to evidentiary problems

9. Nugent v. Brooklyn Heights R. Co., 154 App.Div. 667, 139 N.Y.Supp. 367 (1913). (See also an Irish case, Walker v. Great Northern Ry. Co. of Ireland, 28 L.R. (Ire.) 69.

10. Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U. Pitt.L.R. 359 (1979).

the Supreme Court of Texas quoted the leading Irish case in this matter, in which the court noted the "boundless sea of speculation in evidence"[11] the court would find if it were to allow recovery for prenatal injuries.

Who could possibly testify as to the exact state of the prenatal life's health one moment prior to the injury to the mother, or one moment after? And with respect to Tort or Contract law, would this not make causation impossible to establish? And if, as a matter of law, causation were impossible to establish, would it come as any surprise that in the law of Torts and Contracts, the courts would recognize no duty to prenatal life, and thus no standing to sue?

The third reason for adhering to stare decisis is that allowing a person

11. See Walker, supra note 9, and Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944.

to sue for prenatal injuries would upset the Civil Procedure doctrines of res judicata and collateral estoppel as well as joinder of parties. For if a suit were to be brought on behalf of the child as a separate legal entity, it would be brought by the child's parents, whose claims might already have been settled or adjudicated. This would allow parents to circumvent a defendant's protection in the law against multiple litigation for the same claim. The parties would not be literally the same; but since the claim would be brought by the parents on behalf of the child, they would be effectively the same parties. And there would be a substantial temptation to fraudulently conceal an early pregnancy so as to bring a second claim.[12]

12. Daubert v. Western Meat Co., 139 Cal. 480, 69 P. 297, 73 P. 244. McPheeters, supra note 7, 33 C.A.2d at 638-640, 92 P.2d 683 and 684.

The fourth reason for adhering to stare decisis is that to do otherwise would have upset Family law. As the Illinois Supreme Court said,

> "If an action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it." [13]

The fifth reason is that overly harsh penalties could result in Tort and Criminal law. This would be particularly the case in Criminal law. One defendant who had struck the abdomen of a pregnant woman with one sharp blow that one would never suspect could cause death could face the gallows for killing the person within her; but another defendant who had beaten a nonpregnant woman to within an inch of her life with savage blows all about her body would be convicted only of

13. Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900).

assault and battery, or attempted homicide at most. The law can produce enough harsh results as it is; the courts, no doubt, would have been unwilling to add one more.[14]

Claims pertaining to prenatal injuries presented the courts with vexing problems, for one could easily sympathize with the would-be plaintiffs. But in light of the above principles of law, cases which denied recovery were, for the most part, properly decided. Those courts recognized that the issue before them was not whether a prenatal human life is in fact a person, whether by scientific criteria or otherwise; rather, they recognized that the only issue before them was

14. See 1 W. Blackstone, Commentaries *129-130. (cited in Roe 410 U.S. at 135.) In another context see Furman v. Georgia, 408 U.S. at 309 (Stewart, J., concurring) (application of the death penalty under the statute in question was cruel and unusual in the same way that being struck by lightning was cruel and unusual.)

whether a prenatal human life is a person _in locus standi_.

To hold otherwise would not just have overruled precedent on the limited point of whether a prenatal human life should have standing to sue. It would have wrought havoc in Criminal law and in the law of Contracts, Torts, Evidence, Civil Procedure, and Family Relationships. And since these cases were resolved on issues of standing and defendants' rights under precedent, the courts were precluded from reaching the issue of personhood per se. Thus, the courts effectively deemed the issue to be moot.

In _Sierra Club v. Morton_[15] this Court held that members of the Sierra Club could not bring suit in that case because they were not persons _in locus standi_; are we

15. 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed. 2d 636 (1972).

to conclude, on that basis, that members of the Sierra Club are not persons? Significantly, Sierra Club and Roe were originally brought up at the same time to review the issue of standing and other questions pertaining to jurisdiction; but for the fact that Roe was put over for reargument the next term, they both might have been decided by this Court on the same day. This Court's holding in Sierra Club was in keeping with the aforementioned common law holdings that claims must be limited only to persons with standing to sue; it was not a statement to the effect that those who do not have standing are not persons. (It should be noted, though, that Justice Douglas wrote in an imaginative dissent that one should not even have to be a person-in-fact, much less a person in locus standi, to bring suit. Two other justices, Brennan and Blackmun, also filed dissents.)[16]

16. 405 U.S. at 741, and at 755.

The questions of whether a prenatal human life had standing to sue in civil matters, and whether it was in esse for purposes of crimes against its person in criminal matters, were based on the law's overall view of prenatal human life. But this overall view was not based on just one way of looking at prenatal life; it was based instead on two views of the law which operated separately and independently of each other. One was a presumption which operated in favor of prenatal life. It brought such life within the broad meaning of the word person by enabling such life to sue, through a guardian, in certain instances.[17] This is a right which no animal, born or unborn, had. Thus, prenatal human life was always at least something higher up in the eyes of the law than an animal was.

17. This is discussed in Roe, 410 U.S. at 132-136.

The other view of the law focused on the rights of the defendant, the practical effect of which, as mentioned earlier, was to create a presumption that the prenatal life was dead or would be stillborn. If the prenatal life were born alive and later died as a result of the injuries suffered while still in the womb, the defendant could be prosecuted for murder, for the presumption would have been rebutted by the live birth of the child.[18] Thus, the law's overall view of prenatal human life did not arise by focusing solely on such life; the law's overall view was based on a presumption of personhood for prenatal human life, a recognition of defendants' rights under stare decisis, and questions of standing. The law's overall view did not constitute a statement that a prenatal human life was not a person; far from it, for the overall view included a presumption of personhood. The

18. 3 Inst. 50; 1 P.Wms. 345 (cited in Allaire, supra note 13, 184 Ill. at 371. (Boggs, J., dissenting).

law's overall view constituted a recognition that each person's rights in the law are subject to everyone else's rights in the law and to the principle that one had to be in proper standing to bring suit in order to assert a claim.

When this Court said in Roe that the common law's lack of recognition of the personhood of prenatal human life for all purposes constituted, in effect, a statement by the common law that a prenatal human life is not a person, this Court was reading something into those cases that was not necessary for their holdings. Thus, those cases do not constitute precedents for the proposition that a prenatal human life is not a person. If anything at all can be gathered from those cases, the fact that they would discuss questions of standing and defendants' rights under precedents implies that they recognized a presumption of personhood for prenatal hu-

man life; for if a prenatal human life were not a person at all, why would the courts even have bothered to discuss standing and defendants' rights?

A presumption, though not a finding of fact per se, is based upon the facts which give rise to the presumption. A look at the facts of prenatal development as the courts knew them will assist this Court in understanding the relationship between the knowledge of the facts of prenatal development and the presumption of personhood in law which the courts historically recognized.

In 1828 it was proven that prenatal human life is not preformed at conception, as some had thought. In 1839 it was shown that the cell is the basic unit of living things. By 1855 it was shown that the linings of the body cavities, including the reproductive tract,

are lined with epithelial cells (i.e. skin tissue) which are continuous with the skin of the outer body surfaces. Thus, prenatal life in the Fallopian tubes (where conception takes place) or in the womb itself can be deemed---in a strictly technical, biological sense---to be outside of the body.[19]

These new developments in biology led the American Medical Association to make a statement in 1859 calling for increased protection for prenatal human life. The AMA denounced the "wide-spread popular" belief that "the foetus is not alive till after the period of quickening." The AMA based its position on the knowledge of the "independent and actual ex-

19. E. Gardner, History of Biology, 245, 253-254, 314-319 (1972). L. Magner, A History of the Life Sciences, 203-204 (1979), Greep and Weiss (eds.), Histology (3d ed.) 107-137 (1973), and Hafez and Kenemans (eds.), Atlas of Human Reproduction By Scanning Electron Microscopy 7-11 (1982).

istence of the child before birth, as a living being." Contrary views, they noted, were "...based, and only based, upon mistaken and exploded medical dogmas."[20]

But just after the AMA published its statement, Charles Darwin published his theory of evolution. Biologists were already aware that embyros of different species, including our own, resemble one another at different stages in the womb. Thus, early in development, prenatal human life resembles embryos of fish, birds, and apes before finally appearing distinctly human only at the end of pregnancy.

With Darwin's theory gaining rapid acceptance in the scientific community, Fritz Muller put forth the idea in 1864 that individual development repeats evolution. Another biologist, Ernst Haeckel,

20. 12 Trans. of the Am.Med.Assn. 75-76. (This is cited in Roe, 410 U.S. at 141.)

became the main champion of this theory, and coined the phrase "Ontogeny recapitulates phylogeny" (i.e. the development of the individual repeats the development of the species). To Darwin, these observations were irrefutable proof that his theory of evolution was true, and he considered embryology to be the most important field of biology at that time. T.H. Huxley, who did more than any other 19th century biologist to champion Darwin's theory, made the statement that in the womb we climb the family tree of our ancestry. This theory was widely popular, and it did not fall into disfavor until the first decade of the 20th century.[21]

21. Gardner, supra note 19, at 255-256 and 303-304. Also, Magner, supra note 19, at 204-205. R. Taton (ed.), History of Science: Science in the Nineteenth Century (Vol. 3) 462-463 (1964) and E. Mayr, The Growth of Biological Thought: Diversity, Evolution, and Inheritance 474 (1982). (Note: The exact order of supposed ascendancy in the womb still had not been agreed upon when the discovery of the genetic basis of inheritance

In 1879 it was shown that the sperm and egg play equal roles in the development of a new individual, thereby disproving the various theories as to which, if either, dominated. And in the 1880's Louis Pasteur and John Tyndall finally disproved the theory of spontaneous generation. This theory stated that various plants and animals can come forth from inanimate matter without any parents.[22]

And it was not until the year 1900 that the genetic basis on inheritance came to light. In that year Hugo de Vries rediscovered the works of Gregor Mendel, which had gone unnoticed since 1866.[23]

Our genes fix at conception our indi-

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and species determination was brought to light in the year 1900. See infra notes 23 and 24 and text.)

22. Gardner, supra note 19, at 258 and Magner, supra note 19, at 251-253.
23. Magner, supra note 19, at 241.

vidual identity and what species we are a member of. They fix at conception how we shall be identified later in life in court, for it is then that our genes fix what our fingerprints shall be. They also fix at conception our pigmentation---the color of our eyes, skin, and hair---and they fix at conception our gender, as well as all of our other physical characteristics, such as the shape of the nose, ears, and the other basic contours and features of the face.[24]

By 1963 a Planned Parenthood pamphlet would state that an abortion "...kills the life of a baby after it has begun."[25]

24. Magner, supra note 19, at 437-468, Gardner, supra note 19, 399-426, von Frisch, Biology, 416, 442-48 (1964), Simpson, Life: An Introduction to Biology, 292 (1957), Brown, Biology (2d ed.) 237 (1961), Biological Sciences Curriculum Study (BSCS), Biological Science: Molecules To Man (Blue Version) 415-416 (1963).

25. H. Ratner, Is It a Person or a Thing? 20, 22 (1966), cited in Rice, The Dred Scott Case of the Twentieth Century,

But by the 1970's protection for prenatal human life was on the decline. And in an editorial in the September of 1970 issue of the official journal of the California Medical Association, an editorial which defended the ethic which abortion is based on, the author of the editorial noted society's

> "...curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected." [26]

Granted, those trained in medicine

10 Houston L.Rev. 1059, 1071, n. 64 (1973).

26. Editorial, A New Ethic for Medicine And Society, California Medicine (now known as The Western Journal of Medicine), Sept., 1970 at 67.

and biology do not agree on when human life begins when one uses theological or philosophical concepts such as ensoulment or other transcendent criteria to determine personhood. But simultaneously those trained in medicine and biology do not disagree on when human life begins when one uses only objective criteria to determine the beginnings of human life.

In Roe this Court found it significant that those trained in medicine, theology, and philosophy did not agree on when human life begins.[27] But in light of the Establishment Clause of the First Amendment, should one person's views of theology and philsophy be afforded sufficient weight to deprive another person of personhood status under the law? Objective criteria do not offend the Establishment Clause.

The significance of the fact that the

27. 410 U.S. at 159.

scientific community itself was aware that it did not yet have the answers to some of the fundamental questions of prenatal development is this: It shows that in holding that prenatal human life must be afforded at least some protection of the law, the courts could not possibly have been trying to resolve the underlying question of biology and medicine as to whether a prenatal human life is in fact a person. There weren't just a few details in biology that had to be cleared up at the time of Blackstone or at the time of the adoption of the Fourteenth Amendment. Whole concepts in biology had yet to be elucidated; entire pieces of the puzzle were missing.

Thus, instead of employing a fact analysis of personhood, the courts and the early commentators were employing a presumption analysis. The presumption that

there was life there that the law must protect would arise in response to a recognition of sufficient facts to establish such a presumption.

The presumption was never greater than the facts could establish at any given time, but it was never less than the facts could establish, either. In fact, it must have been relatively easy to establish, for Blackstone noted that some courts deemed it manslaughter to kill a prenatal human life long before any of the basic facts of biology had come to light.[28] And significantly, the acceptance of the idea by the scientific community that we change species in our mothers' wombs did not bring about a reversal of the presumption of personhood already present in the law by case and by statute.

The result which the courts would

28. See supra note 14.

reach in any given case seems to have depended on the court's reading of the history of the common law and question of whether the court would place more emphasis on the presumption operating in favor of the prenatal human life or the defendant's rights under precedent. In 1820, for instance, the Supreme Court of Mississippi expressed in dictum a preference for the presumption operating in favor of prenatal human life. At issue was whether a slave owner had committed a murder when he killed his own slave. The court held that a slave was a sufficiently "reasonable creature" to be a person protected by the homicide statutes, as would be "a lunatic, an idiot, or an unborn child."[29]

29. State v. Jones, 2 Miss. (1 Walker) 39 (1820). Accord, Mills, infra in text p. 35 ("By the well-settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception." 13 Pa. at 632); contra, Mitchell, supra note 7 ("...after a patient investigation,

In 1849 the Supreme Court of New Jersey held that an injury to an unborn child is a separate offense from the offense to the mother. State v. Cooper, 22 N.J.L. 52 (1849). The court further said that an unborn child is in esse rather than merely in posse for purposes of crimes against its person. The court also said that the protection of the law should extend to the first physical proof of life, which is how that court defined quickening.

One year later the Supreme Court of

we are forced to the conclusion that it never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child.") (Mitchell, 78 Ky. at 210. Such a highly polarized split of the authorities implies that the courts rarely had to face the matter one way or the other, for then the rule would have been clear to all. This, in turn, might mean that abortion was not common at this time. See Dellapenna, supra note 10; but see Roe, 410 U.S. at 158. ("...abortion practices were far freer than they are today...").

Pennsylvania employed essentially the same approach and held that under the common law, "...the civil rights of an infant en ventra sa mere are fully protected at all periods after conception...". Mills v. Commonwealth, 13 Pa. 630, 632 (1850).

The holding in Cooper was reaffirmed in 1858. State v. Murphy, 27 N.J.L. 112 (1858). The court in Murphy noted that the primary purpose of the abortion statute was to protect the life of the mother. This case was cited for that proposition in Roe. But according to the court in Murphy there was also another offense taking place---that of the mother, in submitting to the abortion, "...against the life of the child." 27 N.J.L. at 114.

With respect to constitutional law, it is not likely that the issue of prenatal personhood could have been properly

presented to the courts. Protection for prenatal life was on the increase, not on the decrease. And this would remain so until the second half of this century. Thus, a claim based on a denial of Equal Protection or Due Process would have been difficult to establish. For the mere existence of different penalties and liabilities for abortion would not suffice to establish a denial of Due Process or Equal Protection; this point is discussed later in this brief.[30] And if a denial of Due Process or Equal Protection could not be established, who could have standing to sue to establish personhood within the meaning of those clauses for prenatal life?

Furthermore, even if the issue were properly presented to a court in 1868, we would expect it to have been reluctant to recognize the personhood of prenatal human life under the Fourteenth Amendment

30. See infra notes 47 and 48 and text.

without a very great quantum of proof to establish a presumption of personhood, for to recognize the personhood of prenatal life under that amendment would bring an area that had been exclusively a matter of state law under the scope of the amendment. But that great quantum of proof does exist today.

The presumption analysis, rather than a fact analysis, is in keeping with the special competence of the courts to decide questions of law rather than questions of biomedical fact. It is particularly important for the courts to follow this approach with respect to a legal status, such as personhood, for a legal status is ultimately a question of law for the courts. If personhood is simultaneously, in contemplation of law, a question of the actual biomedical fact itself, then the

question of what does and what does not constitute a person would best be left to the legislature with its superior fact-finding capabilities.

But if a legal status depends upon whatever finding of fact a legislature chooses to make, then the protection offered by that status would have no meaning, for it could mean anything that the legislature would want it to mean---unless, of course, this Court, in reviewing the findings of fact, were also to make itself an ultimate finder of biomedical fact. This is what this Court seems to have done in Roe. For though the Court did establish a birth requirement, it did consider the question of personhood-in-fact to be an issue that had to be addressed. And, if that "difficult question" could ever be resolved by agreement among the respective disciplines

of medicine, theology, and philosophy, and personhood-in-fact established, then a prenatal human life would have to be deemed a person within the meaning of the Fourteenth Amendment.[31]

The question of what life must be afforded personhood status depends, of course, on what life the status of personhood has been affirmatively extended to by the Fourteenth Amendment. Granted, if the scope of personhood was meant to be restricted in nature, then entitlement to the status of personhood would have to be proven by showing that one is a member of a class specifically identified and recognized in the minds of the authors of that amendment. And in close cases, the benefit of the doubt would have to go to not recognizing personhood status.

Even with respect to adults person-

31. 410 U.S. at 159.

hood has always been a presumption rather than an analysis of fact. For genetics, the basis of species determination, was unknown until the year 1900. And even if genes had been known in 1868, the technology to analyze the chromosomes for species identification certainly did not exist.

What would be the case if an explorer had returned to the United States from a remote jungle in 1868 with a person suffering from gross congenital deformities and tried to sell him on an auction block, claiming that this being was not a person, but only a creature that looked like a person? Or what if the person he wanted to sell were a pygmie, either with or without congenital deformities? A tissue sample could not have been sent to a laboratory to check the chromosomes, which weren't even known to exist yet, for spe-

cies determination. It being that the factual basis for species determination was not known yet, we must realize that personhood in the eyes of the law has always been based on a presumption.

But if the status of personhood was meant to be broad in scope, and not restricted to any given group or groups of humanity, then entitlement to the status of personhood must be available to all those who can establish that they are within that broad scope of the word person.

The sponsor of the Fourteenth Amendment in the U.S. House of Representatives, John A. Bingham, said that the amendment was "universal" and that it applied to "any human being."[32] His counterpart in the Senate, Jacob Howard, said the amendment applies to "the humblest, the poorest, the

32. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

most despised." And, as U.S. Sen. Allen A. Thurman of Ohio would say a short time later, in 1875, the Equal Protection Clause

> "...covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws."[34]

These are persons who historically had been denied standing solely by reason of their membership in these classes and not by operation of the rules that otherwise pertained to standing. With respect to persons who are prenatal humans, the situation was different. The only reason they did not fall within the complete scope of many of the laws was because of the ordinary operation of the rules of standing, the need for the legislature to initiate any change in the law of Contracts, Torts, Civil Procedure, and Family

33. Id. at 2766.
34. 3 Cong. Rec. 1794 (1875).

Relations, and defendants' rights pertaining to Evidence, causation, and precedent. Thus, historically the law expressed even less hostility to persons who are prenatal humans than it did towards persons who are members of the well-recognized suspect classes. To hold that prenatal human lives are not persons turns the Fourteenth Amendment inside out, for it removes from an entire class of persons the protection which they had formerly enjoyed under the law. A holding that prenatal human lives are persons does not mean that they are entitled to special rules of standing, that defendants' rights must be diminished, or that the legislature may not be the law-making department of government in Contracts, etc. It means only that this Court has recognized the plain and simple status of their personhood, for the facts are sufficient to establish a presumption of their personhood.

What this Court said in the context of another civil rights case---that of how to construe the scope of the Civil Rights Act of 1866---gives guidance here:

> "As we said in a somewhat different setting two Terms ago, 'We think that history leaves no doubt that, if we are to give (the law) the scope that its origins dictate, we must accord it a sweep as broad as its language.' United States v. Price, 383 U.S. 787, 801, 16 L.Ed.2d 267, 276, 86 S.Ct. 1162. 'We are not at liberty to seek ingenious analytical instruments,' ibid., to carve from S 1982 an exception for private conduct---even though its application to such conduct in the present context is without established precedent. And, as the Attorney General of the United States said at the oral argument of this case, 'The fact that the statute lay partially dormant for many years cannot be held to diminish its force today.'"[35]

Significantly, not only would the presumption analysis be consistent with the case and statutory law of the time of the adoption of the Fourteenth Amendment, it probably would not have required this

35. Jones v. Mayer Co., 392 U.S. 409, 437 (1968).

Court to strike down any of those statutes or decisions on Fourteenth Amendment grounds, for it is not likely that the factual basis for clearly establishing the presumption would have existed at the time even if biologists did not believe that humans change species in the womb.

Further, in light of Cooper, Mills, and Murphy, the supreme courts of New Jersey and Pennsylvania would no doubt have been surprised to learn that their own states and the others as well had placed a birth requirement for personhood into the Constitution. They certainly never saw any reason to overrule those cases.

Of equal significance, a holding by this Court under the presumption analysis that prenatal human life must be afforded personhood status within the meaning of the Fourteenth Amendment would not run contrary to what this Court said in the

Slaughter-House Cases. This Court expressed therein the opinion that it was unlikely that claims alleging a denial of equal protection would ever be recognized except in cases pertaining to Negroes.[36] At issue in the Slaughter-House Cases was whether a particular form of state action (i.e. the legislation in question) denied a certain class of persons their right to the equal protection of the law. But here, with respect to the Fourteenth Amendment, there is no issue of whether this, that, or some other form of state action denies to any person the equal protection of the law. Rather, here the only issue is whether a prenatal human life is a person within the meaning of that amendment. For the Missouri statute is not being challenged on Equal Protection grounds. If this Court holds that prenatal human life must be afforded personhood status within the meaning of the Fourteenth Amendment,

36. 16 Wall. 36, 81, 21 L.Ed. 394, 410 (1873).

any question as to whether a particular form of state action denied to such persons the equal protection of the laws would be a matter for another claim and another case.

This Court's analysis in Roe can produce bizarre results utterly at odds with the purpose of the Fourteenth Amendment. Under Roe the mother may sell the organs of her nine month child within her for transplant operations on children who are already born. But the recipient child could be younger than the donor child if the recipient had been born prematurely. Under Roe the mother can still seek an abortion or let the child be born, leaving it, if she wishes, in an orphanage with no arms, no legs, and only one lung. Is[37]

37. Levine, Help From the Unborn, Time, Jan. 12, 1987 at 62. Gorman, A Balancing Act of Life and Death, Time, Feb. 1, 1988 at 49.

it a sufficient answer to say that even under Roe the state can probably place limits on this type of conduct? I think not. For if we do not recognize the personhood of prenatal human life in law, an entire class of persons is placed at the mercy of society to protect their rights if society should wish to do so. But without the status of personhood, the rights of prenatal persons among us will always be in doubt.

The field of fetal research can likewise produce results inconsistent with purpose of the Fourteenth Amendment. This was not an issue in 1868 because the technology to do this did not yet exist. But even Roe itself is not the main reason such research takes place, for it started before Roe. The reason this can take place is a lack of an adjudication of the personhood of prenatal human life. Hans O.

Tiefel, Ph.D., points out that the reason scientists are so eager to experiment on prenatal human life is that the fetus is life and a Homo sapiens. "Fetuses are the last of the unemancipated," he notes.[38] Fortunately, a lack of federal funding has kept such research in this country to a relative minimum so far.

And are there no Thirteenth Amendment rights here? The Thirteenth Amendment does not use the word person, but it does use the word slavery. One of the definitions of the word slavery is the ownership of a human being as chattel property. Under Roe, prenatal human life fits any legal definition of the word property.[39]

38. Tiefel, The Cost of Fetal Research: Ethical Considerations, The New England Journal of Medicine, Jan. 8, 1976 at 86.
39. Webster's Ninth New Collegiate Dictionary (1987). Dukeminier and Krier, Property, 5 and 58 (1981). Black's Law Dictionary (5th ed.) ("property" and "property right"). 63A Am.Jur.2d Property sects. 1-3.

Further, the presumption analysis is consistent with the actual choice of the word person itself. The Fourteenth Amendment does not define the word person; it thus takes its meaning, in contemplation of law, from the purpose for which it was chosen and from the body of law that it was taken from: the common law.[40] The meaning of the word person in the common law is, in turn, established by the overall view of the common law towards personhood. And, as we have seen, this included a presumption analysis. As the facts regarding prenatal development came more and more to light, this presumption would become so strong to the appellate court of Cali-

40. With respect to the Constitutional references to the word person, such as the census, trying to count prenatal life would have presented obvious problems; and since prenatal life was not counted in any state, no given state would be prejudiced. And with respect to immigration and fugitive slaves, whatever provisions affected the mother affected her prenatal life, anyway.

fornia that it would eventually go on to say,

> "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding." [41]

The reason prenatal human life still did not enjoy all of the protections and benefits of the law wasn't that the presumption wasn't sufficient to establish personhood. Rather, it was that the aforementioned reasons for adhering to stare decisis were still applicable.

In Roe this Court looked at the history of the common law and noted that e-

41. See McPheeters, supra note 7, 33 C.A. 2d at 634, 92 P.2d at 681. See also, Smith v. Brennan, 31 N.J. 353, 157 A. 2d 497, 502 (1960).

ven though the common law had extended some protection to prenatal human life, and had recognized personhood for such life for certain purposes, the common law had not recognized prenatal human lives as being persons in the sense that post-natal human lives are. This Court thus concluded that a prenatal human life is not a person within the meaning of the Fourteenth Amendment. But this was the wrong approach. It was, in fact, entirely backwards. For the common law, throughout its whole history, gave prenatal human life protection based on a presumption as great as the facts could establish at any given time that there was life there that the law had to recognize and protect. Thus, the whole history of the common law pointed not to a barrier against the protection of prenatal human life, but rather towards increasing protection consistent with such presumption as the facts

could establish.

Significantly, the aforementioned statement of this Court in Levy was this Court's only discussion of the issue of the personhood of illegitimate children.[42] Yet one could easily make the argument that they were not persons "within the meaning of the Fourteenth Amendment", or persons "in the whole sense", on the basis of the law's past treatment of their standing.

Since the analysis used to determine what is a person is an inherent part of the legal meaning of the word person, the application of the facts to the analysis does not constitute an expansion (or a narrowing) of the scope of the word person.

Furthermore, the presumption analysis

42. See supra note 5.

does not alter the relationship between the judiciary and the legislature. First of all, as stated previously, a presumption is based upon the facts which give rise to the presumption. Under the presumption analysis the courts would have been greatly assisted by the superior fact-finding capabilities of the legislature in the 1800's, when the facts of prenatal development were only just then coming to light. As noted earlier, the statutory law of the mid- to late-1800's was probably, in effect what we would have expected to see in the law if this Court had adopted the presumption analysis in 1868. At the present time there may be little or need for the legislatures' fact-finding capabilities. For how could one reasonably and in good faith find that a prenatal human life is not alive, or not a Homo sapien, or not endowed with an identity separate and distinct from that of the mother? Or, to parallel this Court's words in Levy, quoted a-

bove, who could find that prenatal human lives are not human, or not alive, or that they do not have their being?[43]

The closest one could come at the present time to rebutting the presumption would be to point out that identical twins have the same genetic makeup. The phenomenon of identical twins is seen when, after conception, the fertilized ovum goes through a rare division into two separate zygotes instead of a single two-cell structure. Thus, an additional separate life comes into-being, albeit one with identical genetic characteristics of the original life. One might argue on that basis that an individual identity is not established at conception, but afterwards. But the fact that this event can take place and bring about two live births is no more

43. Id.

probative of the possibility that an individual identity is established after conception than it is of the possibility that a person with an individual identity can, while still in the unicellular stage of growth, divide into two separate unicellular lives and thereby bring about the creation of a second life. Alternatively, this phenomenon is equally probative of the possibility that when the division which produces twins takes place, the original life ceases to be, and two new lives which were not present before come into being. This would mean that there is more than just one way (i.e. conception) for a new life to come into being. But it would not mean that conception is not also a way that a new life comes into being. In any event, since all of these possibilities are equally likely, the presumption that an individual life comes into being at conception is not rebutted, and the presumption

stands.[44]

There is a role for the legislature in this. Later developments in science might establish facts sufficient to rebut the presumption that an individual comes into being at conception. Rational findings of fact on the matter can be of assistance to the courts in determining whether the facts are sufficient to rebut the presumption. The presumption analysis does not preclude forever a later finding as new facts come to light.

And what is the case with respect to human embryo transfer? Live births have already been reported from this technique.

44. See, e.g., Lilienthal's Tobacco v. U.S., 97 U.S. 237, 266-267 (1877), Teamsters v. U.S., 431 U.S. 324, 359 n. 45 (1977), U.S. v. Denver & RGR Co., 191 U.S. 84, 91-92 (1903), Campbell v. U.S., 365 U.S. 85, 96 (1961). 29 Am.Jur.2d Evidence sects. 122, 124-126, 130-131; ALR Digests Evidence 93 and 122.

This involves taking a developing embryo from the womb of one woman, before the placenta is formed, and transfering the embryo to the womb of another woman.[45] Does this constitute a birth---more than mere momentary existence outside of the womb, albeit sustained with artificial aid---so that the prenatal life is a person with respect to the original mother? And if that is so, is this life simultaneously not a person with respect to the surrogate mother?[46]

If today this Court rejects the per-

45. N.Y. Times, Jan 8, 1984, sect. 6, at 42, col 1. See also, Note, Artificial Gestation: New Meaning for the Right to Terminate Pregnancy, 21 Ariz.L.Rev. 755, espec. pp. 758-759 (1979), and D. Kraemer, Intra- and Inter-Specific Embryo Transfer, Journal of Experimental Zoology, Nov. 1983, vol 228, at 363. (discussing possible embryo transfer between species).

46. See Colautti v. Franklin, 439 U.S. 379, 387, 99 S.Ct. 675, 681, 58 L.Ed. 2d 596, 604 (1979).

sonhood status of prenatal human life, it must face the endless task of being an on-going biomedical review board. The presumption analysis, though, gives the Court one clear, consistent standard to apply today and in the future, and which could have been applied in 1868. But if this Court continues to adhere to the doctrine of the nonpersonhood status of prenatal human life, it must face the task of changing the rules on a piecemeal basis with every new advance in science.

There are also other ways that the presumption analysis would be consistent with this Court's usual relationship with the legislatures and also with the state courts. First of all questions of what state of mind constitues the requisite malice for various crimes---homicide, assault and battery, reckless endangerment, etc.---would still be state law questions.

Questions of what evidence would suffice to prove causation of a crime or a tort would likewise still be state law questions, as would issues of standing. Perhaps the net result of all of this would be a revival---perhaps to a great degree or perhaps to a small degree---of the old common law presumption that a prenatal life was dead at the time of an alleged injury.

Second, in light of this the legislatures might enact separate penalties for abortion to balance the interests of protecting prenatal human life with the right of defendants not to be found guilty of a crime without adequate proof.[47]

47. "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666, 86 S.

The holding sought by this brief would also allow the states to treat pregnancies resulting from rape and incest differently from other pregnancies.[48] For the state would be under no obligation to recognize a family relationship in law between the biological mother and the child so conceived. Thus, the child would be a trespasser, and the woman could terminate her pregnancy at the earliest point of viability without being liable under the child neglect statutes.

As a closing note, the holding sought by this brief would probably have little or no effect, as a matter of constitutional law, on birth control methods currently on the market which work after conception. There would be the obvious ev-

---

Ct. 1079, 1081, 16 L.Ed.2d 169." (quoted in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351, 354 (1973)

48. Id.

identiary questions of state law, for how could one prove that in a given instance a life had even ever existed, much less been threatened or killed? And there would be a state law question of *mens rea* where a drug or device was already in place or in use before the woman could know whether she had conceived or not.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of the standard proposed in this brief.

Respectfully submitted.

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Counsel for the *amicus curiae* Larry Joyce.

February 23, 1989.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In The
Supreme Court of the United States
October Term, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF RIGHT TO LIFE ADVOCATES, INC. IN SUPPORT OF THE APPELLANTS

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III Chitty, *A Practical Treatise of the Criminal Law* (Phil. and N.Y., 1832), pp. 799-801 17

III Coke, *Institutes of the Laws of England* (London, 1644), pp. 50-51 16

Finch, *Law, Or a Discourse Thereof; in Four Books* (1759), "The Third Book of Law", pp. 185-186 16

Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9 17

I Hale, *The History of the Pleas of the Crown* (1st Am. ed., Phil., 1847), p. 432 16

Hawkins, *A Treatise of the Pleas of the Crown* (1716), (Curwood, London, 1824):

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Macpherson, *A Treatise on the Laws Relating To Infants* (Phil., 1843), Ch. XLII, "INFANT IN VENTRE SA MERE," pp. 353-355 15

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INTEREST OF THE AMICUS CURIAE

Right To Life Advocates, Inc. is a Texas nonprofit membershhip corporation dedicated to the preservation of the sancity of human life from the time of conception to natural death. It is an advocacy organization which has engaged and continues to engage in various activities, including educational, counseling, picketing and litigation.

The instant case, which arose in a state abortion regulatory context, presents this Court with an opportunity to reconsider and overrule *Roe v. Wade,* 410 U.S. 113 (1973). Right To Life Advocates, Inc. ("Amicus") is interested particularly in such reconsideration and overrule, and in the constitutional recognition and protection of the fundamental natural right to life of unborn children in this Nation.

SUMMARY OF ARGUMENT

The 1986 legislative findings of the Missouri statute now before the Court, which are proper and constitutional, address or involve deficiencies in *Roe v. Wade,* decided in 1973. They present the Court with an opportunity to reconsider and overrule that decision.

Amicus urges the Court to reconsider and overrule *Roe* for constitutional reasons and, in the process, hold that an unborn child is a person under the 14th Amendment to the U.S. Constitution. Measured by tests enunciated by this Court for the determination of fundamental personal rights, the Constitution does not include or provide any fundamental right of abortion.

In addition, *Roe* did not consider the unborn child as a separate interest or the nature and reach of the fundamental lift right, as it should have. The unborn child

has a separate legal posture when considered in light of the English Common Law, domestic law, this Court's 14th Amendment personhood holdings and implication from postnatal personhood stature. Accordingly, the unborn child is a person under the 14th Amendment, and the life right protected thereby covers such child from conception forward.

Finally, *Roe* operates to infringe reserved constitutional authorities of the States in the areas of protection of unborn human life and protection of maternal health. The restrictions and limitations imposed by the Court in such regard are arbitrary and unauthorized. The Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence." *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 814 (1986) (O'Connor, J., joined by Rehnquist, J., dissenting). They are symptomatic of the problem which is *Roe v. Wade.*

ARGUMENT

I.

THE LEGISLATIVE FINDINGS AT ISSUE COVER SUBJECTS WHICH WERE NOT, BUT SHOULD HAVE BEEN, CONSIDERED ON THE MERITS IN ROE V. WADE AND, HENCE, PRESENT AND OPPORTUNITY FOR THE RECONSIDERATION AND OVERRULE OF THAT DECISION

A. Background

1. Four aspects of *Roe v. Wade,* 410 U.S. 113 (1973), are here pertinent:

First, the abortion right formulated therein addressed only the interests of the pregnant female and her attending physician, on the one hand, and those of the State, on

the other (*Id.* at 153-154, 162-165). Unborn life in and of itself had no interest or protectable interest against abortion and, instead, was treated only as a subject for discretionary State regulatory or proscriptive action after viability and with certain exceptions thereto (*Id.* at 159, 162-164, 164-165).

Second, the Court said that it "need not resolve" the question of when (human) life begins (*Id.* at 159). It noted briefly "the wide divergence of thinking on this most sensitive and difficult question" (*Id.* at 160).

Third, by positing the State's interest in the unborn as one addressed to "potential human life" (*Id.* at 159) or "potential life" (*Id.* at 163) or the "potentiality of human life" (*Id.* at 162, 164), and by not considering unborn life as an interest in and of itself, the Court, in effect, resolved that life did not begin prenatally.

Fourth, the Court said that it did "not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake" (*Id.* at 162). Texas had argued that life began at conception, that life was present throughout pregnancy and that, therefore, it had a "compelling interest in protecting that life from and after conception" (*Id.* at 159).

2. The Missouri statute before this Court reads, in pertinent part (R.S. Mo. § 1.205.1):

> 1. The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health and well-being;
>
> • • •
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to ac-

knowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. The District Court determined that the two legislative findings conflicted clearly "with the essence of *Roe v. Wade*" and, hence, were invalid as a matter of law (Jurisdictional Statement, p. A15). This aspect of the judgment was affirmed by the Court of Appeals.

B. Discussion

The legislative findings at issue, made in *1986,* involve important matters deficient or not before the Court in *Roe v. Wade,* decided in *1973.* They are proper and constitutional exercises of state legislative authority.

The first finding is a matter of established scientific fact. The second finding is a natural and self-evident truism. Surely it cannot be unconstitutional for the State of Missouri to make findings consonant with scientific fact and reason. Although the findings are not regulatory provisions, they address or involve deficiencies in *Roe,* and, by so doing, extend to the Court an opportunity to reconsider and overrule that decision.

The first finding resolves the "sensitive and difficult question" of when life begins which, Amicus submits, is *central* to any meaningful consideration of induced abortion as a right under the Constitution. While the Court did not resolve that question expressly, Amicus submits that it did so impliedly, above, and that such determination was erroneous as a matter of scientific fact.

In addition, the first finding *implies* that human "personhood" begins at conception since the "life" of each human being begins at that time. A *postnatal* human being, who is a *person* without question, originated *prenatally,* i.e., life for such person began at conception. This is an extremely important subject not considered in *Roe's* determination that the unborn were not persons under the 14th Amendment. The Court recognized that such personhood would have caused the case against the Texas anti-abortion laws there at issue to collapse (*Roe,* 410 U.S. at 156-157).

The second finding posits generally certain vital protectible interests of unborn children. Insofar as induced abortion is concerned, such interests are elevated into the equation in a manner not provided by *Roe,* i.e., as separate and distinct ones inhering in *unborn children.* In *Roe,* "potential life" or the "potentiality of life" was protectible only at the instance of the *State* (*Roe,* 410 U.S. at 162-163, 164-165).

Finally, the two findings enhance properly Missouri's consideration and treatment of unborn children generally, including in an abortion regulatory context. Such statutory posturing was not before the Court when it passed on the constitutionality of Texas' anti-abortion laws in *Roe.*

To be sure, R.S. Mo. § 1.205.1, paragraph 2, above, provides that the interpretation and construction of the Missouri laws *vis-a-vis* rights, privileges and immunities of unborn children are subject, in part, to the U.S. Constitution and the "decisional interpretations thereof" by this Court. This, however, is but statutory recognition of the supremacy of the U.S. Constitution. It does not operate to emasculate the deficiencies in *Roe* treated by such find-

ings or take away the opportunity for the Court to reconsider and overrule *Roe.*

II.

THE COURT SHOULD RECONSIDER AND OVERRULE ROE V. WADE FOR CONSTITUTIONAL REASONS AND, IN THE PROCESS, SHOULD HOLD THAT AN UNBORN CHILD IS A PERSON UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

Amicus urges the Court to take the opportunity presented by this case to reconsider and overrule *Roe v. Wade, supra,* 410 U.S. 113, for constitutional reasons and, in the process, hold that an unborn child is a person under the 14th Amendment to the U.S. Constitution. Supportive positions are presented below:

A. The U.S. Constitution Does Not Include or Provide Any Fundamental Right of Abortion.

In *Roe,* the Court pointed out that "[t]he Constitution does not explicitly mention any right of privacy", but that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution", and that it, or individual Justices, have found the root of such right in various amendments to the U.S. Constitution or in the "penumbras of the Bill of Rights" (*Roe,* 410 U.S. at 152). The Court said further, in pertinent part (pp. 152-153):

> These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia,* 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma,* 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird,* 405 U.S., at 453-454; *id.,* at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), *Meyer v. Nebraska, supra.*
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

1. *Threshold Problem.* The threshold problem with the Court's approach and conclusion is that *nowhere* does the Court establish—or even attempt to establish—that abortion was a "personal right" which could be deemed "'fundamental,'" or that abortion was "'implicit in the concept of ordered liberty.'" Further, since abortion interdicts human life—or at the least, "potential life"—the Court's inquiry should have included *life,* however labeled, as a competing or affected *value* under the U.S. Constitution. As shown below, human life is a fundamental right embraced by the U.S. Constitution, and abortion is neither a right, much less a fundamental one, nor a subject "'implicit in the concept of ordered liberty.'" In short, the Court's approach and conclusion are flawed substantially as a matter of constitutional law. Cf. *Bowers v. Hardwick,* 478 U.S. 186 (1986). As Justice White, with whom then Justice Rehnquist joined, said, in dissenting in *Doe v. Bolton,* 410 U.S. 179, at 221-222 (1973), with application also to *Roe v. Wade* (White, J., joined by Rehnquist, J., dissenting):

> • • • I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that

> right with sufficient substance to override most existing state abortion statutes. * * * As an exercise of raw judicial power, the Court perhaps has the authority to do what it does today; but in any view its judgment is an improvident and extravagent exercise of the power of judicial review that the Constitution extends to this Court.

2. *The Right To Life.* On analysis, it is clear that human life is a fundamental U.S. Constitutional value, and that abortion is not. The Constitution, through various Amendments, treats or covers life, not abortion. Under the Due Process Clauses of the 5th and 14th Amendments, the United States and the States, respectively, are forbidden to deprive persons of their lives without due process of law. Under the 9th Amendment, the enumeration of rights therein "shall not be construed to deny or disparage *others* retained by the people." (Emphasis added.) Hence, any deficiency in the life right of the Due Process Clause of the 5th Amendment would be retained constitutionally by the 9th Amendment.

The life right is, of course, basic, for without it all other rights are meaningless. It is listed first in such Due Process Clauses, over "liberty" and "property." It is a natural right, one that inheres in every human being. As stated in the U.S. Declaration of Independence (July 4, 1776):

> * * * We hold these truths to be *self-evident:* That all men are created equal, that they are endowed by their Creator with *certain unalienable Rights,* that among these are *Life,* Liberty and the pursuit of Happiness. *That to secure these rights, Governments are instituted among men,* deriving their just powers from the consent of the governed * * *. (Emphasis added.)

The Declaration of Independence is foundational to the Constitution—declaring to the world the independence

from Great Britain of the 13 U.S. Colonies and the right to their own self-governance. This Court has declared that "[i]t is *always safe* to read the *letter* of the Constitution in the *spirit* of the Declaration of Independence." *Gulf, Colo. and Santa Fe R. Co. v. Ellis,* 165 U.S. 150, 160 (1887). (Emphasis added.) Since the unalienable right to life expressed in the Declaration of Independence is endowed at creation—which precedes birth—it seems clear that such right exists prenatally as well as postnatally.

Finally, the analysis, above, is fortified by the fact that the Constitution does not address the subject of abortion or, for that matter, any right in one to destroy the life of another. Yet it is clear that the Constitution was intended "to secure the blessings of liberty" to the people and to their "posterity" (Preamble, U.S. Constitution). A liberty in mothers to abort their offspring is inconsistent with securing the "blessings of liberty" to such posterity.

3. *The Posture of Abortion.* Fundamental liberties not enumerated in the text of the U.S. Constitution have been defined as "those that are 'deeply rooted in this Nation's history or tradition'" or, more narrowly, "those interests that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed'" [*Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 790-791 (1986) (White, J., joined by Rehnquist, J., dissenting), and authorities cited]. Due process is violated where a governmental practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).

In *Roe*, the Court did *not* establish abortion as a fundamental right under either of these tests or, for that matter, under any other recognized constitutional standard. Nor do the Court's decisions in areas of procreation, marriage, contraception, family relationships and child rearing and education, to which the Court adverted, pp. 152-153, support the conclusion that abortion is a fundamental right. Indeed, the Court in *Roe* pointed out that the pregnant woman "cannot be isolated in her privacy", that she "carries an *embryo* and, later, a *fetus*, if one accepts the medical definitions of the developing young in the human uterus [citing a medical dictionary]", and that "[t]he situation therefore is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner*, and *Pierce* and *Meyer* were respectively concerned" (p. 159). (Emphasis added.)

Since abortion (1) was an offense under the English Common Law at the time of the adoption of the U.S. Constitution (1787) and the Bill of Rights (1791)[1] (as well as prior thereto), (2) was a *statutory* offense under most domestic law at the time of the adoption of the 14th Amendment (1868),[2] (3) was an offense under the laws of all domestic U.S. Jurisdictions at the time of *Roe* (although some States had liberalized their anti-abortion law

[1] See, e.g., I Blackstone, *Commentaries on the Laws of England*, pp. 129-130 (c. 1765); IV Blackstone, *Commentaries on the Laws of England*, p. 198 (c. 1769). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[2] See *Roe v. Wade, supra*, 410 U.S. at 174-176, including n. 1 (Rehnquist, J., dissenting). In 1868, there were 37 States of the United States and various organized territories.

to permit abortions under varying circumstances or time periods)[3] and (4) was a controversial subject at the time of *Roe*,[4] including opposition to abortion by various Christian and other churches as "an evil form of taking of human life",[5] it could hardly be maintained that abortion was rooted deeply in the history and tradition of the United States or that it was included impliedly in the ordered liberty concept so that if sacrificed or eliminated neither liberty nor justice could exist. See *Thornburgh, supra*, 476 U.S. at 791, 793-794 (White, J., joined by Rehnquist, J., dissenting). In short, the Court's denomination of abortion as a fundamental right under the Constitution was but the *ipse dixit* of seven Justices and imposed upon the Nation in contravention of duly enacted laws. Amicus submits respectfully that the Court's arbitrary exercise of power in such regard has *no place* in the constitutional law or life of this Nation.

B. The Unborn Child Is a Person Under the 14th Amendment to the U.S. Constitution.

In *Roe*, the Court acknowledged that if the personhood of the "fetus" was established under the language and meaning of the 14th Amendment, as the appellee and certain amici argued, "the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment" (*Roe*, 410 U.S. at 156-157). The Court reviewed those places in the Constitution where "person" is used and concluded that "in nearly all these instances, the use of the word is such that it has application only postnatally", and that "[n]one indicates,

[3] See *Roe v. Wade, supra*, 410 U.S. at 118, including n. 2, and 140; *Doe v. Bolton, supra*, 410 U.S. at 182.

[4] See *Roe v. Wade, supra*, 410 U.S. at 116.

[5] Noonan, *A Private Choice* (1979), pp. 62-63.

with any assurance, that it has any possible pre-natal application" (*Id.* at 157) (Footnote omitted.). The Court concluded (*Id.* at 158) (Footnote omitted.):

> All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

This conclusion and the methodology employed by the Court to reach the same are erroneous since the Court (1) did not examine fully the subject in light of Eighteenth Century English Common Law, (2) did not take into account the fact that when the 14th Amendment was adopted induced abortion was at least a statutory offense in most domestic U.S. jurisdictions, (3) did not consider its prior 14th Amendment personhood holdings, (4) failed to take into account the fact that postnatal human personhood originates prenatally, thereby implying commencement of personhood at the prenatal stage of development, and (5) did not consider fully the substantial legal recognition and rights posture of an unborn child in substantial areas of domestic law. These areas are discussed briefly below.

1. *Eighteenth Century English Common Law.* This Court declared that the Constitution *"must be interpreted in light of the common law,* the principles and history of which were familiarly known to the framers of the Constitution", and that "[t]he language of the Constitution • • • could not be understood without reference to the common law." *United States v. Wong Kim Ark,* 169 U.S. 649, 654 (1898). (Emphasis added.) See 2 Antieau, *Modern Constitutional Law* (1969) § 15.41, pp. 716-717.

The Court has interpreted various provisions of the Constitution in light of the common law or history. 2 Antieau, *op. cit.,* § 15.41, pp. 717-720. Amicus submits that this principle applies to interpretation of "person" under the 14th Amendment since the *same term* was used by the framers in 1787 and those who drafted the Bill of Rights in 1791, and that the Court in *Roe* should have considered the *full posture* of an unborn child under Eighteenth Century English Common Law in 1787 and 1791 in its interpretation of 14th Amendment personhood *vis-a-vis* the unborn.

Under such Common Law, it is clear that (1) an unborn child was recognized as a natural person, (2) various legal rights and interests inhered or were recognized in such child, (3) it was unlawful to destroy a living unborn child by abortion, i.e., where the mother was "quick with child", and (4) a condemned woman who was "quick with child" was entitled to a reprieve from execution until after she gave birth to such child. These recognitions of the separate personal character of an unborn child are discussed briefly below.

a. *Natural Person.* In 1724, Thomas Wood wrote that "Persons are to be considered in their *Natural* and in their Relative or Civil Capacities"; that "[a] *Person* in its *Natural Capacity* is every Man or Woman: *In Which Capacity the Law takes Notice of its Life,* Sex, Health, Liberty, Good Name or Reputation"; and that *"Life begins when an Infant stirreth in the Womb* • • •." I Wood, *An Institute of the Laws of England* (1724), p. 11. (Emphasis added.)

Later, William Blackstone said that *"persons"* were "divided by the law into either *natural persons* or artificial"; that "[*n*]*atural persons are such as the God of na-*

ture formed us"; that the "rights of *persons considered in their natural capacities* are • • • of two sorts, absolute, and relative"; and that there were three absolute rights—"personal security", "personal Liberty" and "private property." I Blackstone, *Commentaries on the Laws of England* (c. 1765), pp. 123, 129. As for the right of personal security, he wrote, in pertinent part (*Id.*, pp. 129-130):

> I. THE right of personal security consists in a *person's* legal and uninterrupted enjoyment of *his life*, his limbs, his body, his health, and his reputation.
>
> 1. *LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.* For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the *child dieth* in her body, and, she is delivered of a dead *child;* this, though not murder, was by the antient (sic) law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor. (Emphasis added.)

The personhood or legal status of an unborn child was recognized in English case law. Thus, Lord Chancellor Hardwicke, in holding that a posthumous child could inherit a share of the personal estate of her deceased brother, pointed out that the "principal reason" on which he based his opinion was that "the posthumous Sister was *in ventre sa mere* at the Time of the Death of her Brother, *and consequently was a Person in rerum Natura.*" *Wallis v. Hosdon,* 27 E. Repts. 642 (Ch., 1740). (Emphasis added.) See *Millar v. Turner,* 27 E. Repts. 907, 908 (Ch., 1747-1748) (unborn child as "living" at the death of the child's father within the meaning of marriage articles for children) (Chancellor Hardwicke); *Burnet v. Mann,* 27 E. Repts.

953, 954 (Ch., 1748) (unborn children, per the "general rule", "are considered *in esse* for their benefit, not for their prejudice") (Chancellor Hardwicke).

b. *Rights Posture.* By the Eighteenth Century, the English Common Law recognized various property and other rights, vested and contingent, in unborn children. See, e.g., Macpherson, *A Treatise on the Law Relating To Infants* (Phil., 1843), Ch. XLII, "INFANT IN VENTRE SA MERE," pp. 353-355.

In *Millar v. Turner, supra,* 27 E. Repts. at 908, Chancelor Hardwicke described the rights posture of an unborn child in these terms:

> • • • A bill has been brought in favour of such infant to stay waste, and an injunction granted (3 Inst. 50): the destruction of him is murder; *which shews the laws considers such infant as a living creature*: in all cases relating to his advantage he must be considered as *in esse,* according to the rule of the civil law: so on the statute of distribution he shall be considered as living; the intention being to provide for all the children; and if that be so, the same reasoning will hold in a marriage-settlement where the intention was to provide for all the children of the marriage. (Emphasis in original.)

Blackstone addressed the subject as follows (I Blackstone, *op. cit.,* at 130):

> An infant *in ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours. (Footnotes omitted.)

c. *Offenses re Abortion.* By the Eighteenth Century, the English Common Law, as presented by author-

ities in that period, recognized *three offenses* dealing with abortion:[6]

- *murder,* if the woman died as a result of an abortion [*Margaret Tinkler's Case* (Durham, 1781), in I East, *A Treatise of the Pleas of the Crown* (Phil., 1806), pp. 230, 354-356];
- *murder,* if the child was born alive and died later as a result of a potion [I Wood, *op. cit.*, p. 11; I Hawkins, *A Treatise of the Pleas of the Crown* (1716) (Curwood, London, 1824), ch. 13, pp. 94-95; IV Blackstone, *op. cit.*, p. 198];[7]
- *great misprison, heinous misdemeanor, etc.* if a live unborn child, i.e., where the mother was "quick with child" or "big with child," died or was killed (in the womb) as a result of a potion, etc. [I Hawkins, *op. cit.*, ch. 13, pp. 94-95; I Blackstone, *op. cit.*, pp. 129-130; IV Blackstone, *op. cit.*, p. 198; see Finch, *Law, Or a Discourse thereof; in Four Books* (1759), "The Third Book of Law," pp. 185-186; I Wood, *op. cit.*, p. 11]

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[6] Contrast central conclusions in Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?", 17 *N.Y.L.F.* 335 (1971), including his criticism of Edward Coke [III Coke, *Institutes on the Laws of England* (London, 1644), pp. 50-51], with that part of *Boke of justyces of peas* (1515 ed.), referred to in the *subsequently published* II *The Reports of Sir John Spellman* (Selden Society, London) (1978), p. 306, containing an indictment charging, *inter alia,* the felonious slaying of an unborn child, and *R. Wodelake* (K.B., 1530), referred to in said *Report,* p. 306, involving an indictment for murder of an unborn child. Amicus has the texts of these indictments and translations. In *Wodelake* the indictment alleged, in part, that Wodelake (in 1526) tricked a certain pregnant girl into taking a drink meant to destroy her child and that this resulted in her being delivered of a dead child. [Wodelake was also charged with having raped her about 18 months earlier (in 1525).]

[7] Hawkins acknowledged that there were "opinions to the contrary" (I Hawkins, *op. cit.*, p. 95) (Note omitted.). See Blackstone, *op. cit.*, p. 198. For a contrary opinion, see I Hale, *The History of the Pleas of the Crown* (1st Am. ed., Phil., 1847), p. 432.

Abortion remained an offense at Common Law up to the enactment of Lord Ellenborough's Act, 43 Geo. III, c. 58 (1803), when abortion was first made a statutory offense in England. See III Chitty, *A Practical Treatise of the Criminal Law* (Phil. and N.Y., 1832), pp. 799-801.

The fact that the English Common Law in question did not understand the beginning of human life is of no particular moment. The concept of human fertilization was not understood until after the discovery, in 1827, of the mammalian ovum.[8] Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9. Under the Common Law, life was "sacred" and "inalienable." *People v. Sessions,* 26 N.W. 291, 293 (S.C. Mich., 1886); see *The State v. Moore,* 25 Iowa 128, 135-136 (S.C. Ia., 1868). In short, at the time of the adoption of the U.S. Constitution, the Common Law provided protection against abortion based on the understanding of when life began.[9]

d. ***Execution Reprieve.*** Finally, a live unborn child was recognized and protected against death by the execution reprieve rule. Under this rule, a condemned woman who was "quick with child" was given a reprieve from

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[8] Not long after this discovery, a medical/legal work mentioned the human ovum in connection with a discussion of the human embryonic period and said that "the foetus is alive from the moment of conception", and that "abortion is the destruction of a human being * * *." Ryan, *A Manual of Medical Jurisprudence* (Phil., 1832), pp. 127, 128, 131.

[9] It is interesting to note that, in but ten years after the discovery of the mammalian ovum, the English anti-abortion law of 1828, which punished abortion more severely when the woman was "quick with child" [9 Geo. IV, c. 31, § XIII (1828)], was replaced with a statutory provision which made abortion a felony *without regard* to whether the woman was "quick with child" [7 Wm. IV and I Vict., c. 85 (1837)].

execution until after she gave birth to her child. *The Trial of Sarah Baynton et al* (Q.B., 1702), in XIV Howell, *State Trials,* p. 598; II Hawkins, *op. cit.,* p. 657; see *Union Pac. Ry. Co. v. Botsford,* 141 U.S. 250, 253 (1891). However, if after giving birth, the woman became pregnant again, she would not be entitled to a second reprieve and "may now be executed *before* the child is quick in the womb • • •." V Blackstone, *op. cit.* (c. 1770), p. 394. (Emphasis added.)

2. *Abortion Not a Liberty When 14th Amendment Adopted.* In *Roe,* the Court failed to take into account the fact that, when the 14th Amendment was adopted in 1868, abortion was not a liberty, much less a "fundamental" one, for purposes of constitutional inclusion and protection therein. As Justice Rehnquist pointed out, in dissenting in *Roe,* "[b]y the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion" (*Roe v. Wade, supra,* 410 U.S. at 174-175 and n. 1 at 175-176, Rehnquist, J., dissenting).

This, coupled with the fact that "• • • in the early years of our country's existence the English common law of abortion was in force in virtually every state • • •"[10],

[10] II *Wharton's Criminal Law* (14th ed., by Charles E. Torcia, 1979), § 250, p. 415. See II Swift, *A System of Laws of The State of Connecticut* (1796), pp. 299, 365; *Mills v. The Commonwealth,* 13 Pa. St. 630, 632-633 (S.C. Pa., 1850) (applying the crime "[t]he moment the womb is instinct with embryo life, and gestation has begun • • •", p. 632); *State v. Slagle,* 83 N.C. 544, 545-546 (S.C. N.C., 1880) (holding that the criminal act "may be committed at any stage of pregnancy", p. 545). The common law offense was applied by some states *after* enactment of their anti-abortion statutes. *The People v. Jackson,* 3 Hill 92, 93 (S.C.N.Y., May Term, 1842); *Commonwealth v. Kelsea,* 157 A. 42 (Superior Ct. of Pa., 1931); *The State v. Reed,* 45 Ark. 333, 334-335 (S.C. Ark., 1885).

showed that there was no liberty to abort a live unborn child, much less one which was rooted deeply in the social fabric of the people.[11] As Justice Rehnquist stated, in pertinent part (*id.* at 174, 176, Rehnquist, J., dissenting):

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).
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> • • •
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> To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment

[11] During the second oral argument in *Roe,* Counsel for Henry Wade indicated *erroneously* that prior to 1854, when Texas first legislated on the subject of abortion, abortion was legal in the State (Tr. Oral Arg., *Roe v. Wade,* October 11, 1972, pp. 67-68 by Hoover Reporting Co., Inc.). Abortion was *not* legal in Texas prior to 1854. The Republic of Texas adopted the English Common Law as the "rule of decision" for application "in all criminal cases" (Const. Rep. of Tex., 1836, Art. IV, § 13) and, by statute in 1836, provided that "all offenses known to the common law of England," as then understood and practiced, which were not provided for in such statute (and abortion was not provided for therein), were to be "punished in the same manner as known to the said common law" (Act Punishing Crimes and Misdemeanors, Sec. 54, approved December 21, 1836, 1 Gam. *The Laws of Texas* 1247, 1255. The common law proscription against abortion formed part of the laws of the Republic of Texas which were carried forward into the laws of the State of Texas by the 1845 Annexation Accord between the Republic and the United States (Tex. Const. of 1845, Art. Thirteenth, § 3, see § 13; see *id.,* Art. Seventh, § 20; 5 *U.S. Stats. at Large,* 797-798; 9 *U.S. Stats. at Large* 108). After statehood, the Supreme Court of Texas declared that "[t]he common law in criminal cases, not provided for by legislative enactment, was introduced by the constitution of the republic, *and is still the law.*" *Grinder v. The State,* 2 Tex. 339, 340 (Tex., Dec. Term, 1847). (Emphasis added.)

a right that was apparently completely unknown to the drafters of the Amendment.

• • •

There apparently was no question concerning the validity of this provision [Texas' anti-abortion statutory enactment of 1857] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Moreover, the language of the Due Process Clause of the 14th Amendment is *broad* in reach. Nowhere does it *even suggest* that unborn life is not protected thereby, or that one has a liberty to destroy such life which a State may not infringe without due process of law.

3. *Failure To Apply Personhood Holdings Under the 14th Amendment.* While Amicus recognizes that 14th Amendment personhood for the unborn was urged in *Roe* [e.g., Brief of Americans United for Life, Amicus Curiae, in Support of Appellee, pp. 4-7, arguing personhood under the Equal Protection Clause of said Amendment, with *Levy v. Louisiana,* 391 U.S. 68 (1968), as the centerpiece ("AUL Brief")], it submits that the Court failed to apply its own personhood holdings under that Amendment, and that, had it done so, the unborn would have been held to be persons thereunder. See *id.* at pp. 4, 7 (Equal Protection Clause).

Except for *Roe,* the Court has given a broad and healthy application to the term "person" under the 14th Amendment. Thus, the Court has held or declared that the term includes a corporation [*Santa Clara County v. So. Pac. R. Co.,* 118 U.S. 394 (1886); *First Nat. Bank of Boston*

v. Bellotti, 435 U.S. 765, n. 15 at 780 (1978)]; an alien, even "one whose presence in this country is unlawful, involuntary, or transitory • • •" [*Matthews v. Diaz,* 426 U.S. 67, 77 1986)]; and to illegitimate children (*Levy v. Louisiana, supra,* 391 U.S. at 70). In *Levy,* the Court declared that it started from the premise that illegitimate children were not "'nonpersons'", that they were *"humans, live, and have their being"*, and they were "clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." (Emphasis added.) In *Glona v. Am. Guarantee & Liab. Ins. Co.,* 391 U.S. 73, 75-76 (1968), the Court indicated that the *Levy* test of personhood was one of *"biological relationship."* (Emphasis added.)

In *Roe,* the Court did not apply the human personhood standard formulated in *Levy,* nor did it explain how a corporation, which is an artificial entity not mentioned in the Constitution, could be considered a person for 14th Amendment purposes when an actual, developing human being, recognized in the law and possessive of legal rights, is not. Indeed, the Court's nonpersonhood holding in *Roe* cannot be squared with its constitutionally interpretive decisions in such regard, resulting in a crazy-quilt interpretation of the word person under the Amendment, not to mention an outright retreat from its broad interpretation of the Amendment's coverage.

An unborn child meets clearly the three-part test of human personhood of *Levy* and, therefore, is within the protective reach of the 14th Amendment. See AUL Brief, p. 7. The unborn child is alive since it results from the joinder of two live cells and thereafter grows and exhibits other manifestations of life. The unborn child has its own being or entityship since, while within and dependant upon

the mother, the child has an existence and being separate from that of the mother. The unborn child is human because the offspring of human parents and possessive of the human genetic code from the beginning. The child has a biologic relationship with his or her parents.

Moreover, the Court's nonpersonhood holding for the unborn under the 14th Amendment, above, is unconstitutional since it discriminates invidiously against the unborn as compared to corporate entities, in violation of the due process clauses of the 5th and 14th Amendments to the Constitution. Simply put, an unborn child, *as an actual living being,* with legal rights and recognitions aplenty, should not have been deprived of personhood status under the Amendment when the Court has recognized or accorded such status to *artificial corporate beings* not even *mentioned* in the Constitution. This is extremely important since, as the Court recognized, establishment of 14th Amendment personhood for the unborn would cause appellee's case in *Roe* to collapse (*Roe,* 410 U.S. at 156-157).

4. *Human Personhood Under the 14th Amendment Extends Prenatally.* By excluding the unborn from 14th Amendment personhood, the Court in *Roe* eliminated the well understood prenatal part of the life right and, in effect, recognized the personhood of an individual human as commencing at birth. This approach contravened the implied rights concept that the Court articulated in developing the constitutional right of privacy, including the abortion aspect; and distorted not only the well recognized nature of the life right—human life being a continuum which commences at a beginning (conception) and terminates at an end (death)—but the nature of human personhood under the Amendment.

As shown above, a human person under the 14th Amendment means a live human being. A deceased person has no such constitutional status because he or she no longer possesses life or any other constitutional or worldly right upon which the Amendment could operate for him or her. Constitutional personhood for a postnatal person extends, by implication, prenatally since such person is the same individual or entity that he or she was prenatally, only at a different developmental stage. It is a truism that the unalienable right to life of human beings begins not at birth but at the beginning. Accordingly, the Court's nonpersonhood holding in *Roe* fails to apply the very implied rights test to the meaning of person—implying from the generic term—which it applied to the meaning of liberty under the 14th Amendment as encompassing an abortion right.

Moreover, any doubt on this score should have been resolved in favor of personhood for the unborn since life is a fundamental right and protected specifically by the 14th Amendment; abortion, which is not even mentioned in the Constitution, destroys such right; and the Amendment was intended to have a broad and healthy reach, one which the Court, except for *Roe,* has recognized and applied. Further, nowhere does the Constitution provide or recognize in anyone the right to destroy human life.

5. *Legal Posture of Unborn Children.* Unborn children are recognized legally and have substantial rights, vested and contingent, in Texas and other States. Certain federal statutes have a similar operation. Since rights cannot and do not exist *in vacuo,* legal statuses stem therefrom. As this Court put it in *Lynch v. H.F.C.,* 405 U.S. 538, 552 (1972), "Property does not have rights. *People*

have rights.'' (Emphasis added.) Full appraisal of the legal posture of unborn children should have been made by the Court in considering the issue of personhood, including trends favorable to unborn children in tort law. See the broad brush treatment of this subject in *Roe* at 161-162—*after* the Court had established the right of abortion.

Numerous matters in this regard were—and continue to be—of great significance. For example, under the prenatal tort injury doctrine recognized in all States, a *duty of care* is recognized as owing to the unborn child. See Prosser, *Handbook of the Law of Torts* (4th ed., 1971), § 55, pp. 335-338. In a majority of States, an unborn child who has reached the viability stage and who is killed or stillborn is considered a person, etc., under their wrongful death statutes, and, in Georgia and Rhode Island, the prenatal stage is earlier, at quickening and conception, respectively. See *Witty v. American General Cap. Distributors,* 727 S.W. 2d 503, n. 2 at 512 (Tex., 1987) (Kilgarlin, J., joined by Hill, C.J., and Ray, J., dissenting); *Porter v. Lassiter,* 87 S.E. 2d 100, 103 (Ga. App., Div. 2, 1955); *Presley v. Newport Hosp.,* 365 A. 2d 748, 754 (S.C.R.I., 1976). While Texas is in the minority in such regard, yet an unborn child was represented by his mother and took a share of a wrongful death award on the death of his father in *Brantley v. Boone,* 34 S.W. 2d 409, 411 (Tex. Civ. App.—Eastland, 1931, no writ). The child was born after entry of the judgment.

In other areas, a remainder interest in property may vest in an unborn child [*Chrisfield v. Storr,* 36 Md. 129, 145-146 (Ct. App. Md., 1872)], and an unborn child can take a vested interest in a trust [*Gay v. Baker,* 58 N.C.

344, 345, 346 (S.C.N.C., 1860)]. While the perfection of many property rights requires live birth, the law still recognizes the posture of an unborn child and *makes allowance* for such perfection as posthumous children, etc. See, e.g., *Hall v. Hancock,* 32 Mass. 255, 257-258 (15 Pick.) (S.J.C. Mass., March Term, 1834). This Court has recognized the matter similarly. See *McArthur v. Scott,* 113 U.S. 340, 391-392, 404 (1885), where the Court recognized that unborn children (not even in existence at the time) were entitled to be represented in judicial proceedings which affected them and, if not represented, a decree thus entered did not conclude their rights.[12]

An unborn child is entitled to a blood transfusion or to have the mother undergo a needed caesarian section procedure, notwithstanding the mother's objections for religious or other reasons, and is entitled to be represented in judicial proceedings on such subjects. *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson,* 201 A. 2d 537, 538 (S.C.N.J., 1964), *cert. denied,* 337 U.S. 985; *Jefferson v. Griffin Spalding Co. Hosp. Authority,* 274 S.E. 2d 457, 459, 460 (S.C. Ga., 1981). Thus, the life right outweighed the mother's religious or other rights or interests.

An unborn child is recognized in relation to insurance benefits under the Social Security Act, Subchapter II, 42 U.S.C. 401 *et seq.* [*Adams v. Weinberger,* 521 F. 2d 656,

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[12] By statute in England, a father was authorized to appoint, by deed or will, a guardian for his minor child, including his unborn child, and such guardian (testamentary guardian) was authorized to take custody of the profits of all lands, etc. of such child, for the use of such child, and "may bring such Action or Actions in relation thereunto, as by Law a Guardian in common Socage might do." 12 Ch. II, c. 24, §§ VIII and IX (1660).

660-661 (C.A. 2, 1975)]; to ADC benefits under Subchapter IV of that Act, 42 U.S.C. 601 *et seq.* [*In the Matter of Diane Catoe v. Lavine,* 378 N.Y.S. 2d 623, 626 (App. Div., 2nd Dept., N.Y., 1976), *mot. for lv. to app. den.,* 386 N.Y.S. 2d 1027]; and to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea,* 410 F. 2d 56, 61, 62 (C.A. 5, 1969)].

C. Infringement of Certain Reserved Constitutional Authorities of the States.

There should be no question but that the States possess reserved authorities over such domestic matters as marriage, divorce and children, together with related subjects of health, education and safety. The "power to make rules to establish, protect and strengthen family life, as well as to regulate the disposition of property" at death "is committed by the Constitution of the United States and the people of * * * [the affected State] to the legislature of that State." *Labine v. Vincent,* 401 U.S. 532, 538 (1971). Prior to *Roe,* the States were relatively free of federal judicial control in such areas, including the protection of unborn life through anti-abortion laws.

Under *Roe,* the Court not only placed severe restrictions on the rights and authorities of the States to protect unborn life, but placed limitations on their rights and authorities to protect maternal health. These restrictions have adverse ancillary effects as well. For example, a pregnant woman whose husband has died not only could profit personally under his will if she underwent an abortion, but could frustrate his intention therein to provide for his child (who would have been born posthumously).

Since, as shown on pp. 6-11, above, there is no abortion privacy right in the Constitution, *Roe* stands as judicial infringement of such reserved rights and authorities, in derogation of the division of powers concept recognized in the 10th Amendment to the U.S. Constitution. See, in related vein, *Erie R. Co. v. Tompkins,* 304 U.S. 64, 77-80 (1938). Further, since an unborn child is a person within the reach of the 14th Amendment, pp. 11-26, above, *Roe* constitutes a class-based intrusion upon and denial of State responsibility to the unborn under said Amendment, in violation of said Amendment and of the Court's authority under Article III of the Constitution.

Moreover, the restrictions and limitations on such rights and authorities, above, represent *arbitrary* or *unrealistic* lines drawn by the Court. *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 453-461 (1983) (O'Connor, J., joined by Rehnquist, J., and White, J., dissenting); *Thornburgh, supra,* 476 U.S. at 794-795 (White, J., joined by Rehnquist, J., dissenting). As Justice White put it, in describing, in part, the State's interest in the "fetus" (*id.* at 795):

> The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development * * *. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom.

Justice O'Connor said that the State's interests in protecting "potential human life" and maternal health were com-

pelling ones "throughout pregnancy" (*Akron,* 462 U.S. at 461, O'Connor, J., joined by Rehnquist, J. and White, J., dissenting). The arbitrary—and unauthorized—lines which the Court prescribed in *Roe* on these important State interests are also violative of the division of powers concept recognized in the 10th Amendment to the U.S. Constitution.

Finally, "[t]he Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence" (*Thornburgh,* 476 U.S. at 814, O'Connor, J., joined by Rehnquist, J., dissenting). This has manifested itself in decisions which appear to ignore principles or conclusions announced in prior decisions and in decisions where the Court looks and acts like a super medical, hospital and "know best" regulatory agency on the effectuation of abortion.[13] These decisions are symptomatic of the problem which is *Roe v. Wade.*

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[13] For example, while the Court has recognized that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting * * * particularly so when the patient is immature" [*H.L. v. Matheson,* 450 U.S. 398, 411 (1981)], it is unconstitutional for a State to require a 24-hour waiting period for an abortion (*Akron,* 462 U.S. at 450-451) where the patient might have time to reflect on the subject, to consult with others and/or to consider alternatives to abortion. Further, while the State has a strong and legitimate interest in encouraging childbirth or normal childbirth [*Beal v. Doe,* 432 U.S. 438, 445-446 (1977); *Maher v. Roe,* 432 U.S. 464, 478 (1977)], it becomes unconstitutional for it to furnish information to a pregnant woman contemplating abortion which is capable of furthering that interest (*Thornburgh,* 476 U.S. at 760). On related subjects, the Court has extended broad license in the determination of maternal "health" [*Doe,* 410 U.S. at 192]; has opined on the concept of viability [*Roe,* 410 U.S. at 160, 163; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 64-65 (1976);

(Continued on following page)

Roe and much of its progeny have interposed improperly the Constitution in such domestic areas or concerns as the protection of unborn human life, the mother/child relationship, the husband/wife relationship, the parents/daughter relationship, the protection of maternal health, medical or surgical procedures and hospitalization requirements. In the process, *central values* which the Constitution was designed to protect and espouse have been eroded substantially. There should be no question but that the life right stands *paramount* over all other personal rights protected by the Constitution, and that the blessings of liberty extend not only to the people of this Nation but to their posterity. By abandoning *Roe,* the Court will serve the constitutional values denigrated by that and subsequent decisions—the primacy of human life and the rightful role of the States in relation thereto, including protection of unborn human life against induced abortion.

—o—

(Continued from previous page)

Colautti v. Franklin, 439 U.S. 379, 388-389 (1979)]; has instructed that no single element of viability appraisal is to be determinative (*Colautti,* 439 U.S. at 388-389); has invalidated hospitalization requirements for post first trimester abortions (*Akron,* 462 U.S. at 438-439); and has struck down hospitalization requirements for D & E abortions performed after the 12th week of pregnancy due to the Court's acceptance of maternal safety advances where such abortions are performed up to 16 weeks in outpatient facilities [*Planned Parenthood of Kansas City, Mo. v. Ashcroft,* 462 U.S. 476, 482 (1983)]. In this latter regard, one is prompted to ask what happened to the "serious" and possibly "lasting" "medical, emotional, and psychological consequences of abortion * * * particularly so when the patient is immature" (*H.L.,* 450 U.S. at 411)?

CONCLUSION

For the reasons and authorities set forth, above, Amicus submits respectfully that the Court should reverse the Judgment of the Court of Appeals and, in the process, reconsider and overrule *Roe v. Wade, supra,* 410 U.S. 113, and hold that an unborn child in the United States is a person under the 14th Amendment to the U.S. Constitution.

Respectfully submitted,

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February, 1989

AMICUS CURIAE

BRIEF

FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

-vs.-

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE OF DOCTORS FOR LIFE, MISSOURI DOCTORS FOR LIFE, MISSOURI CITIZENS FOR LIFE, MISSOURI NURSES FOR LIFE, AND LAWYERS FOR LIFE, INC. IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

Doctors for Life is a not-for-profit Missouri corporation incorporated in 1979 with approximately 1,700 members nationwide, all of whom are physicians or who possess equivalent doctoral degrees. Doctors for Life's purpose is essentially educational and informational aimed at the medical profession nationally and promotes, in part, the traditional medical ethic of respect for all human life at all stages of biological development from conception to death.

Missouri Doctors for Life is a not-for-profit Missouri corporation incorporated in 1973 with approximately 600 members, all of whom are physicians or who possess equivalent doctoral degrees. Missouri Doctors for Life's purpose is essentially educational and informational aimed at the medical profession in Missouri and promotes, in part, the traditional medical attitude of respect for all human life regardless of race, creed, color, religion or stage of biological development.

Missouri Citizens for Life is a not-for-profit Missouri corporation incorporated in 1974 with approximately 25,000 members whose purpose is, in part, to inform and educate its members and the public, in particular, citizens and residents of the State of Missouri, on the basic right to life of all human beings and thereby foster a respect for all human life at every stage of development from conception to death.

Missouri Nurses for Life has been in existence since 1973 and was incorporated in 1988 as a not-for-profit Missouri corporation with approximately 700 members, all of whom are registered nurses and health care professionals. Missouri Nurses for Life's purpose is to promote the quality and dignity of all human life and to support the right to life as the fundamental and inalienable right of each and every individual human being.

Lawyers for Life, Inc. is a not-for-profit Missouri corporation incorporated in 1974. It has approximately 260 members, the majority of whom are St. Louis metropolitan area attorneys. Lawyers for Life, Inc. engages in litigation at all levels to protect the unborn and to foster respect for human life at every stage of biological development.

Counsel of record for Amici has filed Amicus Curiae Briefs in this case before both the District Court and the Eighth Circuit. Counsel also co-authoried the article which proposed the enactment of Mo.Rev.Stat. §1.205. *See* Walker and Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal,* 13 Stetson L.Rev. 237 (1984).

SUMMARY OF ARGUMENTS

Amici submit that *Roe v. Wade* should be reversed. The evidence that human life begins at conception is compelling and voluminous. As such, unborn children should be afforded full personhood under the Constitution. Alternatively, the protection to be afforded the unborn is a matter properly determined by State legislatures. To the extent *Roe* prevents State legislative action in this area, it should be reversed.

However, even if *Roe* should stand, Amici submit that Mo.Rev.Stat. §1.205 and all subparts thereof (hereinafter the "Statute") are constitutional. The Statute itself has been in effect since January 1, 1988 without impinging upon anyone's constitutional rights. Appellees have challenged only the Statute's preamble which recognizes the medical/scientific fact that human life begins at conception, but has no legal effect. A statutory preamble without legal effect can hardly violate anyone's constitutional rights, especially where the Statute itself (which is unchallenged) fails to violate anyone's constitutional rights.

The Statute is abortion neutral and was neither designed nor intended to regulate abortion in any way. The Statute simply expands protection for unborn children in the areas of tort, criminal, and probate law consistent with modern medical knowledge. The States have acted in these areas without violating anyone's constitutional rights for as long as we have had a Constitution. This is a proper area for State legislative action, and such legislative action is entitled to great deference from this Honorable Court.

As such, the Statute and its preamble are patently constitutional and should be upheld.

ARGUMENT

I. THE EIGHTH CIRCUIT INCORRECTLY HELD THAT MO.REV.STAT. §1.205 IS A PART OF MISSOURI'S "ABORTION REGULATION STATUTE."

At the very outset of its opinion, the Eighth Circuit states that Mo.Rev.Stat. §1.205 (hereinafter "the Statute") is a section of "Missouri's 1986 Abortion Regulation Statute." 851 F.2d at 1073. This statement is simply wrong.

The Statute was originally proposed in a law review article which suggested state legislation designed to protect unborn children "in areas *other than abortion.*" Walker and Puzder, *State Protection of The Unborn After Roe v. Wade: A Legislative Proposal,* 13 Stetson L.Rev. 237, 239 (1984) (emphasis supplied). The legislation proposed by this article was introduced in the Missouri House of Representatives in its 1985 session, but died in committee. House Bill No. 315.

In 1986 the Statute was reintroduced as part of the Senate Committee substitute for House Bill No. 1596, the subject of which was "unborn children and abortion." In addition to the Statute and certain revisions to Missouri law on abortion regulation, the bill also contained a section revising Missouri's criminal law concerning the definition of involuntary manslaughter with respect to an unborn child.[1]

The fact that the Statute was passed as part of the bill on the subject of unborn children which, among other things, con-

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[1] The involuntary manslaughter portion of House Bill No. 1596 amended Mo.Rev.Stat. §565.024 by deleting subsection 1(3), which provided that: "A person commits the crime of involuntary manslaughter if he: Causes the death of an unborn quick child by any injury to the mother of such child which would be murder if it resulted in the death of such mother." Mo.Rev.Stat. §565.024.1(3) (repealed 1986). Such deletion was necessary to afford unborn children full rights, privileges, and immunities in the area of homicide law consistent with the Statute. However, this provision of the Bill obviously had nothing to do with abortion.

tained certain provisions concerning abortion does not make the Statue part of Missouri's Abortion Regulation Statute.

Missouri's abortion statutes are contained in Title XII (entitled "Public Health and Welfare"), Chapter 188 of The Missouri Revised Statutes. However, the Statute is contained in Title I (entitled "Law in Force and Construction of Statutes"), Chapter 1 of The Missouri Revised Statutes. Far from being part of the same chapter or statute, the Statute and Missouri's Abortion Regulation Statutes are 11 titles and 187 chapters apart.

Moreover, the Statute does not affect any laws relating to abortion. Its very language precludes its applicability in the abortion context. In fact, the substantive portions of the Statute have been in effect since January 1, 1988 and no one has even attempted to argue that any provision of the Statute applies in the abortion context.

Appellees readily admit this in their Motion to Affirm filed in this Court by stating that "[i]ndeed the provisions of the [Statute] requiring Missouri's laws to be construed to protect the unborn remain in place and effect." (Motion to Affirm, p.6 n.8). Appellees go well beyond this simple admission, however, and actually recognize the constitutional validity of the Statute. Appellees specifically admit that the Statute states when human life begins "as a basis for legislation in certain [areas other than abortion], such as inheritance rights" and that this would be permissible if done "in a separate statute" (Motion to Affirm, p.6). Appellees go on to state that the whole issue "boils down to one of statutory location...." *Id.*

Amici Curiae submit that if the issue is simply one of statutory location, Appellees should have reviewed Missouri's statute books before proceeding with their lawsuit. As noted above, the Statute is 11 titles and 187 chapters away from Missouri's Abortion Regulation Statutes, was never intended to have any impact on abortion regulation and is currently in effect without having any such impact on abortion.

As such, Amici Curiae submit that the Eighth Circuit erred in holding the Statute's preamble an unconstitutional abortion regulation statute. As admitted by Appellees, its location alone demonstrates the Eighth Circuit's error.

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE STATUTE WAS AN INVALID EXERCISE OF MISSOURI'S LEGISLATIVE POWER. JUDGE ARNOLD CORRECTLY STATED IN HIS DISSENT THAT THE STATUTE SHOULD BE "UPHELD INSOFAR AS IT RELATES TO SUBJECTS OTHER THAN ABORTION."

In 1986, Missouri's General Assembly enacted Mo.Rev.Stat. §1.205 (hereinafter "the Statute") as a part of Title I (Laws and Statutes), Chapter I (Laws in Force and Construction of Statutes) of the Missouri Revised Statutes. The Statute provides as follows:

1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;
(2) Unborn children have protectable interests in life, health, and well-being;
(3) The natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of the state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of

conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Mo.Rev.Stat. §1.205.[2]

Thus, the Statute defines when human life begins for purposes of Missouri law (such as tort law, property law, and criminal law). Substantively, the Statute expands existing state tort, property, and criminal law protection for unborn children. Prior to the Statute, Missouri law provided differing degrees of protection for unborn children. The Statute updates Missouri law in the aforesaid areas in a manner consistent with modern medical and scientific knowledge and provides for consistent treatment of unborn children. However, the Statute *specifically excludes abortion from its ambit* by providing unborn children only those rights, privileges and immunities permitted by "the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court" (Mo.Rev.Stat. §1.205.2), and by specifically providing that it does not create any cause of action against pregnant women with respect to the care of their unborn children. Mo.Rev.Stat. §1.205.4.

The Statute was not intended to affect, and does not in any way affect, any woman's constitutional right to choose abortion over child birth. It simply defines the point at which unborn children are entitled to the protections of Missouri law in circumstances other than those involving abortion.

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[2] Notably, in erroneously holding that the Statute's intention was to regulate abortion, the Eighth Circuit wholly failed to set forth or consider section 4 of the Statute. 851 F.2d at 1075. Judge Arnold noted this unusual omission in his dissent stating that the omitted section's "implication is that the section may properly be interpreted as creating causes of action against persons *other than the mother*." 851 F.2d at 1085 (emphasis supplied).

Nonetheless, Appellees herein challenged the constitutionality of portions of this statute. In particular, Appellees challenged and the lower courts held unconstitutional §1.205.1(1) and §1.205.1(2) which provide that for purposes of Missouri law (excluding its law relating to abortion), "[t]he life of each human being begins at conception" and unborn children have protectable interests in life, health, and well being." These provisions are a part of the Statute's preamble and serve as an explanation and justification for the remainder of the Statute. However, *the challenged provisions are not operative portions of the Statute.*[3] As noted by one Court, "[a] preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute...." *Association of America Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977). *See also, National Wildlife Federation v. Marsh*, 721 F.2d 767, 773 (11th Cir. 1983) ("[p]reambles to statutes do not impose substantive rights, duties or obligations").

Thus, the Statute itself is currently in effect providing rights to unborn children. The scope of the Statute's impact on state law was undiminished by the lower courts' holdings. In essence, Appellees challenged as violative of individual constitutional rights and the lower courts held unconstitutional statutory provisions which have no substantive effect and were intended only to aid in the understanding of the substantive provisions of the Statute, which provisions stand unchallenged and are in effect. Amici Curiae submit that if the substantive provisions of the Statute fail to violate anyone's individual constitutional rights (as is clearly the case), the non-operative provisions of the Statute obviously do not violate such rights.

Amici Curiae submit herein below that the Eighth Circuit's holding concerning the constitutionality of the Statute is clearly incorrect, both factually and legally, because: (1) This

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[3] Preliminarily, Amici Curiae agree with Appellants that Appellees lack standing to challenge any provision of Mo.Rev.Stat. §1.205 since it will have no impact on Plaintiffs or any of Plaintiffs' patients.—

Court has never placed any limitation on state legislative authority to determine when human life beings in non-abortion contexts; (2) since the Statute is abortion neutral, it is in no way inconsistent with *Roe;* and (3) the Statute in no way inhibits any woman from having an abortion, but merely provides protection for the unborn children of women who choose childbirth over abortion. As such, Amici Curiae respectfully submit that the Eighth Circuit was constitutionally bound to uphold Mo.Rev.Stat. §1.205 and the challenged provisions thereof.

A. The Passage of the Statute Was a Legitimate and Constitutional Exercise of Missouri's Legislative Powers.

In Missouri, "the legislative power...is vested in the General Assembly..." *State v. Green,* 470 S.W.2d 571, 573 (Mo.banc 1971). *See* Mo. Const. art.III, §1. This "legislative power is plenary and residual, subject only to the limits of the federal and state constitutions." *Penner v. King,* 695 S.W.2d 887, 889 (Mo.banc 1985). Thus, it is clear that the Missouri General Assembly is the proper governmental body to make legislative policy decisions for the State of Missouri.

It is also clear that states have always determined the point at which unborn children are entitled to the protections of state law. For example, most states provide children a cause of action in tort for prenatal injuries inflicted by a person other than the child's mother. *See* W. Prosser, *Handbook on The Law of Torts,* 337 §55 (4th ed. 1971) ("when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick"). *See also, e.g., Bonbrest v. Kotz,* 65 F.Supp. 138, 140-42 (D.C. 1946) (child could maintain a cause of action for injuries sustained while *in utero* in part because "a child *en ventre sa mere* is not only regarded as [a] human being, but as such from the moment of conception — which it is in fact"); *Kelly v. Gregory,* 282 App. Div. 542, 543-44, 125 N.Y.S. 2d 696, 697 (1953) (child

may recover for previability injuries in part because "what we now know makes it possible to demonstrate clearly that separability begins at conception").

Many states also provide a cause of action to parents for the wrongful death of their unborn children. For example, the Rhode Island Supreme Court held in *Presley v. Newport Hospital,* 117 R.I. 179, 365 A.2d 748 (1976) that the word "person" as used in the Rhode Island Wrongful Death Act includes unborn children. 117 R.I. at 188, 365 A.2d at 754. As recently as 1983, the Missouri Supreme Court similarly held that the term "person" as used in Missouri's Wrongful Death Statute "includes the human fetus *en ventre sa mere*" stating that its conclusion was "supported by a strong positive trend among other jurisdictions holding that the fetus is a 'person,' 'minor' or 'minor child' within the meaning of their particular wrongful death statutes." *O'Grady v. Brown,* 654 S.W.2d 904, 910 (Mo.banc 1983).

Most states also provide to or recognize in unborn children certain rights under property law. These rights date back to English common law which acknowledged that an unborn child was "entitled to all the privileges of other persons." *Thellusson v. Woodford,* 31 Eng. Rep. 117, 164 (Ch. 1798). The American states adopted the English common law and recognized the unborn child from the moment of conception with respect to numerous property rights. For example, an unborn child may receive an income interest prior to birth. *Industrial Trust Co. v. Wilson,* 61 R.I. 169, 200 A. 467 (1938). He or she may be a tenant in common with his or her mother. *Biggs v. McCarty,* 86 Ind. 352 (1882). He or she is entitled to participate in damages received from the wrongful death of his or her father. *Boise Payette Lumber Co. v. Larsen,* 214 F.2d 373 (9th Cir. 1954); *Herndon v. St. Louis & S.F.R. Co.,* 37 Okla. 256, 128 P. 727 (1912). Unborn children are also recognized from the moment of conception as heirs of an estate, whether by devise or intestate succession. *Biggs v. McCarty,* 86 Ind. 352 (1882); *Deal v. Sexton,* 144 N.C. 157, 56 S.E. 691 (1907). Certain

of these common law rules have been codified. For example, the Uniform Probate Code provides that unborn children are to be treated as though born within the lifetime of the decedent. *Uniform Probate Code,* §2-108; *Uniform Probate Code Practice Manual,* p.11, §1.11.

Finally, many states provide criminal sanctions for the intentional or criminally negligent killing of an unborn child. For example, a number of states impose criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child. *See, e.g.,* Ark. Stat. Ann. §41-2553 (1947); Cal. Penal Code §187 (West 1970); Fla. Stat. Ann. §782.09 (West Supp. 1983); Mich. Comp. Laws Ann. §750-322 (West Supp. 1983); Nev. Rev. Stat. §§200.210, 200.220 (Supp. 1983); N.Y. Penal Law §§125.00, 125.05 (McKinney Supp. 1983); Okla. Stat. Ann. tit. 21 §§713, 714 (West Supp. 1983). In fact, until Missouri's General Assembly enacted the Statute, and accorded full protection to the unborn, Missouri also had such a law. Mo.Rev.Stat. §565.024.1(3) (Amended by L. 1986, H.B. No. 1596, §A).

Amici Curiae have set forth the foregoing examples of statutory and common law regulation of the rights of unborn children for the purpose of demonstrating that the matters dealt with in the Statute have long been recognized as within the proper purview of state regulation and proper subjects for legislative enactments. (For further case law and a more detailed discussion, *see* Walker and Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal,* 13 Stetson L.Rev. 237, 253-64 (1984)). Moreover, it is clear that, as stated in the provisions of the Statute challenged herein, "[u]nborn children have [and always have had] protectable interests in life, health and well being." Mo.Rev.Stat. §1.205.1(2). In this respect, the Statute is merely a proper exercise of legislative authority which recognizes what is now and has long been a fact. Given the states' traditional role in this area, Amici Curiae submit that the challenged statutory provisions are entitled to a strong presumption of validity.

State "legislatures are presumed to have acted constitutionally..." *Schilb v. Kuebel,* 404 U.S. 357, 364 (1971). *See also, Fitz v. Dolyak,* 712 F.2d 330, 333 (8th Cir. 1983) ("a presumption of constitutionality attaches to state legislative enactments"). The burden is upon the person claiming a constitutional violation to prove the challenged Statute's invalidity. *Fitz v. Dolyak, supra,* 712 F.2d at 333 (party challenging a statute "bears a heavy burden"); *Wilson v. Robinson,* 668 F.2d 380, 383 (8th Cir. 1981) ("burden is upon party asserting unconstitutionality to establish the invalidity"). Federal Courts "are obligated to presume a legislative intent to act within constitutional bounds." *Casbah, Inc. v. Thone,* 651 F.2d 551, 564 (8th Cir. 1981), *cert. denied,* 455 U.S. 1005 (1982). *See also, Turchick v. United States,* 561 F.2d 719, 724 (8th Cir. 1977) ("general principle that courts should construe statutes to avoid a finding of unconstitutionality...presumes a legislative intent to act only within constitutional bounds").

The presumption of validity to which state legislative acts are entitled is even stronger when the area in which the legislature is acting involves consideration of controversial medical, scientific, and social issues. This Court has specifically recognized that when a legislative body "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad, and courts should be cautious to rewrite legislation...." *Marshall v. United States,* 414 U.S. 417, 427 (1974). The United States Court of Appeals for the Eighth Circuit has similarly stated that "judicial self-restraint is especially appropriate where as here the challenged classification entails legislative judgments on a whole host of controversial medical, scientific, and social issues." *United States v. Fogarty,* 692 F.2d 542, 547 (8th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983). *See also, United States v. Kiffler,* 477 F.2d 349, 352 (2nd Cir. 1973), *cert. denied,* 414 U.S. 831 (1973) (where "challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America...the resolution of such sensitive

issues is best left to" branches of government other than the judiciary).

> As this Court has aptly stated:
>
> [W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits.... But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in [certain fields], so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952). *See also, Murphy v. Matheson,* 742 F.2d 564, 575 (10th Cir. 1984) ("[u]nless a state law trammels fundamental personal rights, [federal courts] are to presume that state legislatures have acted within their constitutional power and are to require only that the law 'bear a reasonable relation to the State's legitimate purpose'"); *Price v. Heckler,* 733 F.2d 699, 701 (9th Cir. 1984), *cert. denied,* 469 U.S. 1224 (1985) ("[t]he court does not sit as a 'super legislature' to weigh the widsom of legislation nor to decide whether the policy which it expresses offends the public welfare").

In enacting the Statute, Missouri's General Assembly was clearly acting in an area where it has traditionally and properly had authority. Moreover, the legislature was the appropriate branch of government to investigate and weigh the evidence on the issues involved which arguably raise "medical and scientific uncertainties." *Marshall v. United States, supra,* 414 U.S. at 427. Thus, "judicial self-restraint is especially appropriate...." *United States v. Fogarty, supra,* 692 F.2d at 547.

The only question legitimately before this Court is whether the challenged provisions of the Statute (which are not even

the operative provisions of the Statute) violate "specific constitutional prohibitions." *Day-Brite Lighting v. Missouri, supra,* 342 U.S. at 423. Absent such a violation, the Statute is clearly constitutional. As set forth below, Amici Curiae submit that the Statute is abortion neutral and in no way violates anyone's constitutional rights.

B. The Statute in No Way Violates Anyone's Constitutional Rights and Is Wholly Consistent with the Supreme Court's Decision in *Roe v. Wade,* 410 U.S. 113 (1973).

Amici Curiae respectfully submit that the Statute by its very terms is wholly abortion neutral and makes no effort in any way to affect any woman's right to choose abortion over child birth. The Statute's very terms specifically and clearly exclude any possible conflict with *Roe v. Wade,* 410 U.S. 113 (1973) by stating that the Statute's provisions are subject to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court and that the Statute and its provisions were not intended to create any cause of action pregnant women. The Statute simply provides protections for the children of women who choose birth over abortion.

Thus, the Statute and the challenged provisions are clearly consistent with *Roe.* In *Roe,* this Court decided that women have a constitutionally protected right to choose abortion. However, the Court placed no limit on state legislation concerning unborn children where such legislation leaves unimpaired a woman's right to choose abortion.

In fact, in *Roe* this Court acknowledged that states have a valid and important interest in encouraging childbirth. It stated that states have an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. The Court repeated its *Roe* language in *Beal v. Doe,* 432 U.S. 438 (1977), adding that a state's "strong and legitimate interest in encouraging normal childbirth" exists "throughout the course of the woman's pregnancy." 432 U.S. at 445-46.

In *Maher v. Roe,* 432 U.S. 464 (1977), the Supreme Court faced the question of whether a woman's "freedom of choice" included an entitlement to medicaid payments for abortions that are not medically necessary. At issue was a Connecticut Welfare Department regulation providing medicaid benefits for medical services incident to childbirth but not for non-therapeutic abortions. The district court had ruled that the regulation violated the equal protection clause of the fourteenth amendment and was, therefore, unconstitutional. It held that the unequal subsidization of childbirth and abortion impinged on the "fundamental right to abortion."

This Court disagreed, and stated that the district court failed to understand the scope of the right recognized in *Roe.* The *Roe* Court did not create an *absolute* right to abortion, rather it protects a woman from "unduly burdensome interference" with her right to obtain an abortion. The Court emphasized that *Roe* "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion...." 432 U.S. at 471, 473-74. In upholding the constitutionality of the Connecticut regulation, the Court distinguished between state interference with protected activity — i.e. abortion — and state encouragement of an alternate activity in accordance with legislative policy. The state is permitted to make childbirth a more desirable alternative and thereby influence a woman's decision, as long as it does not impose any restrictions upon abortions that were not already present. Thus, a state does not violate equal protection by financing childbirth but not abortions, since financial restrictions limit access to abortion whether or not the state finances childbirth. 432 U.S. at 474-75.

The *Maher* Court emphasized that a state need not show a compelling interest for its policy choice favoring normal childbirth. 432 U.S. at 477. A state statute need only comply with the less demanding test that the statute be rationally related to a "constitutionally permissible purpose." 432 U.S. at 478. The Court acknowledged the state's "'strong and legitimate

interest in encouraging normal childbirth'...an interest honored over the centuries" and held that the regulation rationally furthered that interest. 432 U.S. at 478. The Court then noted that:

> The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought"...Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the court.'

432 U.S. at 479-80.

Three years after *Maher,* this Court decided *Harris v. McRae,* 448 U.S. 297 (1980). In *Harris,* the Court had to resolve the constitutionality of the Hyde Amendment to Title XIX of the Social Security Act, which severely limits the use of federal funds for "medically necessary" abortions. The Court upheld the statute against the argument that it violated the due process clause of the Fifth Amendment, which purportedly guarantees the right to abortion. The Court cited *Maher* and quoted its language extensively for the proposition that federal legislation may encourage childbirth over abortion so long as the government does not create any obstacles to abortion that did not previously exist. Since financing childbirth does not create a financial obstacle to abortion that does not already exist, the Hyde Amendment needed only to be rationally related to a legitimate government interest. The Court held that, by encouraging childbirth, the Hyde Amendment is rationally related to the legitimate government objective of protecting "potential life." 448 U.S. at 325.

The Statute under consideration herein clearly complies in its entirety with the pronouncements and guidelines of *Maher* and *McRae*. It in no way conflicts with or impairs a woman's right to choose abortion over childbirth. At most, the Statute may be construed to promote legislative policies favoring protecting childbirth and unborn children at all stages of fetal development to an extent constitutionally permissible.

As noted above, the Statute *expands* (it does not create) tort, criminal and property law protections for unborn children. It is hardly novel in expanding these protections. Unborn children have enjoyed extensive rights in America Jurisprudence both before and after *Roe*, in areas which in no way conflict with any right to privacy or any woman's right to choose an abortion.

As long as the Statute's declarations that, for purposes of state law, life begins at conception and unborn children have rights avoid any conflict with a woman's right to choose an abortion (as they clearly do), there is no constitutional basis upon which to strike down the Statute. In reality, the Statute's statement that unborn children have rights for purposes of Missouri law (excluding abortion) is merely a statement of existing fact. As noted above, even before the Statute, unborn children had such rights and this has never been interpreted as creating an unduly burdensome interference with the right to choose abortion.

Amici Curiae thus submit that the Statute (which specifically excludes abortion) clearly does not create any "unduly burdensome interference" with the right to choose abortion but, at most, indicates a "value judgment favoring childbirth over abortion...." *Maher v. Roe, supra*, 432 U.S. at 471, 473-74. Obviously, if the Statute itself fails to create an unduly burdensome interference with abortion, the challenged non-operative provisions of the Statute do not create such interference. As such, the Statute and each of its provisions is clearly consistent with *Roe* and constitutional.

C. The Supreme Court Has Not Precluded States from Declaring that, in Non-Abortion Contexts, Human Life Begins at Conception.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court stated that given the then current knowledge available, the judiciary was "not in a position to speculate" as to when human life begins. 410 U.S. at 159. The District Court below correctly noted that it was "inappropriate" for it to conduct an inquiry on this issue and granted Appellees' Motion in Limine precluding Appellants from offering evidence on this issue. Amici Curiae do not dispute that the District Court was an inappropriate body to consider the evidence on this issue. 662 F.Supp. at 413. However, *Roe's* holding does not mean that a state legislature is unable to consider such evidence or to act in this area, so long as its actions avoid a conflict with individual constitutional rights. In fact, the *Roe* Court's reluctance to act on this issue, because of the medical and scientific issues involved, suggests that the legislative branch of government is the appropriate branch to act. The Court has often recognized that in certain areas, particularly those involving scientific and medical uncertainties, the legislature, not the judiciary, is the appropriate body to act.

For example, in *Marshall v. United States*, 414 U.S. 417 (1974), the Court interpreted one of its holdings in a prior case (*Powell v. Texas*, 392 U.S. 514 (1968)), as "a candid acknowledgment that the medical uncertainties [in certain cases] afford little basis for judicial responses in absolute terms." 414 U.S. at 427. The Court went on to state that:

> When [a legislature] undertakes to act in areas fraught with medical and scientific uncertainties, *legislative options must be especially broad* and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices.

414 U.S. at 427 (emphasis supplied). *See also, United States v. Fogarty, supra*, 692 F.2d at 547 ("judicial self-restraint is esp-

cially appropriate where as here the challenged classifications entail legislative judgments on a whole host of controversial medical, scientific, and social issues"); *United States v. Kiffler, supra,* 477 F.2d at 352 (where "challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America...the resolution of such sensitive issues is best left to" branches of government other than the judiciary).

Thus, the fact that the Court in *Roe* felt it was not in a position to reach a determination as to when human life begins indicates, if anything, that the legislature may be the appropriate body to act on this issue. However, this does not mean that state legislatures can exercise their "extremely broad" options so as to unduly interfere with a woman's right to choose abortion. States are constitutionally precluded from legislatively expressing their attitudes about abortion or the beginning of human life when, and only when, such legislation constitutes an unduly burdensome interference with a woman's right to choose abortion. *Maher v. Roe, supra* 432 U.S. at 471. However, this is not the case with the Statute under consideration herein which specifically excludes abortion from its ambit and merely codifies and updates the traditional recognition of rights in unborn children under state law *in non-abortion contexts.* Constitutional prohibitions only come into effect when a state attempts to justify *its regulation of abortion* by adopting a particular theory of when life begins.

For example, Rhode Island enacted legislation in reaction to *Roe* in which the legislature made the express finding of fact that human life and a "person" commence at conception. The statute then proceeded to make all abortions illegal except when necessary to preserve the life of the mother. This obviously created an unduly burdensome interference with a woman's right to choose abortion, and the courts invalidated it. *Doe v. Israel,* 482 F.2d 156, 159 (5th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

Similarly, in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983), this Court considered a municipal regulation which required a physician to inform his patient seeking an abortion that "the unborn child is a human life from the moment of conception." 462 U.S. at 444. The Court invalidated this provision stating that "a state may not adopt one theory of when life begins *to justify its regulation of abortions.*" 462 U.S. at 444 (emphasis supplied).

These cases are obviously distinguishable from the instant case. The Statute herein is *not* a part of Missouri's abortion laws (under which abortion is clearly still legal and unaffected by the Statute). The Statute in no way even attempts to interfere with anyone's right to choose abortion and in no way attempts to justify Missouri's regulation of abortion. In fact, the Statute has nothing to do with regulation of abortion and deals solely and only with unrelated areas of law which have no affect on abortion, and which have always been within the province of the state legislatures.

Having acted in an area which is wholly proper and having avoided any conflict with anyone's constitutional rights, Amici Curiae submit that the General Assembly properly weighed the relevant medical/scientific evidence involved and acted within the proper scope of its authority. As such, the Statute and the declarations contained therein are wholly constitutional.

D. Conclusion to Argument II.

For the reasons set forth above, Amici Curiae respectfully submit that this Honorable Court should reverse the lower courts and uphold the constitutionality of the Statute and each of its provisions.

III. HOUSE BILL NO. 1596 CONTAINED ONE SUBJECT (UNBORN CHILDREN) AND WAS WHOLLY CONSISTENT WITH MISSOURI'S CONSTITUTION.

Appellees argue the Statute may be invalidated on separate and independent state grounds. Appellees cite a section of the

Missouri Constitution which provides that "[n]o bill should contain more than one subject which shall be clearly expressed in its title." Mo. Const. art.III, §23. The argument appears to be that House Bill No. 1596, in which the Statute originated, contained more than one subject.

On the face of House Bill No. 1596, such an argument is completely erroneous because House Bill No. 1596 concerns unborn children, as the title to House Bill No. 1596 clearly states: "An Act...relating to unborn children and abortion." The Missouri Supreme Court's test for determining if a bill contains more than one subject is "whether all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose." *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 6 (Mo.banc 1984).

Examination of House Bill No. 1596 reveals that in fact its provisions all fairly relate to the subject of unborn children. House Bill No. 1596 contained the Statute, certain revisions to Missouri law on abortion regulations (§§188.010 *et seq.)*, and a provision concerning involuntary manslaughter (§565.024). Each of these subjects concerns unborn children.

The Statute fairly relates to the subject of unborn children; for it concerns the rights, privileges, and immunities of unborn children. Mo.Rev.Stat. §1.205.2. To support this substantive provision, the section defines "unborn children" (§1.205.3), and makes prefatory findings as to the beginning of life (§1.205.1(1)), the protectable interests of unborn children (§1.205.1(2)), and the protectable interests of natural parents in their unborn children (§1.205.1(3)).

Furthermore, the revisions to the Missouri law on abortion regulation also fairly relate to the subject of unborn children. Abortion directly affects unborn children and the revisions themselves contain (as did the law revised) a definition of "unborn child." Mo.Rev.Stat. §188.015(6). Therefore, it is obvious that the revisions to the Missouri law on abortion relate to the subject of unborn children.

Finally, the involuntary manslaughter portion of House Bill No. 1596 also fairly relates to the subject of unborn children. This portion amended §565.024 by deleting subsection 1(3), which provided that: "A person commits the crime of involuntary manslaughter if he: Causes the death of an unborn quick child by any injury to the mother of such child which would be murder if it resulted in the death of such mother." Mo.Rev.Stat. §565.024.1(3) (repealed 1986). Such deletion was necessary to afford unborn children full rights, privileges and immunities in the area of homicide law. Clearly, this provision was related to the subect of unborn children.

Therefore, House Bill No. 1596 contained only one subject because each of the three provisions contained in House Bill No. 1596 relates to the subject of unborn children. Thus, House Bill No. 1596 is wholly consistent with Article III, Section 23 of the Missouri Constitution and no separate and independent state grounds exist for the invalidation of the Statute.

IV. IF, UNDER *ROE V. WADE*, THE STATUTE IS UNCONSTITUTIONAL, THEN *ROE* SHOULD BE REVERSED AS IMPERMISSIBLY INTERFERING WITH LEGITIMATE STATE ACTION.

As noted above, Amici Curiae clearly submit that the Statute is constitutional even if *Roe v. Wade* should stand as a precedent. However, if *Roe* requires a holding that the Statute is invalid then this Court should reverse *Roe* as impermissibly interfering with legitimate state action.

The fact that human life begins at conception is beyond dispute. As stated by a Senate subcommittee which conducted extensive hearings on this issue:

> During the course of eight days of hearing, fifty-seven witnesses testified on §.158 before the subcommittee. Of these witnesses, twenty-two including world-renowned geneticists, biologists and practicing physicians addressed the medical and biological questions raised by the bill. Eleven testified in support of the bill and eleven in opposition.

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete. Until the early nineteenth century science had not advanced sufficiently to be able to know that conception is the beginning of a human life; but today the facts are beyond dispute.
>
> Physicians, biologists and other scientists agree that conception marks the beginning of the life of a human being — of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological and scientific writings.

Subcomm. on Separation of Powers of The Senate Comm. on the Judiciary, Human Life Bill §158, 97th Cong., 1st Sess. 7, 13 (1981).[4]

The authorities in support of the medical/scientific fact that human life begins at conception are virtually endless. *See e.g.*, Nelson, *Textbook of Pediatrics* 234 (7th ed. 1959) ("[t]he child's life begins with fertilization of the ovum"). *See also*, authorities cited in Walker and Puzder, *State Protection of the Unborn After Roe v. Wade: A Legislative Proposal*, 13 Stetson L. Rev. 237, 243-44, n.17 (1984). As such, Amici submit that the unborn should be afforded full personhood under the Constitution. However, the question as concerns the Statute is whether a State legislature is constitutionally permitted to acknowledge the medical/scientific fact that human life begins at conception. If *Roe* prohibits such recognition even in non-abortion contexts (as the lower courts both held), or if *Roe*

[4] By Presidential Proclamation on January 14, 1988, the President of the United States "proclaim[ed] and declare[d] the inalienable personhood of every American from the moment of conception...." Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

was based on the presumption that human life does not begin at conception, then clearly *Roe* was erroneously decided and should be reversed. A decision which precludes the law from recognizing a relevant truth can only serve as a veil for injustice.

CONCLUSION

For the reasons stated above, Amici Curiae respectfully submit that Mo.Rev.Stat. §1.205 is wholly constitutional and that *Roe v. Wade* should be reversed in its entirety.

Respectfully submitted,

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BRIEF

(9)

No. 88-605

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Dated: February 22, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Act for the Suppression of Trade In, and Circulation of . . . Articles of immoral Use, 17 Stat. 598 (1873) 19
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LEGISLATIVE MATERIALS:

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Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) 18
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Cong. Globe, 40th Cong., 1st Sess. 514 (1868) 18
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Staff of Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., *Report on the Human Life Bill—S. 158* (Comm. Print 1981) 20

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E. Coke, *Third Institute* (1644) 15
Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 14, 15, 16, 17
Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975) ..... *passim*
East & Valentine, *Reconciling Santa Clara and Roe v. Wade: A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons* in *Abortion and the Constitution* (D. Horan, E. Grant, P. Cunningham eds. 1987) 12
Editorial, *A New Ethic for Medicine and Society*, California Medicine, Sept. 1970 16
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 9, 11

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W. LaFave and A. Scott, *Handbook on Criminal Law* (1972)	13
J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978)	16
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Note, *The Law and the Unborn Child: The Legal and Logical Inconsistences*, 46 Notre Dame Law. 349 (1971)	9, 10
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Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Studies 53 (1974)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

The Knights of Columbus files this brief *amicus curiae* with the consent of the parties.

The Knights of Columbus is an international Catholic fraternal organization of 1.4 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. While the Knights of Columbus engages in a broad range of social action programs aiding the sick, the handicapped, and the less fortunate, it devotes a considerable portion of its resources and volunteer effort to protect and

strengthen the family and to promote pro-life values. Thus, the Knights have a long-standing, substantial interest in the issues presented in this case, and their participation as *amicus curiae* will bring an important, and broader, perspective to bear.

SUMMARY OF ARGUMENT

The present case is an appropriate vehicle for overruling *Roe v. Wade* even if the case could be decided under the *Roe* framework. As precedents like *Garcia v. San Antonio Metropolitan Transit Authority* and *Erie R.R. Co. v. Tompkins* illustrate, when this Court has found an analytical framework, of short or long duration, to be flawed, it has not hesitated to abandon that framework —even if the case before the Court could be decided under its prior analysis, and even if the parties to the case have not argued that earlier precedent must be overruled.

As a practical matter, *Roe*'s analytical framework is flawed beyond repair because it rests on "viability"—the point at which an unborn child can survive outside of the womb with artificial aid—to determine when a state may protect the life of "the developing young in the human uterus." As Justice O'Connor has pointed out, because viability is almost solely defined by ever-progressing technology, it is a constantly moving point that cannot be a neutral and stable basis for long-term constitutional adjudication.

More fundamentally, viability is an invalid benchmark for construing the meaning of "person" in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology. Viability's true utility lies in its insight that a viable infant is certainly a person and that only limitations on technology prevent all unborn children from being viable. If a "viable" unborn

child is a person, then so are all unborn children, viable or not.

Roe's justifications for excluding the unborn from the Fourteenth Amendment are unpersuasive. Before *Roe*, in equity, property, crime, and tort, the law recognized the unborn as persons of legal consequence, reckoning that consequence in terms of the particular circumstances of the unborn. Upon examination, neither the Constitution's other uses of the word "person," the punishment provided for abortion, the traditional status of the mother of the aborted child as a victim, not an accomplice, nor 19th century abortion practices provides any principled basis on which to exclude the unborn from the protections of the Fourteenth Amendment.

In view of the logic and history of the Amendment, and this Court's traditional liberal construction of constitutional protections for personal rights, the only reasonable reading of the word "person" is one that includes an unborn child. The framers of the Amendment explicitly intended to extend its protections to "every human being." Their expansive design for the Amendment, combined with the predominant anti-abortion sentiment and legislation of the time in which it was proposed and ratified, inexorably leads to inclusion of the unborn as "persons" under the Fourteenth Amendment.

Indeed, this Court's understanding of the word "person" has been flexible enough to hold business corporations to be Fourteenth Amendment "persons." If the word can extend the fundamental protections of law to "beings" that are mere legal constructs, no rule of interpretation or principle of law can justify excluding unborn human beings.

ARGUMENT

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR OVERRULING *ROE*, EVEN IF THE MISSOURI STATUTE AT ISSUE COULD ITSELF BE UPHELD UNDER *ROE*'S ANALYSIS.

This case provides the Court with an appropriate vehicle for overruling *Roe v. Wade*, 410 U.S. 113 (1973). Indeed, the present case would provide the Court with such a vehicle even if appellants did not ask the Court to overrule *Roe*, and even if the case could be decided under the framework of *Roe* itself. When faced with similar circumstances in the past, the Court has overruled similar precedents.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the Tenth Amendment prohibited Congress from intruding upon "traditional government functions" of the States. Neither of the parties in *Garcia* had asked the Court to reconsider *National League of Cities*; they simply debated whether or not setting the pay scale of municipal transit employees was a "traditional government function." Nevertheless, while considering that question, a majority of this Court apparently concluded that the entire *National League of Cities* framework was suspect. Consequently, the Court set the case for reargument, specifying as a new question presented whether *National League of Cities* should be overruled. 468 U.S. 1213 (1984) (mem.) Then, after rehearing, the Court voted 5-4 to overrule *National League of Cities*. Writing for the Court, Justice Blackmun explained that:

> Our examination of this "function" standard applied in . . . cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional government function" is not only unworkable but is also inconsistent with . . . [the] principles on which *National League of Cities* purported to rest.

Garcia, 469 U.S. at 531. *Garcia*, therefore, demonstrates the willingness of the Court to overrule precedent even when it has not been asked to do so, and even when only a bare majority of the Court considers the precedent unsound.

The Court has not hesitated to abandon even long-standing precedents, and even at the cost of great resulting turmoil. Thus, in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which held that federal courts, sitting in diversity cases, should apply federal "general" common law, but state "local" common law. There was nearly a century of judicial precedent elaborating and refining *Swift*'s distinction between "local" and "general" law. The Court could have decided *Erie* simply by further refining that standard and holding that certain state tort law was "local," not "general." Nevertheless, the Court completely overruled *Swift*. Justice Brandeis explained that:

> Experience in applying the doctrine of *Swift v. Tyson* has revealed its defects, political and social; . . . [T]he impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

Erie, 304 U.S. at 74.

In sum, when the Court has found an analytical framework, of short or long duration, to be flawed, it has not hesitated to abandon that framework—even if the case before the Court could be decided under its prior analysis, and even if the parties to that case have asked the Court to so decide it. So too here.

II. *ROE*'S ANALYTICAL FRAMEWORK IS FLAWED BEYOND REPAIR.

Roe v. Wade is both inherently unworkable, and inherently wrong. Its analytical framework rests on two judgments. First, that beginning "at approximately the end of the first trimester," a state may reasonably regulate abortion in the interest of motherhood health. *Id.* at 163. This is so, *Roe* explains, because in 1973 "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Ibid.* *Roe*'s second judgment is that, for "the stage subsequent to viability," the State may proscribe all abortions, except those necessary for the life or health of the mother. *Id.* at 164-65. Viability is the demarcation, *Roe* announces, because "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163.

That analytical system, even if it were otherwise valid, could never serve as the basis for long-term constitutional analysis.

> The *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . ."

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (citation omitted).

More fundamentally, however, *Roe*'s use of viability as a constitutional benchmark could never be valid. As Justice White has noted, a viability standard has almost nothing to do with attributes of personhood, or a particularized state of being, and everything to do with the "state of medical practice and technology" that allows an unborn child to survive at an ever earlier point in gestation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).[1]

Moreover, the quality of medical technology varies not only with time, but also with locale. Many unborn children who are "viable" on any given day in a major metropolitan center would not be viable in a more rural setting. If constitutional personhood were pegged to the quality of medical technology in a given state, it would lead to the absurd result of the same unborn child being a "person" in some states, but not in others. Such an unborn child would then periodically gain, lose, and regain constitutional "personhood" whenever his or her mother traveled across state boundaries.

To be sure, the idea of "viability" does have some analytical utility, but a utility completely at odds with the result in *Roe*. Referring to the point at which an unborn child could survive outside the womb, "albeit with artificial aid," *Roe*, 410 U.S. at 160, viability provides a standard by which to find when an unborn child

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[1] *See* Krimmel and Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. Cinn. L. Rev. 725, 740 (1977) (a seven month old fetus 100 years ago was not viable, while it generally is today); W. Prosser, *The Law of Torts* 369 (5th ed. 1984) (viability is "a most unsatisfactory criterion [for the legal existence of the fetus], since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development"). *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1312 (1975).

becomes "equal" to a child already born. And no one would seriously argue that an infant—even one born prematurely—was not a "person" whose right to life was protected by the Fourteenth Amendment.

Viability's value, however, lies not in its ability to draw the line at when one "becomes" a person, but rather in its insight that a viable infant is certainly a person, and that only limitations on technology prevent all unborn children from being viable. In short, if a "viable" unborn child is a person then so are all unborn children, viable or not.[2]

A. There Is No Principled Basis by Which to Exclude the Unborn From the Protections Given to Persons By the Fourteenth Amendment.

Nevertheless, "the unborn," *Roe* announced, "have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 162. This point is, at the same time, both mistaken and irrelevant. Women and blacks were not treated as persons "in the whole sense" for significant periods of Anglo-American legal history, yet that fact hardly disqualifies them from personhood. Minors are not legally capable "in the whole sense" and often have legal interests that are contingent on future events, notably coming of age. Yet they most assuredly are persons.

Roe is, moreover, simply mistaken. Contrary to the *Roe* majority's belief otherwise, "[i]n equity, property, crime, and tort the unborn has received and continues to receive a legal personality."[3] And as Dean Ely has observed, even "[t]o the extent they are not entirely conclusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion."[4] In the law of property, for example, an unborn child is considered a person in being for all purposes that are to his or her benefit, including taking by will or descent.[5] Equally noteworthy is the extension in equity of *parens patriae* protection to unborn children regardless of gestational age, illustrated by cases compelling blood transfusions for pregnant women to protect their unborn children.[6]

Roe's discussion of tort law, *Roe*, 410 U.S. at 161-62, is also "largely inaccurate."[7] Far from exhibiting *Roe*'s skepticism, the "ideological history of prenatal injury law, and the more recent development of prenatal death law has consistently moved toward the affirmation of the unborn as a 'person' in the law . . . ."[8] Even in 1973,

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[2] Indeed, it is doubtful whether there is any such thing as a "viable" infant at all. Born or unborn, every infant is utterly dependent upon its parents and society. So are many other "non-viable" persons—the elderly and the handicapped, for example.

[3] Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980).

[4] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 925 (1973).

[5] Prosser, *supra* note 1, at 368; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law. 349, 351-54 (1971) ("The property rights of the unborn child are as old as the common law itself."). For example, an 18th century English court, replying to the contention that a devise for the life of a child *en ventre sa mere* was void because the child was a nonentity, wrote this succinct rejoinder to the *Roe* Court's notion:

> Let us see what this non-entity can do. He may be vouched in recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.

Thellusson v. Woodford, 311 Eng.Rep. 117, 163 (Ch. 1798).

[6] *See* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 844-48 (1973); Note, *supra* note 5, at 360-62.

[7] Kader, *supra* note 3, at 652.

[8] *Id.* at 640. Before *Roe*, common legal authorities did not shrink from acknowledging the personhood of the unborn. Dean Prosser, for example, observed that "medical authority has recognized long

it was well established that a child born alive could recover for prenatal injury.[9] Moreover, the trend in tort is towards permitting recovery for prenatal injury when the child is stillborn. Again, at the time of *Roe*, of the jurisdictions that had addressed the issue, 17 allowed such recovery, while 12 did not.[10]

In short, the "sense" in which the law has recognized the unborn outside of the abortion context is as persons of legal consequence, reckoning that consequence in terms of the particular circumstances of the unborn. That sense is not only consistent with the status of persons under the Fourteenth Amendment, but, given the broad scope of the Amendment, requires inclusion of the unborn within its protections.

Ultimately, however, *Roe*'s conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," 410 U.S. at 158, was premised on three more precise notions: first, that no other use of the word "person" in the Constitution has a "prenatal application," *id.* at 157; second, that aspects of "the typical abortion statute," such as permitting abortion to save the

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since that the child is in existence from the moment of conception. . . ." Prosser, *supra* note 1, at 367. *See also* 42 Am. Jur. 2d *Infants* § 2, at 9 (1969) ("Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb . . . .").

[9] *Id.* at 642; Prosser, *supra* note 1, at 367-68; Note, *supra* note 5, at 354-60.

[10] Kader, *supra* note 3, at 654. Though Prosser noted the practical "difficulties of proof of causation and damages" by allowing such recovery, Prosser, *supra* note 1, at 369, neither he nor the other authority cited by *Roe* as examples of commentators who opposed this development, *Roe*, 410 U.S. at 163, were in fact critics of this trend in the law. *See* Kader, *supra* note 3, at 652-53. Indeed, Prosser generally was critical of arbitrary distinctions that might circumscribe the duty owed to the unborn. *E.g.* Prosser, *supra* note 1, at 369 ("Viability . . . does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty . . . .").

life of the mother, are inconsistent with "Fourteenth Amendment status," *id.* at 157 n.54; and third, that "throughout major portion of the 19th century prevailing legal abortion practices were far freer than they are today," *id.* at 158. None of these propositions compels *Roe*'s conclusion. The first is irrelevant; the second and third, simply mistaken.

1. *The Constitutional Text Does Not Exclude the Unborn.*

As *Roe* noted, neither the Constitution as a whole nor the Fourteenth Amendment in particular defines the word "person." *Id.* at 157. Reviewing the uses of that word elsewhere in the Constitution, however, the *Roe* majority pronounced that the word nowhere else admitted of any prenatal application. And that, the majority inferred, meant that the word "person" did not embrace the unborn within the meaning of the Fourteenth Amendment. *Id.* That inference is transparently unwarranted.

It is now a common criticism of this analysis that most of the provisions of the Constitution noted by the Court plainly had adults in mind when employing the word "person."[11] This does not mean that children are not persons under the Fourteenth Amendment. The Twenty-Second Amendment, for another example, prohibits any "person" from being elected to the Office of President more than twice. Such a use of the word hardly precludes application of "person" in the Fourteenth Amendment to a human being who is not a natural-born citizen and not yet 35. Clearly, "[i]n the clauses mentioned by the Court, the concept of 'person' was broad and undefined and the function of the specific constitutional clause was to limit the broader class of persons for a particular purpose."[12]

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[11] *E.g.*, Ely, *supra* note 4, at 925-6.

[12] Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. Ill. L. Rev. 1, 11-12.

Perhaps more strikingly, few of the usages cited by the *Roe* Court have any application to corporations. Yet the Fourteenth Amendment's "person" is expansive enough to encompass the business corporation, an entity that exists solely in the imagination of the law. *See Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886).[13] And in the words of two commentators, when *Roe* is considered in light of *Santa Clara*, it takes on a "hauntingly Orwellian" character: "something can be a person without being human, and can be human without being a person."[14] If the word "person" can be extended to embrace a corporation, it surely must include living human beings, like the unborn, whom it meets along the way.

2. *Pre-Roe Abortion Statutes Are Not Inconsistent With the Status of the Unborn as Persons Protected By the Fourteenth Amendment.*

None of the aspects of statutes regulating abortion, thought by the *Roe* majority to be inconsistent with "Fourteenth Amendment status" for the unborn, *Roe*, 410 U.S. at 157 n.54, is in fact at loggerheads with such status. One "inconsistency" *Roe* identified was an exception for abortions done to save the life of the mother.

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[13] As critics of *Santa Clara* have noted, the Court so stretched the term "person" in establishing corporate personhood that it went far beyond the purposes of the Fourteenth Amendment. Justice Black, for example, emphasized that "the amendment was intended to protect the life, liberty, and property of *human* beings." *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting) (emphasis in original). Nevertheless, the Court subsequently found constitutional categories to be so flexible that it has held the corporation to have First Amendment rights to freedom of speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[14] East and Valentine, *Reconciling Santa Clara and Roe v. Wade: A Route to Supreme Court Recognition of Unborn Children as Constitutional Persons* in *Abortion and the Constitution* 90 (D. Horan, E. Grant, P. Cunningham eds. 1987).

But that exception is no more inconsistent with the personhood of the unborn than an exception from murder for homicides committed in self-defense[15] or out of legal necessity[16] is inconsistent with the personhood of the victim.[17] Indeed, it is hornbook law that "[o]ne human life may legally be terminated when doing so is necessary to preserve or protect another or others." *Steinberg v. Brown*, 321 F.Supp. 741, 747 (N.D. Ohio 1970).

The *Roe* majority also noted that the criminal penalty for abortion in the statute before the Court was less than the penalty for murder. *Roe*, 410 U.S. at 157 n.54. But that is hardly startling. The law has always distinguished among types of homicide and degrees of culpability of the actor.[18] Manslaughter, for example, is a distinct offense, and not a degree of murder. Yet a victim of manslaughter is no less a person because his killer ultimately is convicted of manslaughter instead of murder. Indeed such distinctions continue to develop with respect to "new" crimes, such as vehicular manslaughter, which is generally punished less severely than traditional manslaughter.[19]

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[15] *See* Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 180. *See also* Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059, 1081-82 (1976); Destro, *supra* note 1, at 1256 n.30.

[16] *See* J. Hall, *General Principles of Criminal Law* 426 (2d ed. 1960). *See also* Byrn, *supra* note 6, at 853-54.

[17] Most abortion statutes, including the one at issue here, do not distinguish between direct abortion and indirect abortion resulting from, say, treatment of ectopic pregnancies.

[18] R. Perkins and R. Boyce, *Criminal Law* 46-139 (3d ed. 1982).

[19] W. LaFave and A. Scott, *Handbook on Criminal Law* at 593 (1972). *See also* Horan & Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *Abortion and the Constitution*, *supra* note 14, at 73; Byrn, *supra* note 6, at 855; *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F.Supp. 1217, 1227 n.8 (E.D. La. 1970), *vacated for reconsideration in light of Roe v. Wade*, 412 U.S. 902 (1973) (the fact that murder and abortion are distinct offenses in Louisiana does not mean the legislature considered the unborn not to be "forms of human life").

The fact that, traditionally, the mother has rarely been considered a principal or accomplice in the crime of abortion, *Roe*, 410 U.S. at 157 n.54, is likewise beside the point. Not holding the mother as a principal of, or accomplice in, abortion has pragmatic, evidentiary roots. Working with only a primitive understanding of gestation, common law judges had difficulty determining if the child was alive before the abortion, or if the abortion caused the miscarriage. Obviously, if the mother was the defendant, rather than a witness, it could be very hard to prove that point.[20] And, in any event, the law has long tolerated "accomplices" who act under duress.[21] In sum, the status of the woman in criminal law hardly provides a reasoned basis for *Roe*'s conclusion that the Fourteenth Amendment cannot be read to embrace the unborn.

3. *Throughout Most of the 19th Century Abortion Was a Crime and Subject to Penal Sanctions.*

The *Roe* majority also believed that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158. That conclusion, however, misapprehends the state of 19th century abortion law and its relationship to scientific knowledge and technology.[22]

At the outset of the 19th century, abortion law was based entirely on the received English common law, under which abortion of a woman "quick with child" was

[20] Byrn, *supra* note 6, at 845-55; Dellapenna, *The History of Abortion: Technology, Mortality, and Law*, 40 U. Pitt. L. Rev. 359, 379 (1979).

[21] *See e.g.*, R. Perkins and R. Boyce, *supra* note 18, at 1054-72 (3d ed. 1982); J. Hall, *supra* note 16, at 415-552.

[22] *See* Dellapenna, *supra* note 20, at 363-64 (noting the failure of the Court to discuss the levels of technology at relevant stages of history). The ovum would not even be discovered until 1827. *Id.* at 370.

a common law crime.[23] The underlying principle was clear: "Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 W. Blackstone, *Commentaries* 129.

Early 19th century American case law, faithful to Blackstone's precept, considered abortion of a quickened fetus to be a common law crime. For example, in a Mississippi case holding that a slaveowner could be prosecuted for the murder of a slave, the court observed:

> The taking away of the life of a reasonable creature under the King's peace, with malice aforethought, express or implied, is murder at common law. Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, for the killing of a lunatic, an idiot, *or even a child unborn*, is murder, as much as killing a philosopher, and has not the slave as much reason as a lunatic, an idiot or an unborn child.

State v. Jones, 2 Miss. (1 Walker) 39 (1820) (emphasis added).[24]

[23] *See* E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprison"); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion, though not murder or manslaughter, is a "great crime"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31, § 16 (7th ed. 1795) (agreeing with Coke); 4 W. Blackstone, *Commentaries* 198. *See generally* Byrn, *supra* note 6, at 819-24.

Relying on an article by Prof. Cyril Means analyzing the fragmentary record of two 14th century cases, the *Roe* majority doubted that post-quickening abortion was "firmly established as a common law crime" even in the face of this historical record. *Roe*, 410 U.S. at 135-37. Prof. Means' analysis has since been discredited. *See* Byrn, *supra* note 6, at 817-19; Dellapenna, *supra* note 20, at 366-67, 369-71, 387-89; Destro, *supra* note 1, at 1268-71.

[24] *See also Mills v. Commonwealth*, 13 Pa. 630, 633-34 (1850) ("The moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and

Subsequent scientific developments, notably the discovery of the ovum in 1827, convinced the medical profession that a distinct human life was formed at conception.[25] These physicians quickly mounted a highly-successful campaign to tighten abortion laws to protect the unborn. Thus, "[t]he anti-abortion policies sustained in the United States through the first two-thirds of the twentieth century had their formal legislative origins, for the most part, in the wave of tough laws passed in the wake of the doctors' crusade and the public response their campaign evoked."[26] Consequently, most states enacted strict abortion laws,[27] with the preservation of unborn life as one of their major purposes.[28]

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charged in the indictment."); *State v. Slagle*, 83 N.C. 630, 632 (1880). For a review of the 19th century case law, *see* Gorby, *supra* note 12, at 15.

[25] Dellapenna, *supra* note 20, at 404. Indeed, more modern technological developments appear only to have confirmed this judgment. *See* Editorial, *A New Ethnic for Medicine and Society*, California Medicine, Sept. 1970, at 68, quoted in Destro, *supra* note 1, at 1255 (pointing out that the argument over abortion smacks of "a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous, whether intra- or extra-uterine until death.").

[26] J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 200 (1978). *See also* Bryn, *supra* note 6, at 832 (1867 condemnation by the Medical Society of New York of abortion at every stage of gestation as murder); *Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., Vol. 1, at 679-84 (1982); *Roe*, 410 U.S. at 141-42.

[27] For a list of the statutes enacted at the time of the adoption of the Fourteenth Amendment, see *Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting). *See also* J. Mohr, *supra* note 26, at 200 ("[M]ost of the legislation passed between 1860 and 1880 explicitly accepted the [regular physicians'] assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion.").

[28] J. Noonan, *A Private Choice* 51-52 (1979); Gorby, *supra* note 12, at 15-19 (reviewing abortion caselaw, including cases applying statutes, and concluding that concern for the unborn was at least one motivating factor in each case); Dellapenna, *supra* note 20, at 400 (observing that surgical procedures other than abortion had comparable mortality rates from the same causes as abortion, infection and shock, but were not banned).

Properly understood, history provides no basis for *Roe*'s belief that 19th century abortion practices were "far freer" than those of the early 1970's. To be sure, the 19th century saw significant change in abortion laws, but that change, spurred by scientific discovery, was in the direction of protecting the unborn at every stage of gestation.

B. The Letter and Intent of the Fourteenth Amendment Mandate Protection of the Unborn as Persons.

The text of the Fourteenth Amendment itself sets out only two classes of individual: "citizens," who must be born or naturalized in the United States and for whom the privileges and immunities of citizenship are assured, and "persons," a broader class not circumscribed by any specified criteria and for whom the fundamental rights of life, liberty, and property are guaranteed. U.S. Const. amend. XIV, § 1. Lacking any affirmative command to exclude unborn human children from the Fourteenth Amendment's guarantee of the right to life, the Court should apply "the rule that constitutional provisions for the security of person and property should be liberally construed," *Boyd v. United States*, 116 U.S. 616, 635 (1886), and give the word "person" in the Fourteenth Amendment the broadest possible reading.[29] *Cf. Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'nonper-

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[29] Such a construction seems most fitting in a case involving the right to life, that most fundamental "right to have rights." *Furman v. Georgia*, 408 U.S. 238, 272 (1972) (Brennan, J., concurring). *See also* J. Noonan, *supra* note 28, at 18 (All rights are premised on humanity, and so "[n]o discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman.").

sons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be the 'legal' rather than the biological relationship [of illegitimate children to their parents] is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.").

Moreover, such a construction of the word "person" in Section 1 of the Fourteenth Amendment is consistent with the intent of the Amendment's framers and ratifiers. Congressman John Bingham, the sponsor of Section 1 in the House of Representatives, intended it to have "universal" application, *Cong. Globe*, 39th Cong., 1st Sess. 1089 (1866), guaranteeing the rights of "any human being." *Id.* The Amendment would thus extend the protections of the law to "common humanity." *Cong. Globe*, 40th Cong., 1st Sess. 514 (1868). Bingham's test for the law's coverage was straightforward: "the only question to be asked of the creature claiming its protection is this: Is he a man?" *Cong. Globe*, 40th Cong., 1st Sess. 542 (1867). Similarly, the Amendment's Senate sponsor, Senator Jacob Howard, felt that it would apply to the "humblest, the poorest, the most despised of the human race." *Cong. Globe*, 39th Cong., 1st Sess. 2766 (1866). Congress contemplated the broadest scope for the word "person" in the due process and equal protection clauses, postulating neither a class of humans that could be excluded nor any governmental power to make such exclusions.[30]

To be sure, the legislative history of the Amendment makes no explicit reference to the unborn or to abortion.

[30] *See Hearings on S.158, supra* note 26, at 479 (statement of Prof. Victor Rosenblum), 663-67; Destro, *supra* note 1, at 1286-91.

Yet by its adoption in 1868, every state used its criminal law to regulate abortion, and generally regarded the unborn as legal persons.[31] In that legal milieu, the Amendment's authors, if asked, would almost certainly have considered the word "person" to include an unborn child.[32] At a minimum, the expansive language its framers used both in the Amendment and in their explanations of what they were trying to accomplish suggests the opposite of an intent to exclude any particular class of persons from coverage, much less to overturn in one stroke newly-tightened state abortion laws.[33] On the

[31] The courts recognized this strong anti-abortion attitude. *See, e.g., Smith v. State*, 33 Me. 46 (1851); *State v. Howard*, 32 Vt. 380 (1859). *See generally*, Destro, *supra* note 1, at 1289-91. Even a 19th century case cited by *Roe* as an early right of privacy precedent, *Union Pacific R.R. v. Botsford*, 141 U.S. 250 (1891), is consistent with the 19th century concern for the unborn child. *Botsford* held that the privacy of a female plaintiff in a personal injury action precluded a court from ordering a medical examination of her without statutory authority. The Court pointed to two exceptions in which a court has inherent authority to order such an examination, one of which is relevant here. "The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253.

[32] J. Noonan, *supra* note 28, at 6-7. Other legislation passed by the Congress in the 1860's and 1870's, when many of the leading proponents of the Thirteenth and Fourteenth Amendments were still serving, suggests affirmative congressional participation in the anti-abortion mood and legislation so common in the 19th century. Particular examples are the 1866 Assimilative Crimes Act, 14 Stat. 13 (1866), which made state law, including abortion statutes, applicable in federal enclaves, and the 1873 "Act for the Suppression of Trade in, and Circulation of . . . Articles of immoral Use," 17 Stat. 598 (1873), which made it a misdemeanor to sell in those enclaves, federal territories, and the District of Columbia drugs or articles "for causing unlawful abortion." *Hearing on S.158, supra* note 26, at 686-90.

[33] *See* Destro, *supra* note 1, at 1289-90 ("In light of the contemporary feeling that abortion involved the taking of human life,

contrary, the anti-abortion feeling of the period in which the Fourteenth Amendment was proposed and ratified is hard to overstate. "[N]ot one statement by any nineteenth-century commentator can be found which was in any way sympathetic to women desiring abortions."[34]

Ultimately, then, *Roe*'s effort to build an analytical framework on an unborn child's "capability of meaningful life outside the mother's womb," *Roe*, 410 U.S. at 163, injects into judicial decisionmaking an analysis alien to the Fourteenth Amendment. When a human life becomes "meaningful," or when it loses its "meaning,"[35] are subjective questions of value that look beyond the physical existence of a human being.[36] However illuminating such philosophical inquiry may be, the framers embodied in the Fourteenth Amendment a more fundamental threshold of value that must be applied by the courts and that is not subject to *ad hoc* modification under the influence of such extrinsic value systems.

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it would be incongruous to claim that the authors of the fourteenth amendment intended to exclude the unborn, and that they considered abortion to be part of the liberty protected by the amendment.").

[34] Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Population Studies 53, 56 (1974). *See also Hearings on S.158, supra* note 26, at 478 (statement of Prof. Rosenblum) (there was no organized opposition to the physicians' crusade to tighten abortion laws).

[35] For an example of such a discussion of the "meaningfulness" of human life, *see* Destro, *supra* note 1, at 1330 (summarizing the Senate testimony of a state legislator, supporting legalization of euthanasia, who questioned the "benefit" of the lives of 1500 retarded individuals in his state's mental institutions, individuals "who never had a rational thought").

[36] For a discussion of the distinction between the "scientific question" and the "value question," *see* Staff of Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., *Report on the Human Life Bill—S.158* at 3-5 (Comm. Print 1981).

Securing the interest of the unborn in life on the same Fourteenth Amendment foundation as the right to life of all human beings would return this Court to the neutral and balanced framework of adjudication provided by the Constitution. It would harmonize this Court's understanding of human beings and of Fourteenth Amendment "persons." And it would do so on the strength of a simple insight: if a being is human, as an unborn child is, he is a person protected by the terms of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Eighth Circuit should be reversed, and *Roe v. Wade* should be overruled.

Respectfully submitted,

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Dated: February 22, 1989

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 22 1989

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, State of Missouri,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICE: Planned Parenthood of Greater Kansas City; Howard I. Schwartz, M.D.; Robert L. Blake, M.D.; Carl C. Pearman, M.D.; Carroll Metzger, R.N.C.; Mary L. Pemberton, B.S.W.;
Appellees,

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1988
No. 88-605

WILLIAM L. WEBSTER, State of Missouri,

Appellants

v.

REPRODUCTIVE HEALTH SERVICE; Planned Parenthood of Greater Kansas City; Howard I. Schwartz, M.D.; Robert L. Blake, M.D.; Carl C. Pearman, M.D.; Carroll Metzger, R.N.C.; Mary L. Pemberton, B.S.W.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE NATIONAL LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, The National Legal Foundation respectfully moves the Court for leave to file a brief amicus curiae in the above entitled case. It is our understanding that Counsel for Appellees have consented to this filing, but no written confirmation has been received. Counsel for Appellants have given consent.

The National Legal Foundation is an organization devoted to advocacy and

support of Constitutional Rights and Liberties. The Foundation is gravely concerned about attempts to restrict states in the exercise of their duty to protect the life and liberty of all persons within their jurisdiction, including the unborn. The Court's disposition of this case could dramatically affect the exercise of that duty.

The Missouri statute attempts to regulate abortions in the state and assure that state resources are not utilized to further such procedure. In particular, the enactment prevents public employees from counseling and encouraging abortions except where the mother's life is in danger and restricts the use of public facilities to perform abortions.

The Court of Appeals struck down both provisions; the counseling provision on vagueness grounds and the restriction on public facilities as an obstacle to a woman's freedom to choose abortion. Both holdings are in error.

The counseling provision is not unconstitutionally vague. It applies only to public employees in the scope of their employment and has been given a precise interpretation by the Attorney General that should be respected by the Court. No penalty attaches for violation of the statute, only a taxpayer proceeding to more clearly define the statute's application.

The withholding of public facilities is no different from withholding public funds for abortions which this Court has previously upheld as valid. The

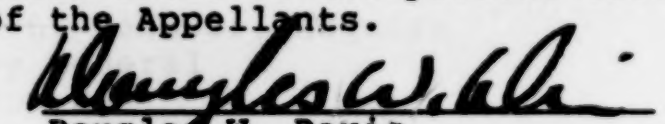
allocation of public resources is a decision best left to the state legislative process and not the federal courts.

Lastly, the Court should reconsider its decision in Roe v. Wade, 410 U.S. 113 (1973). The arbitrarily established trimester approach of that case conflicts with the self evident truth that the unborn child is human and entitled to the rights to life and liberty guaranteed in the Declaration of Independence.

Counsel of Record for amicus curiae Robert K. Skolrood is Executive Director for The National Legal Foundation and Douglas W. Davis is General Counsel for that organization. Counsel for amicus curiae specialize in Constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying amicus curiae brief in the present case in support of the Appellants.



Douglas W. Davis
The National Legal Foundation

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. 88-605

WILLIAM L. WEBSTER

Appellants

v.

REPRODUCTIVE HEALTH SERVICE

Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 1989, three copies of the Motion and Brief of Amicus Curiae, and a copy of the Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5 (b):

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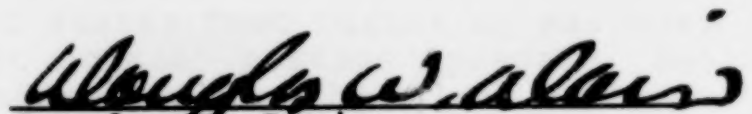
I further certify that service is not required on any other persons, and that all parties required to be served have been served as required under S. CT. Rule 28.



Douglas W. Davis
Attorney for Amicus Curiae
The National Legal Foundation

STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Motion and Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on February 22, 1989, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 22nd day of February 1989.

The National Legal Foundation

By: Douglas W. Davis
Douglas W. Davis
Attorney for Amicus Curiae
The National Legal Foundation

Subscribed and Sworn before me this 22nd day of February, 1989.

Jennifer G. Spell
Notary Public

My Commission Expires: September 1, 1992.

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is constituted for the purpose of advocacy in support First Amendment freedoms and other inalienable rights. While typically this involves the Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate and historically acceptable governmental efforts to protect the lives of unborn children. The Court's decision in this case will dramatically affect the ability of our state elected officials to extend the guarantees of life and liberty found in the Declaration of Independence to all men and women regardless of their vulnerability or stage in life. When such protection is denied to the unborn, it opens the door for arbitrary withdrawal of such guarantees to all men and women.

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for Amicus Curiae, Robert K. Skolrood is Executive Director and Douglas W. Davis is General Counsel for The National Legal Foundation. Counsel for Amicus Curiae specialize in constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this case.

ISSUES PRESENTED

Is the Missouri Statute prohibiting public employees, in the scope of their employment, to "encourage or counsel" a woman to have an abortion not necessary to save her life, unconstitutionally vague?

Is the Missouri Statute forbidding all public funding and use of public facilities for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, unconstitutional?

Should the Court reconsider the Roe v. Wade decision?

SUMMARY OF ARGUMENT

The Missouri Statute's prohibition against public employees, within the scope of their employment, encouraging or counselling a woman to have an abortion except to preserve her life is not unconstitutionally vague. The statute does not apply generally, but only in the public employment context. The words "encourage" and "counsel" are sufficiently clear that a reasonable person, using reasonable common sense, could understand what activity is prohibited. The Attorney General, the only state official with opportunity to interpret the statute, has further clarified the meaning of these terms. His interpretation should be duly regarded and places all effected state employees on notice as to what activities are prohibited.

The prohibition of public funding and utilization of public facilities for abortions is also constitutional. It conforms with this Court's holdings that a state is under no obligation to utilize its resources to remove obstacles, not of its own making, to a woman's freedom to choose an abortion. The Court of Appeals unduly narrowed the application of the state funding cases and its opinion should be reversed.

Lastly, the Court should reconsider and discard the trimester approach of Roe v. Wade, 410 U.S. 113 (1973). That opinion denies the self evident truth that the unborn child is human and therefore possesses the rights to life and liberty found in the Declaration of Independence. This same rationale was applied in the Dred Scott case to arbitrarily deny the self evident humanity of the African-American.

WILLIAM L. WEBSTER

Appellants

v.

REPRODUCTIVE HEALTH SERVICE

Appellees

ARGUMENT

I.

Introduction.

It is vital that this Court begin its analysis of the constitutionality of Missouri's Statute §§188.200-188.215 by recognizing its limited scope. This case must be analyzed in light of the following facts:

1. The statute's proscriptions extend only to public employees within the scope of their employment, public facilities, and public funding. The statute has no application to conduct or speech outside the public employment context.

2. The only remedy authorized by the statute for its violation is a civil taxpayer enforcement proceeding.

3. The state of Missouri stands in the position of an employer in relation to public employees. The state, through the Attorney General, has declared the terms "encourage" and "counsel" to be limited to "affirmative advocacy."

Less than one month after the Missouri statute was signed into law by Governor Ashcroft and before it became effective, the Plaintiffs filed suit to restrain its enforcement and mount a void for vagueness challenge against the terms "counsel" and "encourage". The state administrative and judicial machinery has not been afforded the opportunity to construe the enactment. The Plaintiffs have asked this Court to examine statutory terms in the abstract. It is against this backdrop that the Court is asked to analyze whether the terms "counsel" and "encourage" are void for vagueness.

II.

The Eighth Circuit Court Erred In Holding That The Missouri Statute Is Void For Vagueness.

This Court has long recognized the fundamental principle that an enactment is void for vagueness if its prohibitions are not clearly defined. The dangers inherent in a vague law are threefold:

1. a lack of a "reasonable opportunity to know what is prohibited" may "trap the innocent by not providing fair warning;"

2. vague laws permit arbitrary and discriminatory enforcement on an "ad hoc" basis;

3. and vague laws may lead citizens to "steer far wider than necessary in the exercise of free speech.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). None of these concerns are applicable in this case.

The Missouri statute does not apply to

public at large but only to public employees, public facilities, and public funds. This Court has expressed a willingness to sustain statutes that regulate federal and state employees in the face of void for vagueness challenges.

In Broderick v. Oklahoma, 413 U.S. 601 (1973), governmental employees mounted a void for vagueness challenge against a statute modeled after the Hatch Act which prohibited them from "taking part 'in the management or affairs of any political party ....'" Id. at 608. In that case, this Court rejected the notion that the term "taking part in" rendered the statute facially vague:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with ....

Broderick, 413 U.S. at 608, quoting CSC v. Letter Carriers, 413 U.S. 548, 578, 579 (1973).

If the term "take part in" was sufficiently precise to place state employees on notice of the type of conduct that the statute prohibited, it would be an anomaly to hold that the terms "encourage" and "counsel" are so vague that men of common intelligence must necessarily guess at [their] meaning." Connally v. General Construction Company, 269 U.S. 385, 381 (1926).

Unlike the public employees in Broderick, the Missouri public employees in this case have the advantage of an advance ruling by their employer which declares that the words "counsel" and "encourage" are limited only to "affirmative advocacy." The Attorney General's Opinion satisfies Due Process requirements by providing fair warning of

prohibited activity.

The Eighth Circuit's refusal to accept the Attorney General's narrowing construction of the statute ignores controlling Supreme Court precedent. When a federal court is presented with the Attorney General's interpretation of a state statute, it must give that opinion "respectful consideration." Law Students Research Council v. Wadmond, 401 U.S. 154, 163 (1971). A federal court cannot be expected to ignore an authoritative pronouncement when analyzing a state statute to determine whether it will meet a vagueness challenge.

The Attorney General's construction is consistent with a reasonable interpretation of the words "encourage" and "counsel." It is even more appropriate for the court to defer to the state's construction of the terms when there has been no other state judicial or

administrative interpretation.

This Court recently reaffirmed the "well established principle that statutes will be interpreted to avoid constitutional difficulties." Frisby v. Schultz, 487 U.S. ___, 101 L.Ed.2d 420, 430 (1988). In Frisby, this Court narrowly read a statute that prohibited "picketing before or about the residence or dwelling of any individual" to prohibit only "focused picketing taking place solely in front of a particular residence ...." Frisby, 101 L.Ed.2d at 431. The Court justified its narrow reading on representations made during Oral Argument by counsel for the town of Brookfield who stated, that the town itself "takes, and will enforce, a limited view of the 'picketing' proscribed ...." Id., at 431.

In Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554, (E.D. PA. 1975), aff'd., sub nom. Franklin v.

Fitzpatrick, 428 U.S. 901 (1976), this Court affirmed a district court opinion which relied upon representation by counsel for Pennsylvania, that requiring "humane disposal" of a fetus was designed to prohibit only the "mindless dumping of aborted fetuses on to garbage piles." Planned Parenthood, 401 F.Supp. at 573. Based upon this representation, that provision of the statute was held to be constitutional on its face.

The Court of Appeals erred by failing to consider the narrowing construction applied to the statute by the Attorney General for the state of Missouri. That construction controls in the face of a vagueness challenge as the Missouri statute imposes no criminal penalty and is reasonable and consistent with the common understanding of the terms, "encouraging" or "counseling" a person to have an abortion. The statute does not prohibit a

public employee from educating women about abortion but only prohibits encouraging or advising a woman to have an abortion. The Attorney General's construction is consistent with this limitation.

Public employees stand in a different position in relation to the state than citizens in general. "[T]he state's interest as an employer in regulating the speech of its employees differs significantly from those it possesses in connection with regulation of the speech of citizens in general." Connick v. Meyers, 461 U.S. 138, 140 (1983).

Unlike citizens in general, state employees have administrative procedures that are provided to obtain advance clarification of prohibited conduct. Public employees are expected and required to consult relevant employment regulations much like "businesses, which face economic demands to plan behavior carefully, can be

expected to consult relevant legislation in advance of action." Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). The question of when a public employee crosses the line from informing a woman of her alternatives, to encouraging and counseling a woman to have an abortion is readily apparent. Any doubt can be resolved in advance by consulting employment manuals, personnel policies, or through the Attorney General's office.

Finally, a public employee who does "counsel" or "encourage" a woman to obtain an abortion is not subject to criminal penalty or any punitive civil action. The remedy provided for violation of the statute is a provision for taxpayer proceedings in civil court. This limited remedy does not subject an employee to criminal charges or immediate dismissal and will only operate to clarify the type

of speech and conduct prohibited by the statute.

The Eighth Circuit erred in discounting the civil nature of the statute. Once the court determined that the statute implicated conduct associated with speech, it failed to consider other aspects that would justify a less stringent standard of review. The statute must be viewed as a whole. It carries civil enforcement remedies and is only applicable to public employees who are operating within the scope of their employment. Furthermore, the cases that the Court of Appeals relied upon, Village of Hoffman Estates, Grayned, and Colautti v. Franklin, 439 U.S. 379 (1979), all involve state statutes imposed upon the general populace and not solely upon governmental employees.

The court's reliance upon Baggett v. Bullitt, 377 U.S. 360 (1964) which involved a statute requiring state

employees, upon pain of perjury to swear a loyalty oath or be precluded from employment is also misplaced. The Missouri statute imposes no sanction upon any employee, precludes no employee from continued employment nor does it infringe upon the personal conscience of any individual.

This case falls squarely within the parameters of Letter Carriers and Broderick, both of which implicated First Amendment freedoms of speech and imposed civil penalties requiring dismissal of public employees. Both cases withstood void for vagueness challenges.

The Missouri statute is aimed exclusively at state employees who are operating within the scope of their employment and who affirmatively advocate an abortion. In light of all these factors any person of common sense would be able to ascertain what conduct the

state is attempting to proscribe. The Eighth Circuit erred in its determination that the Missouri statute was void for vagueness.

III.

The Eighth Circuit Erred In Holding That The State Has Created Obstacles By Refusing To Make Its Facilities, Employees, Or Funds Available To Procure Abortions.

In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court concluded that the right of privacy, whether founded in the Fourteenth Amendment or the Ninth Amendment is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153. The right declared in Roe does not confer the constitutional right of access, or a consitutional right of entitlement to funds, services, or facilities:

Roe did not declare an unqualified

> "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Maher v. Roe, 432 U.S. 464, 473-474 (1977) (emphasis added). A woman's right to decide protects her from state created obstacles, but it "need not remove those not of its own creation." Harris v. McCrae, 448 U.S. 297, 316 (1980). In Harris, the court made clear that a woman's right to decide does not include "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." Id., at 316.

In striking down the Missouri statute, the Court of Appeals stated that prohibiting public employees from

encouraging or counseling abortion "is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." Webster, 851 F.2d at 1079.

This case however, is no different from either Harris or Maher. The Court of Appeals assumed that a woman has a constitutional entitlement to receive advice by a doctor in order to make her decision knowingly and intelligently. This rationale is no different than saying that an indigent woman has a right to receive public funds in order that she may exercise her right to decide. Whether the woman's lack is a lack of funds or a lack of information is irrelevant. Both are a form of difficulty but neither has been created by the state.

The Eighth Circuit determined that the

state's "choice of childbirth over abortion" was exercised in a manner that "prevents the patient from making a fully informed and intelligent choice." Webster, 851 F.2d at 1080. The court also characterized the Missouri statute as a "state imposed blackout on the information necessary to make a decision." Id., at 1080. These statements missed the mark. Both Maher and Harris involved a state imposed withholding of funds that certainly burdened, and often prevented, an indigent woman from procurring an abortion. The withholding of information by public employees in this case may ultimately prevent a woman from making a fully informed choice, but the lack was not created by the state, the state has merely refused to alleviate a pre-existing condition.

To illustrate this point, the Supreme Court has declared that the Constitution

guarantees the right to travel from one state to another and that this fundamental right can only be outweighed by a compelling state interest. Shapiro v. Thompson, 394 U.S. 618 (1969). But by no stretch of the imagination does it follow that citizens now have a constitutional right to compel a state to provide them with the information and equipment necessary to effect this constitutional right, e. g. maps and transportation. Likewise, citizens of a state have no constitutionally guaranteed right to compel their state to provide them with information necessary to carry out a decision to have an abortion.

The Eighth Circuit's decision overturning the statutory provisions which forbid the performance or assistance of nontheraputic abortions in public facilities or by public employees is tainted by the same flawed reading of

Harris, Maher, and Poelker v. Doe, 432 U.S. 519 (1977) (per curiam). The Court of Appeals held that so long as the state recovered all funding expended for use of public facilities and the costs of employees services in providing an abortion, no state funding issue exists. Thus, the withholding of public facilities and employees could be "for no other expressed reason than the state's desire to discourage abortions." This desire, according to the Court of Appeals, was not a "sufficient justification" to withstand a "compelling state interest" requirement. Webster, 851 F.2d at 1083. Such a holding ignores precedent established by this Court in Harris and Maher. A woman's right to decide whether to have an abortion "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion ...." Maher, 432 U.S. at 474.

[emphasis added]. There exists no principled distinction between the Missouri legislature exercising its value judgments by withholding funds, or by withholding the services of its employees and the use of its facilities. The Eighth Circuit made no attempt to expound upon the distinction it attempts to draw, except to say that such a value judgment "narrows and in some cases forecloses the availability of abortion to women." Webster, 851 F.2d at 1081.

This Supreme Court has held that a state has unlimited authority to make value judgments in the allocation of its resources. Maher, 432 U.S. at 474. The Eighth Circuit limited the exercise of the state's judgment to the withholding of state finances. It is not for the federal judiciary to make such value determinations. Those decisions must be left to the legislature.

IV.

This Court Must Reconsider And Discard The Trimester Approach Of Roe V. Wade.

The underlying rationale of the Court's Opinion in Roe v. Wade, which has permitted abortion on demand under a trimester approach, is based upon an erroneous perception of life and liberty found in the case of Scott v. Sanford, 60 U.S. (19 How.) 393 (1957) (hereafter Dred Scott).

Central to Chief Justice Taney's rationale in Dred Scott was the Court's assertion that the black slave was merely, "an ordinary article of merchandize and property." Dred Scott, 60 U.S. at 451. By so holding, the Court dehumanized African-Americans, equating them, in Abraham Lincoln's words, with "the beasts

of the field." A. Lincoln, "Speech at Edwardsville, Illinois, Sept. 11, 1858," in 3 Collected Work of Abraham Lincoln 95 (R. Basler ed. 1953). The Dred Scott Court was able to assert that the slaveholder had absolute authority to do whatever he wished with his "property" and that any attempt by Congress to prohibit the expansion of slavery into the territiories was forbidden. In fact the Court asserted that there was nothing "which entitles property of that kind [slaves] to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights." Dred Scott, 60 U.S. at 452.

The Court in Roe proceeded upon the same basis as Dred Scott, the only distinction being that Dred Scott classified men as "property" based on their race, while Roe

classified them as "property" based on their stage of development.

The Court in Roe disclaimed any intent to "resolve the difficult question of when life begins," Roe, 410 U.S. at 160, as did the court below, Webster, 851 F.2d at 1076 n.7. Yet implicit in the Roe Opinion is the assumption that the child in the womb is something less than human; that the child in the womb is in fact "property". The implication is more readily apparent where the Court freely conceded that if the "suggestion of personhood is established, the appellant's [Roe's] case, of course collapses, for the fetus' right to life is then guaranteed specifically by the [Fourteenth] Amendment." Roe, 410 U.S. at 156-57. For the Roe Opinion to withstand scrutiny, the unborn child had to be "dehumanized" in the same manner as the slaves of Dred Scott.

The assumption has been completely

established since Roe v. Wade. Roe and its progeny have created abortion on demand. A woman may freely destroy her fetal "property" as she chooses. In language strikingly similar to Dred Scott's assertion that the government had only "the power coupled with the duty of guarding and protecting the owner in his rights," 60 U.S. at 452, with respect to slaves, and could not, therefore block their ownership in the territories previously free from slavery by law, the Court has interpreted Roe to stand for the proposition that "government may not place obstacles in the path of a woman's exercise of her freedom of choice." Harris, 448 U.S. at 316.

The most effective opponent of slavery was Abraham Lincoln. In his debates with Stephen Douglas, Lincoln vigorously attacked the underlying presumption of Dred Scott that man as man should ever be

classified as something less than human before the law. His arguments apply with equal force to the Roe rationale.

In opposition to the Dred Scott opinion, Lincoln relied upon the Declaration of Independence.[1] That document states:

> We hold these truths to be self evident: that all men are created equal; that they are endowed, by their Creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Looking to the "plain unmistakable language of the Declaration," Lincoln asserted that "the authors of that notable

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[1]Some might argue that the Declaration of Independence is not a legal document and has no legal significance. Lincoln thought otherwise, specifically dating the founding of the nation to the Declaration of Independence in his Gettsburg Address. The Supreme Court has recognized the binding legal effect of the Declaration of Independence in at least two cases, Inglis v. The Trustees of the Sailor's Snug Harbor, 27 U.S. (3 Peters) 121, 7 L.Ed. 617 (1830) (citizenship determination) Ware v. Hylton, 3 U.S. (3 Dallas) 199, 1 L.Ed. 568 (1796) (application of international law).

instrument intended to include all men ...." when they asserted the self-evident truth that "all men are created equal and that they are endowed by their Creator with certain inalienable rights." A. Lincoln, Speech at Springfield, Illinois, June 26, 1857, 2 Collected Works of Abraham Lincoln 405 (R. Basler ed. 1953) (emphasis in original). Lincoln defined his assertion in rebutting Douglas and Chief Justice Taney's phrase that "all men" did not include African-Americans.

> I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal - equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said, and this meant .... They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even

> though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

Id., 405-406.

The Declaration of Independence established that "all men" enjoy "inalienable rights" including the right to life and liberty. As Lincoln stated, the principle upon which our government was founded admits of no exception. As Lincoln noted in a speech in Chicago on July 10, 1858:

> I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle and making exceptions to it where will it stop. If one man says it does not mean a negro, why not another say it does not mean some other man? If that declaration is not the truth, let us get the Statute book, in which we find it and tear it out!

Collected Works 2: 500-501.

Lincoln did not need the latest scientific data to proclaim what was self-

evident. The African-American was a human being - not a stone, not a beast or other animal - and therefore the claims of the Declaration of Independence were rightfully his. The unborn child stands in the same posture today. It is equally self evident that the unborn child is a human being - not a stone, not a beast or other animal: science only confirms this truth, it does not create it. All attempts to classify the unborn as more or or less of a person by an arbitrary trimester approach are no different than classifying persons as more or less human based on the color of their skin. Roe stands in the same place of opposition to the equality of man and the inalienable rights of life and liberty as Dred Scott and should likewise be repudiated.

In a speech at Edwardsville, Illinois, Lincoln reiterated that treating African-Americans as less than human had

consequences beyond the immediate issue of slavery:

> Now, when by all these means you have succeeded in dehumanizing the negro; when you have put him down, and made it forever impossible for him to be but as the beasts of the field; when you have extinguished his soul, and placed him where the ray of hope is blown out in darkness like that which broods over the spirits of the damned; are you quite sure the demon which you have roused <u>will not turn and rend you</u>? .... Our defense is in the preservation of the spirit which prizes liberty as the heritage of <u>all</u> men, in all lands, everywhere. Destroy this spirit, and you have planted the seeds of despotism around your own doors. Familiarize yourselves with the chains of bondage, and you are preparing you own limbs to wear them. Accustomed to trample on the rights of those around you, you have lost the genius of your own independence, and become the fit subjects of the first cunning tyrant who rises.

<u>Collected Works</u>, 3:95.

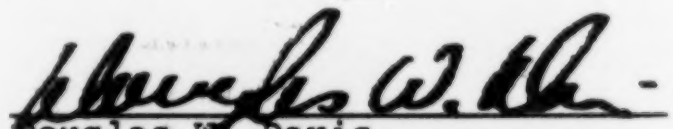
<u>Roe</u>, applying the rationale of <u>Dred Scott</u> against the unborn child, is no less of a threat to liberty. When once we exclude any human because of race or stage of development from the guarantees of life

and liberty found in the Declaration of Independence and thereby treat them as "property" or "potential life," we abandon the rule of law which protects men and women equally and substitute the rule of men, which picks and chooses among persons arbitrarily in deciding who will and who will not receive the protection of the law.

To overturn the rationale of Dred Scott required Constitutional Amendments and a Civil War. Even now, our nation struggles with the effects of discrimination against African Americans. To stamp out this injustice once again as it has appeared in Roe v. Wade against unborn men and women does not, as yet, require such measures. This Court must recognize the authority, indeed the duty, of the states to enact laws in support of a Declaration of Independence that guarantees life and liberty to all men. The Missouri statute

begins this process. The Eighth Circuit Court of Appeals has erred in its analysis of the Missouri statute and must be reversed.

Respectfully submitted,



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BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM L. WEBSTER, et al., - - Appellants,

versus

REPRODUCTIVE HEALTH SERVICES, et al., - - - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CATHOLICS UNITED FOR LIFE, NATIONAL ORGANIZATION OF EPISCOPALIANS FOR LIFE, PRESBYTERIANS PRO-LIFE, AMERICAN BAPTIST FRIENDS OF LIFE, BAPTISTS FOR LIFE, SOUTHERN BAPTISTS FOR LIFE, LUTHERANS FOR LIFE, MORAVIANS FOR LIFE, UNITED CHURCH OF CHRIST FRIENDS FOR LIFE, TASK FORCE OF UNITED METHODISTS ON ABORTION AND SEXUALITY, AND THE CHRISTIAN ACTION COUNCIL AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*) 10, 30
City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983) 20
Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973) 17
Furman v. Georgia, 408 U.S. 238 (1972) 26
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Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc) 22
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) 4-5
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Michael M. v. Superior Court, 450 U.S. 464 (1981) 9
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Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970) ... 7, 17
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United States v. Salerno, 107 S. Ct. 2095 (1987) 29
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 27

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Cal. Penal Code § 187 (West 1988) 23
Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1988) 23
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Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971) 23
Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978) 23
L. Arey, *Developmental Anatomy* 55 (7th ed. 1974) 16
Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) 15
Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) 14
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Cong. Globe, 40th Cong., 1st Sess. 542 (1867) 14
Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) 19

Other Authorities (Continued):

3 Cong. Rec. 1794 (1875) 14
Declaration of Independence para. 2 (U.S. 1776). 26
Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution* 137 (D. Horan, E. Grant & P. Cunningham eds. 1987) 11-12
W. Hamilton & H. Mossman, *Human Embryology* (4th ed. 1972) 16
K. Moore, *The Developing Human: Clinically Oriented Embryology* (2d ed. 1977) 17
The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16, 17 (1982) 16
H. Storer, *Criminal Abortion in America* (1860) 8, 23
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INTEREST OF AMICI

Catholics United for Life

Catholics United for Life (CUL) is the pro-life apostolate of the St. Martin de Porres Dominican Community. Formed in 1974, CUL has twenty-three affiliates across the country, and promotes sidewalk counseling, a technique it developed for saving babies from abortion. Sidewalk counselors work to save each individual baby threatened by abortion—through prayer, persuasion, offers of assistance, and distribution of literature. CUL also supplies literature on a national level to promote respect for all human life.

National Organization of Episcopalians for Life

National Organization of Episcopalians for Life Research and Education Foundation, Inc. (NOEL), a nonprofit Maryland corporation with national offices in Fairfax, Virginia, is a general organization of the Episcopal Church. NOEL's purposes affirm the sacredness and the right to life of all human beings from conception to natural death. NOEL supports the 1988 General Convention Resolution of the Episcopal Church which "emphatically oppose[s] abortion as a means of birth control, family planning, sex selection or any reason of mere convenience," promotes alternatives to abortion, including adoption, and assists those faced with problem pregnancies through its 92 chapters in 27 states.

Presbyterians Pro-Life

Presbyterians Pro-Life is organized under the rules of the Book of Order of the Presbyterian Church (USA), a denomination with three million members. Its objectives are to proclaim the Church's obligation to protect all innocent human life from conception to natural death and to support women in crisis pregnancies by offering alternatives to abortion. It is governed by a board of directors of thirty lay men and women and pastors, all members of the Presbysterian Church (USA). It has a network of local chapters throughout the denomination and publishes a quarterly newsletter that reaches 15,000 individuals and churches.

Southern Baptists for Life

Southern Baptists for Life (SBL) is a pro-life advocacy organization, incorporated in the State of Missouri as a non-profit corporation. SBL was established for the purpose of helping Southern Baptists take a firm, visible, and active stand against abortion, infanticide, and euthanasia. SBL concurs fully with the resolution on abortion passed at the 1982 Southern Baptist Convention, ". . . that all human life, both born and preborn, is sacred." SBL is governed by a six member board of directors and a fifteen member advisory board and provides pro-life resources to thirty-seven thousand Southern Baptist churches.

American Baptist Friends of Life

American Baptist Friends of Life is a pro-life advocacy organization within the American Baptist Churches/USA, representing the pro-life position of a large percentage of American Baptists. Directed by an eight member executive committee, it publishes a regular newsletter and is taking leadership in the implementation of its new denominational resolution on abortion passed in June of 1988 which states, "as American Baptists, we oppose abortion as a means of avoiding responsibility for conception."

Baptists for Life

Baptists for Life is a Christian pro-life organization representing independent Baptist Churches throughout the United States with main offices in Grand Rapids, Michigan. Baptists for Life believes in the sacredness of human life at every stage of biological development and in its value throughout the life continuum. It exists to provide alternatives to abortion through the over 2,000 church congregations which it represents.

Lutherans for Life

Lutherans for Life (LFL) is a volunteer pan-Lutheran educational organization seeking to restore respect for life at all its stages and legal protection for unborn children, the handicapped, and the medically dependent. Headquartered in St. Paul, Minnesota, LFL is a Minnesota non-profit corporation with federations in 10 states and over 200 chapters throughout the country.

Moravians for Life

Moravians for Life, also known as MOR'LIFE, is an association of individual members of the North American Moravian Church who are committed to pro-life education and advocacy.

United Church of Christ Friends for Life

United Church of Christ Friends for Life is a duly constituted special interest group within the United Church of Christ. It upholds the sanctity of human life from conception to natural death and speaks to this issue at every opportunity within the denomination. It produces a quarterly newsletter and is in the process of establishing chapters throughout the denomination.

Task Force of United Methodists on Abortion and Sexuality

The Task Force of United Methodists on Abortion and Sexuality is a national network of over 200 United Methodist pastors, theologians, and organizations begun in 1987 to minister to the problems of abortion in society. The view that life does not begin until live birth does not represent the position of a large segment of the United Methodist Church. According to our Discipline, only our General Conference, not our agencies, speaks for the Church. In 1988, General Conference stated in paragraph 71, section G of our Social Principles that "We recognize tragic conflicts of life with life may justify abortion and in such cases support the legal option of abortion under proper medical procedures. We cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection." That abortion involves human life before birth is signified by the phrase "conflicts of *life* with *life*" (emphasis added). That abortion should be restricted to minimize indiscriminate practice is signified by the General Conference saying "we cannot affirm abortion as an acceptable means of birth control and we unconditionally reject it as a means of gender selection."

Christian Action Council

The Christian Action Council (CAC), founded in 1975 as a Protestant evangelical pro-life organization, is incorporated in the District of Columbia. Since its founding, the CAC has established 400 crisis pregnancy centers around the country. These crisis pregnancy centers serviced more than 150,000 women in 1987, providing them with support, encouragement, and necessary services to enable them to carry their babies to term. The CAC also counsels and supports women who suffer from the aftermath of abortion. CAC has 120 local affiliate chapters that are activist-oriented and involved politically in promoting pro-life legislation and seeking a reversal of Roe v. Wade.

The parties to the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-605

WILLIAM L. WEBSTER, ET AL., - - - *Appellants,*
v.
REPRODUCTIVE HEALTH SERVICES, ET AL., - *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUMMARY OF ARGUMENT

This case presents a facial challenge to certain Missouri statutes alleged to violate the principles set forth in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. The state of Missouri has responded both by defending its statutes under *Roe*, and by questioning *Roe* itself.

In *Roe v. Wade*, this Court erroneously held that unborn children are not "persons" with rights under the fourteenth amendment to the United States Constitution, and that the fourteenth amendment includes a right to abortion. This Court should now repudiate the exclusion of unborn children from constitutional protection, and overrule *Roe v. Wade*.

The fourteenth amendment secures protection for the minimum human rights a state must respect: the rights to life, liberty, and property. This amendment would be of little value, however, if those invoking its guarantees had to bear the burden of proving their entitlement to protection under the amendment. Thus

the Court must presume that the amendment applies to all living human beings. Those who assert that a particular class of individuals is outside the scope of the amendment must bear the burden of justifying such an exclusion.

No valid basis exists for excluding human beings conceived but not yet born from the protection afforded "persons" under the fourteenth amendment.

The *Roe* Court offered no defensible justification for such an exception. The alleged absence of precedents for the personhood of unborn children is not only incorrect, but also irrelevant in view of the similar dearth of such precedents for any other class of humans. The postnatal applicability of some provisions of the Constitution referring to "persons" does not imply that those excluded, e.g., from eligibility for Congress or for citizenship, are not persons; moreover, the assertedly ambiguous scope of other consitutional provisions referring to persons provides no basis for anything but circular arguments as to their scope. The alleged inconsistency of exceptions in state anti-abortion laws with the personhood of unborn children merely identifies possible constitutional defects in those laws; such defects do not justify the categorical exclusion, from all constitutional protection, of the class suffering discrimination. The supposed laxity of state abortion legislation in much of the nineteenth century is historically misleading because it ignores the fact that stringent anti-abortion legislation, largely representing a response to the scientific discovery of the humanity of unborn children from the moment of fertilization, preceded and accompanied passage of the fourteenth amendment. Furthermore, even prior to this legislation, abortion was illegal at common law and, until after the technical developments of the late

eighteenth century, practically unavailable and virtually suicidal.

Contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the fourteenth amendment. The framers of that amendment clearly drew no distinction between "persons" and biological "human beings." Science demonstrates that each individual member of the human race begins life at the moment of fertilization. Logic supports no essential distinction between human beings on the basis of their dwelling inside or outside the maternal womb, or on the basis of their status as "viable" or "nonviable" individuals. Legal consistency supports the rejection of distinctions, in matters of basic rights, between born and unborn children, as well as between "viable" and "nonviable" unborn children. Finally, the intrinsic sanctity of every human life compels the rejection of any arbitrary exclusion of unborn children from entitlement to the most basic of human rights.

This Court should overrule *Roe v. Wade*. Any challenge to the Missouri laws predicated upon a supposed right to abortion, as in the present appeal, must accordingly fail.

A challenge to the Missouri legislation might rest on the basis that it insufficiently respects the personhood of the unborn. The appellees have not raised or indicated any wish to raise such constitutional objections; nor would these parties likely have standing to do so. The attorney general, however, who is an appellant in this case, is a proper party to vindicate the rights of unborn children. This Court should therefore uphold the personhood of children conceived but not yet born, and set this case for further briefing and reargument on the question of the proper disposition of this appeal.

ARGUMENT

The decision of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), rests upon two central holdings: first, that the due process clause of the fourteenth amendment to the United States Constitution provides for a right to abortion; and second, that unborn children are not "persons" possessing a right to life and equal protection of law under the fourteenth amendment.

The present case has called into question the validity of the *Roe* decision. This brief addresses the personhood, under the fourteenth amendment, of human beings conceived but not yet born.

I. THE BURDEN OF PROOF RESTS UPON THOSE WHO WOULD EXCLUDE UNBORN CHILDREN FROM THE MEANING OF THE TERM "PERSON" UNDER THE FOURTEENTH AMENDMENT.

The fourteenth amendment to the Constitution of the United States provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This amendment secures protection for the basic, minimum human rights any state must respect. It is imperative that categories of human beings not be read out of the terms of this amendment without the clearest demonstration of justification for such exceptions.

The Constitution is not a legislative code designed to specify its application in every conceivable situation. "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." *Legal Tender Cases*,

79 U.S. (12 Wall.) 457, 532 (1870). Thus, the vitality of constitutional principles depends upon their being presumed to apply. "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

If there were ever a term whose scope must be presumed to be broad, it is the term "person." For whoever is not a person lacks not only the privileges of citizenship, but even the barest minimum of human rights. A person need not have every right — prisoners, minors, and aliens, for example, do not possess the full panoply of rights and privileges afforded under the Constitution — but a nonperson has *no* rights whatsoever. A nonperson is no better off than property, entirely subject to the whim of the owner and whatever permissible regulation the state may deign to impose.

The constitutional protection for "persons" simply cannot function if each individual or class of human beings must prove inclusion in the roll of "persons." Does the term "person" include mentally disabled individuals? There is not likely much, if any, explicit support for that particular proposition in the text, history, or early application of the fourteenth amendment. Yet these are certainly persons. Does "person" include citizens of hostile nations? Children under the age of eighteen? Convicted misdemeanants or felons? Comatose individuals? Each of these classes of human beings lacks either the legal or physical ability to exercise certain rights, yet each is unquestionably a class of persons. This is so, not because members of each class can *prove* their inclusion under the fourteenth amendment, but because they are *pre-*

sumed included absent decisive contrary proof. "They are humans, live, and have their being." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (discussing illegitimate children). Therefore, "[t]hey are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

Human offspring conceived but not yet born are likewise "humans, live, and have their being." They do not need to overcome any additional hurdles in order to establish their right to presumptive inclusion within the term "person" as used in the fourteenth amendment. If unborn children are not persons, it must be because some further evidence authoritatively rebuts this presumption. No such evidence, however, exists.

II. THERE IS NO JUSTIFICATION FOR EXCLUDING FROM THE TERM "PERSON" THE CLASS OF HUMAN BEINGS CONCEIVED BUT NOT YET BORN.

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), the Court read into the term "person" in the fourteenth amendment an exception for unborn children. There is no valid justification for the creation of such an exception.

A. *Roe v. Wade* Gave No Valid Basis for Creating an Exception for Unborn Children.

The *Roe* Court made several arguments to support its conclusion that the word "person" does not include the unborn. None of these arguments withstands analysis.

1. Alleged absence of precedent

First, the Court observed that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." 410 U.S. at 157.

This observation is incorrect as a matter of fact. In *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970) (three-judge court), the court rejected a challenge to Ohio's abortion laws, holding that the implied right to privacy

> must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for *here there is an embryo or fetus* incapable of protecting itself.

Id. at 745-46 (emphasis added). As the court in *Steinberg* explained, "a new life comes into being with the union of human egg and sperm cells," *id.* at 746, and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it," *id.* at 746-47.

Moreover, as a legal matter, an absence or dearth of case support for unborn personhood is irrelevant. There may well not be any cases, for example, holding newborn infants to be persons. This obviously does not mean, however, that such children are beyond the scope of the fourteenth amendment. As discussed above, such a cramped construction of the text would largely negate the effect of the amendment.

2. Postnatal application of other constitutional provisions

Second, the *Roe* Court noted that the use of the word "person" in "nearly all" other parts of the Constitution "is such that it has application only postnatally. None [of these uses] indicates, with any assurance, that it has any possible prenatal application." 410 U.S. at 157 (footnote omitted). But this

simply begs the question. Those provisions that *cannot* apply prenatally explicitly limit the class of human beings to which they apply, *e.g.*, U.S. Const. art. I, § 2, cl. 2 (person must be at least age twenty-five to be a Representative); *id.* art. I, § 3, cl. 3 (person must be at least age thirty to be a Senator); *id.* amend. XIV, § 1 (person who is born, if born in the United States, is a citizen). Such exclusions obviously do not imply that those excluded (e.g., with respect to Representatives, those under age twenty-five) are not persons. Moreover, those provisions that *can* apply to unborn children,[1] *e.g., id.* art. I, § 9, cl. 1 (tax on importation of "persons"); *id.* amend. IV (security of the person against unreasonable searches and seizures); *id.* amend. V (due process requirement for deprivation of life), contain no exclusion for any particular class of children, born or unborn. Again, the burden is on those who would create an exception, not those who claim inclusion.

3. Apparent inconsistency of state anti-abortion laws with personhood of unborn children

Third, the Court pointed to allegedly fatal inconsistencies in the abortion laws of Texas and other states.

> [I]f the fetus is a person who is not to be deprived of life without due process of law, . . . does not the Texas exception [for abortion necessary to save the life of the mother] appear to be out of line with the Amendment's command? . . .

[1] It bears mention that the holding of an office need not, in theory, be limited to competent adults. History, for example, has seen numerous infants wear the royal crown. Furthermore, unborn children have been explicitly recognized as capable of serving as the executor of an estate. H. Storer, *Criminal Abortion in America* 92 (1860) ("an infant in utero . . . at every stage of [gestation], no matter how early, . . . may be appointed executor. . ."). *Accord Thellusson v. Woodford,* 31 Eng. Rep. 117, 163 (Ch. 1798).

> . . . If the fetus is a person, why is the woman not a principal or an accomplice [to an unlawful abortion]? . . . If the fetus is a person, may the penalties be different [for abortion and first degree murder]

Roe, 410 U.S. at 157 n.54.

Here the *Roe* Court confused two distinct issues: the constitutionality of the Texas abortion laws, and the constitutional personhood of unborn children.

A state, of course, may not exclude from the general protection of the criminal law a particular class of innocent persons.[2] This fundamental obligation does not disappear, however, simply because a state fails

[2] Whether an exception for the life of the mother would entail a denial of equal protection would depend upon the scope of that exception. There is a grave moral and legal difference between, on the one hand, allowing a physician to remove an ectopic pregnancy or cancerous uterus from a pregnant woman, with the death of her unborn child occurring as an unintended effect of that necessary operation, and, on the other hand, giving permission for the direct, intentional killing of the unborn child whenever such is claimed to be necessary to save the mother's life.

The total exemption of the pregnant woman herself from the scope of criminal prohibitions against abortion would, like total parental immunity from prosecution for serious child abuse, be unconstitutional. *But cf. Michael M. v. Superior Court,* 450 U. S. 464 (1981) (sustaining, against equal protection challenge, statutory rape law that only applied to male offenders). Prosecutorial discretion, of course, is fully capable of handling situations in which the mother is more accurately considered a victim instead of an offender.

The primary effect of holding the unborn child to be a person would be that the child could no longer be regarded as beyond the equal protection of the criminal law. In other words, if all of the elements of a statute defining an offense against a person were satisfied, the statute could not be held inapplicable simply because the victim was not yet born.

The state may properly create a separate and additional offense of abortion which could apply without proof of pregnancy or causation of fetal death.

to comply with it. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), for example, it would have been outrageous to suggest that the long history and widespread practice of segregated public education meant that black people were not persons. On the contrary, this segregation represented a constitutional violation.

Similarly, the denial of equal statutory treatment to unborn children does not support a categorical denial of constitutional protection to such children. As the Court emphasized in *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." If the state in fact is denying due process or equal protection to a class of humans, the remedy is to declare the discrimination unconstitutional, not to deny the personhood of the victimized class. To hold otherwise would be to deny the possibility of unconstitutional action by states, and to turn civil rights litigation upside down.

4. Alleged laxity of nineteenth century abortion laws

Fourth, the Court cited its "observation" that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer" than in 1973, *Roe*, 410 U.S. at 158, presumably as evidence that the framers and those who ratified the fourteenth amendment did not regard unborn children as human persons.

On this point the *Roe* opinion refutes itself. The fourteenth amendment was adopted in 1868, precisely the time when the scientific discovery of the humanity of the unborn had become widely known, and precisely at the time when this discovery prompted vig-

orous opposition to abortion by means of numerous statutory bans. *See* 410 U.S. at 129 (observing that abortion laws in effect in 1973 "derive from statutory changes effected, for the most part, in the latter half of the 19th century"); *id.* at 141 (noting the "anti-abortion mood prevalent in this country in the late 19th century"); *id.* at 141-42 (noting that the concern of the medical profession for prenatal human life destroyed by abortion "may have played a significant role in the enactment of stringent criminal abortion legislation during that period"); *see also id.* at 174-77 (Rehnquist, J., dissenting) (noting the multiplicity of state and territorial anti-abortion laws at the time of the adoption of the fourteenth amendment).

Furthermore, the assumption by the *Roe* Court that abortion was freely and legally available, even in the early part of the nineteenth century, simply ignores reality. As Professor Joseph W. Dellapenna has demonstrated, the primitive state of medical technology made abortion prior to 1780 "tantamount to suicide." Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution* 137, 148 (D. Horan, E. Grant & P. Cunningham eds. 1987). Thus, while abortion was indeed unlawful at common law, prosecutions were infrequent because they were unnecessary. *Id.* at 146.

> During this period, techniques to induce abortions were either magical, and hence punishable as witchcraft (whether they were successful or not), or extremely crude invasions of the woman's body, likely to be fatal to the woman as well as to the fetus. In the few cases where an abortionist was punished, it was for killing the mother. In fact, there is no evidence of voluntary abortion during this time. Abortions, if they occurred, seem to have resulted from assaults upon women rather than by their choice. Even then, abortion prose-

> cutions were hampered by ignorance of medical knowledge about the gestation process. The net result of these circumstances was that abortion was rare and the law did not have to deal with it because hanging the abortionist for killing the mother was sufficient punishment for the few cases that did arise.

Id. at 145 (footnotes omitted). The disposal of "unwanted" children was effectuated instead by infanticide. *Id.* (citing numerous authorities). When new abortion techniques finally became available in the late eighteenth century, the result was the initiation of anti-abortion legislation. *Id.* at 146. This legislative movement subsequently expanded in response to embryological discoveries that identified fertilization as the beginning of human life. *Id.* at 147.

B. No Other Basis Exists For Creating an Exception for Unborn Children.

Roe failed to give any justification for reading an exception for unborn children into the scope of the term "person" as used in the fourteenth amendment. Nor does any valid justification appear from other sources. On the contrary, history, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.

1. The framers of the fourteenth amendment did not distinguish between "human beings" and "persons."

Roe v. Wade distinguished between human beings and persons, holding that unborn children were not persons even if they were human beings. 410 U.S. at 159 ("We need not resolve the difficult question of when life begins"). Such a distinction, however, was foreign to the men who proposed and adopted the fourteenth amendment.

If one thing is overwhelmingly clear from the record of the debates leading up to and surrounding the thirteenth and fourteenth amendments and the postwar civil rights legislation, it is that the legislators considered personhood and biological humanity to be interchangeable terms.

Thus Representative Thaddeus Stevens, on the day the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74 (1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States . . . declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that personhood required something more than human life.

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[3]

There is, therefore, no warrant for the conclusion that a class of human beings might be excluded from the persons protected under the fourteenth amendment. As forcefully stated by Representative Joshua R. Giddings,

[3] *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 7[illegible] (1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); *id.* at 322-23 (1866) (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); *id.* at 1159 (1866) (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right of human nature [is] the right to exist"); *id.* at 1151 (1866) (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live . . . .
>
> . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

2. Science rejects the exclusion of unborn children from the class of human beings.

Science does not purport to identify the value society should place upon human life. Science does indisputably show, however, that each individual human organism begins life at the moment of fertilization. Thus science offers no valid basis for excluding prenatal human life from the category of "persons" protected under the fourteenth amendment.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.

Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747, 792 (1986) (White, J., joined by Rehnquist, J., dissenting).

This principle of continuous development is not unique to human beings.

> In biology and in medicine, it is an accepted fact that the life of *any* individual organism reproducing by sexual reproduction begins at conception, or fertilization — the time when the egg cell from the female and sperm cell from the male join to form a single new cell, the zygote. The zygote is the starting cell of the new organism.
>
> . . . It is important to also remember . . . that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them.

The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14, 16 (1982) (testimony of Dr. Micheline Mathews-Roth, principal research associate, Dept. of Medicine, Harvard Medical School) (emphasis added). The conclusion in the case of human life rests, therefore, not only upon human embryological research, but upon the findings of a broad area of biological study.

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 17. *Accord* W. Hamilton & H. Mossman, *Human Embryology* 14 (4th ed. 1972) ("the fusion of two germ cells . . . one, the spermatozoan from the male parent; the other, the ovum from the female parent . . . is the formation of the first cell of the new individual, the zygote"); L. Arey, *Developmental Anatomy* 55 (7th ed. 1974) (union "of a male and female

sex cell . . . definitely marks the beginning of a new individual"); K. Moore, *The Developing Human: Clinically Oriented Embryology* 1 (2d ed. 1977) (a zygote "results from fertilization of an oocyte by a sperm and is the beginning of human life").[4]

Science cannot identify a spiritual soul or assign a moral value to a given creature. Science does identify individual members of a particular species, such as homo sapiens. Unborn children are unquestionably individual members of this species, and thus the conclusions of science utterly reject the arbitrary exclusion of prenatal humans from the term "person."

3. Logic militates against the creation of an exception for unborn children in the term "person."

According to Roe *v. Wade*, unborn children are non-persons, and abortion of such children is a constitutional right. But it is plainly absurd to draw so tenuous a border as birth (or, for that matter, viability) between what is a constitutional liberty and what is homicide.

First of all, the act of abortion itself cannot sensibly be what distinguishes between persons and non-persons. Presumably no member of this Court would deny that "a newborn infant, whether the prod-

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[4] *See also Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973):

> During fertilization, sperm and egg pool their nuclei and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

322 F. Supp. at 1252 (citations omitted). *Accord Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973); *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (three-judge court); *Presley v. Newport Hosp.*, 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

uct of a normal birth or an abortion," *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 503 n.10 (1983) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting), is a person under the fourteenth amendment.

The point of detachment from the mother — whether by normal birth, induced delivery, or abortion — likewise fails as a logical point for creating an exception to personhood. For a considerable period prior to birth, the unborn child is viable, and thus capable of surviving premature delivery. The child of seven or eight months' gestation who still resides in the maternal womb is essentially indistinguishable from the child of identical age who has been born prematurely.

The fourteenth amendment does distinguish between born and unborn children of the same age for purposes of citizenship. *See* U.S. Const. amend. XIV, § 1 ("persons born . . . in the United States . . . are citizens"). But citizenship is a political classification the boundaries of which are necessarily arbitrary.

Personhood, in contrast, entitles an individual to the basic, minimal protections accorded to humanity. Whether the mother in labor while traveling interstate gives birth in Texas today or Mexico tomorrow is a question with political ramifications for the child; such incidental details, however, cannot reasonably determine whether the child may be slain. "No governmental power exists to say that a viable fetus should not have every protection required to preserve its life." *Thornburgh*, 476 U.S. at 784 (Burger, C.J., dissenting). As Senator Arthur S. Boreman explained in regard to the then recently enacted protections of the fourteenth amendment:

> This . . . is not confined to citizens of the United States, but it includes every person that is found within these States, and guarantying to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to *every person residing anywhere, everywhere*, within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject.

Cong. Globe, 42nd Cong., 1st Sess. App. 229 (1871) (emphasis added).

The total meaninglessness of birth as a criterion for personhood is more apparent today than ever, when induced, "scheduled" deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb.[5] Birth changes *where* the person is, not *what* the person is.

Nor does the concept of viability supply a logical alternative to birth as a boundary for excluding some unborn children from personhood.

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[5] Already *in vitro* fertilization and embryonic transfer have demonstrated beyond all doubt the fundamental biological independence of the newly conceived child from any particular woman, genetic mother or not, and the capacity of an unborn child to live outside of the womb altogether, if only for the initial stages of development. It is now clear, in other words, that intrauterine gestation is not even the first stage of life, but is merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child.

> If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur*.

Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 754 (1976).

Members of this Court have already strongly criticized reliance upon the concept of viability for drawing constitutional lines. *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., joined by White and Rehnquist JJ., dissenting) (point of viability is unstable because tied to contemporaneous state of medical technology, and is therefore unsuitable as a basis for judicial decision making). Justice White, in his dissent in *Thornburgh*, elaborated upon this point with regard to the state interest in protecting human life:

> The government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

476 U.S. at 795 (White, J., joined by Rehnquist, J., dissenting) (footnote omitted). The same rationale applies to constitutional personhood, i.e., the claim to minimal protection of basic human rights. One's capacity for survival is "constitutionally irrelevant" because "the character of the entity does not change at the point of viability."

The very notion of viability as a criterion for denying legal protection is gravely flawed. Viability is not a transcendent concept — it refers to conditional circumstances. The Arctic explorer is viable *if* sufficiently clothed. The serious diabetic is viable *if* properly treated. The newborn, full-term infant is viable *if* fed and nurtured. And the unborn child is viable *if* not prematurely expelled from the necessary environment, be it a petri dish or a womb. To deny protection on the basis of one's need for protection is no more sensible than to deny those who cannot swim the right to stay on board a ship. *Roe* stripped protection from precisely those who most need the minimum safeguards of the fourteenth amendment. This is topsy-turvy jurisprudence.

4. Legal consistency would not be served by the exclusion of unborn children from the protection of the fourteenth amendment.

The integrity of the law is not served, but rather is harmed, by the arbitrary exclusion of unborn children from constitutional protection. The history of legal developments of the past century and a half regarding prenatal human life has been a history of increasing recognition and protection of unborn children. The creation of an exception to the fourteenth amendment which would deny protection to such children represents a reversion to outmoded and unworkable legal fictions, and leads to disrespect for the law.

The ordinary legal guardians of the civil rights to life, liberty, and property are the criminal law and the law of torts. In both of these areas of law, courts and litigants have struggled with, and to a certain extent overcome, the absurdity and injustice of arbitrary distinctions between born and unborn children, and between viable and nonviable unborn children.

The common law is considerably older than contemporary knowledge of prenatal human development. Ignorance of fertilization and the nature of the human embryo consequently left its mark on the common law. In particular, the considerable problems of proof facing those alleging the perpetration of wrongs against unborn children led to the recognition of various arbitrary rules. These rules, for want of better guides, tied civil and criminal liability to observable phenomena such as quickening (the detection of the child moving in the womb) and live birth.

The criminal law has found it difficult to "outgrow" these arbitrary rules, presumably because of a combination of stare decisis, concern for advance notice to defendants of the criminality of particular conduct, and the rule of strict construction in favor of the defendant. *E.g., Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc). As a result, the general rule today remains that the homicide of an unborn child cannot be established without proof that the mortally wounded infant survived, even if only momentarily, outside the womb. *See* Annotation, *Homicide Based on Killing of Unborn Child*, 40 A.L.R.3d 444 (1971). States have responded to this archaic requirement, however, by amending

their criminal codes and specifying that the destruction of an unborn child is a crime.[6]

The law of torts has demonstrated a greater ability to "keep pace with the sciences," *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 (D.D.C. 1946) (allowing action for prenatal injuries), and to adjust its rules of liability in the face of increased scientific knowledge. Thus, for example, the courts have overwhelmingly recognized the right of a live child to recover for prenatal injuries, even if inflicted prior to viability. Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971). Likewise, the courts universally allow recovery for the wrongful death of a child born alive whose injuries were inflicted before birth. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978). Similarly, after a protracted struggle over the issue, the courts of a clear majority of jurisdictions — thirty-four states including the District of Columbia, with eleven opposed, and five undetermined — now allow recovery for the wrongful death of a viable unborn child who dies while still

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[6] *E.g.*, Cal. Penal Code § 187 (West 1988) (murder); Ill. Ann. Stat. ch. 38, paras. 9-1.2, 9-2.1, 9-3.2 (Smith-Hurd Supp. 1988) (homicide and manslaughter of unborn child); La. Rev. Stat. Ann. § 14:2(7) (West 1986) (defining "person" in criminal code as including "a human being from the moment of fertilization and implantation"); Minn. Stat. Ann. §§ 609.2661-609.2665 (murder and manslaughter of unborn child); N.D. Cent. Code § 12.1-17.1-02 to 12.1-17.1-04 (Supp. 1987) (murder, manslaughter, and negligent homicide of unborn child).

One of the curious consequences of the difficulties in proving destruction of unborn children was that the lives of such children could better be protected by laws prohibiting abortion *without* proof of pregnancy, destruction of the unborn child, or intent to destroy such child. The American Medical Association incorporated precisely these features in its model anti-abortion statutes in the nineteenth century. *See* 13 Transactions of the American Medical Association 41-42 (1860); H. Storer, *Criminal Abortion in America* 94, 97-100 (1860).

in the womb. *Id.*[7] And while few courts have addressed the issue, already one state supreme court has convincingly argued that wrongful death liability cannot sensibly be limited to wrongs inflicted upon viable unborn children. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).

Roe's imposition of birth and viability requirements (as predicates for personhood and a compelling state interest in protecting prenatal life, respectively) therefore represented a major setback in the law. *Roe* embraced the very same distinctions that the law of torts (and, to a lesser extent, crime) was in the process of finally and completely repudiating.

The consequences in terms of respect for the law are all too obvious. The jealous ex-husband who forcibly aborts his pregnant ex-wife's child may be convicted of homicide, but the professional abortionist cannot be. A woman who is hit by a car and miscarries on the way to an abortion business may sue for the loss of the child she planned to destroy. A disabled child may recover large sums to compensate for harm suffered in the womb, but the mother could have had that same child killed because she did not want a handicapped baby.

Such contrasts make a mockery of the law. The malleable and uncertain lines separating viability from nonviability, or prematurity from pregnancy, simply cannot support the difference between constitutional rights and crimes. The shifting sands of consent to abortion cannot support the distinction between homicidal torts and constitutional liberties.

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[7] One additional state, Tennessee, has legislated this result. *See* Tenn. Code Ann. § 20-5-106 (1980) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977)). Thus, thirty-five jurisdictions now allow recovery, while ten deny recovery.

Either the unborn child is a person, or he is not. While the law in theory can consider someone a person for some purposes and not for others, in practice such artificiality results in contempt for a legal system full of technicalities that contradict reality. The integrity of the legal system calls for inclusion, not exclusion, of the class of unborn children within the term "person" in the fourteenth amendment.

5. Justice demands the inclusion of unborn children within the term "person."

Finally, considerations of justice call for the renunciation of the arbitrary denial of equal protection to children who happen to reside within their mothers' wombs.

Not everyone has *every* right. But no one except a person has *any* rights. Thus *Roe v. Wade* asked the wrong question when it queried whether unborn children were "recognized in the law as persons in the whole sense," 410 U.S. at 162. The issue is not whether children conceived but not yet born should receive the full range of the rights of citizenship, such as voting rights, but whether they may lay claim to the barest minimum of human rights: "the right to *survive* on a basis of equality with human beings generally," *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1226 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973) (emphasis added). The law prior to *Roe* had generally accorded that much recognition, and more, to the child in the womb. And in so doing the law recognized a difference in kind between unborn children and tonsils, worms, or trees. This difference is the difference of personhood.

This difference, then, relates to the inherent dignity of man. Personhood is what characterizes the collection of diverse entities that together compose the human race. As Justice Brennan put it in another context,

> At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death.

Furman v. Georgia, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (overturning Georgia death penalty). If this observation holds true with regard to the life of a convicted felon, it is much more so for the innocent baby growing in the womb.

The answer to the fundamental moral issue, moreover, is clear: society "must treat its members with respect for their intrinsic worth as human beings," for "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." *Id.* at 270, 303 (Brennan, J., concurring).

Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497 (1961), emphasized the central role of tradition and history in the interpretation of the Constitution. "A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.* at 542 (Harlan, J., dissenting).

Roe v. Wade represents precisely such a radical departure from the history, indeed the founding principles, of this nation. Like *Betts v. Brady*, 316 U.S. 455 (1942), overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Roe* "made an abrupt break" with what "seems to us to be an obvious truth," *Gideon*, 372 U.S. at 344: "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776).

The fourteenth amendment was adopted to secure these rights "not only for the sake of . . . the unfortunate human beings for whose special relief it [was] designed," but "for the purpose as well of giving a new assurance . . . that no man shall ever, in the coming future, as long as the Republic stands . . . be deprived of his life, of his liberty, or his property without due process of law." Cong. Globe, 37th Cong., 2d Sess. 1640 (1862). As this Court explained in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), the "very purpose" of a constitutional declaration of rights

> was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Roe v. Wade created an exception to personhood where none existed or could exist. This Court should now correct this fundamental injustice by overruling *Roe v. Wade* and upholding the right to life and equal protection of all human beings, regardless of age, size, health, or condition of dependency.

III. The Personhood of the Unborn Requires the Rejection of Appellees' Attack Upon the Missouri Statutes.

The fourteenth amendment personhood of human beings conceived but not yet born dictates the rejection of the appellees' constitutional challenge to the Missouri legislation at issue here.

Appellees predicate their challenge upon an alleged "right to elect abortion," Motion to Affirm at 3 (dis-

cussing standard of review). Such a "right," however, is fundamentally inconsistent with the right to life of persons conceived but not yet born. As this Court acknowledged in *Roe*, "[i]f this suggestion of personhood is established, the [challengers'] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S. at 156-57.

It is true, of course, that the personhood of unborn children imposes a positive duty upon the state to protect humans conceived but not born. As Justice Stevens observed in the *Thornburgh* case, unless there is a "fundamental" difference between unborn and born human offspring, "the permissibility of terminating the life of the fetus could scarcely be left to the will of the state legislatures." 476 U.S. at 779 (footnote omitted). Thus, a proper litigant could challenge the constitutionality of laws which did *not* provide at least the minimum protection demanded by the fourteenth amendment: the outlawing of all abortions.

Appellees have not challenged the Missouri statutes on this basis. Nor have they indicated any desire to do so. Moreover, it is far from clear that appellees, who are not guardians of unborn children, and whose interests are manifestly opposed to those of such children, have standing to raise objections predicated upon the personhood of the unborn. The Attorney General of Missouri, however, who is an appellant in this case, is a proper party to seek vindication of the rights of unborn persons. This Court should therefore hold that the fourteenth amendment protects unborn children as persons, and set this case for

further briefing and reargument on the question of the proper disposition of this particular appeal.[8]

This Court followed a similar course in the school desegregation cases. In *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), this Court declared that racial segregation in public education violated the fourteenth amendment. The Court then set further proceedings to consider the implications of *Brown I* for the resolution of the particular cases before it.

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[8] Reviewing the challenged provisions of Missouri law in light of the personhood of the unborn, the legislative preamble, Mo. Rev. Stat. § 1.205.1(1)-(2) (1986), is clearly constitutional. It is a merely declaratory provision wholly consistent with the constitutional rights of unborn persons.

A statute which permits any abortions, as section 188.029 arguably does, violates the fourteenth amendment. However, only the second sentence of this section is technically before this Court. This sentence merely sets forth certain requirements for physicians making a viability determination, and is not, of itself, incompatible with a prohibition on abortions.

The restrictions on state involvement in abortion through funding, facilities, and personnel, Mo.Rev. Stat. §§ 188.205, 188.210, 188.215 (1986), do contain exceptions for abortions "necessary to save the life of the mother." The constitutionality of these provisions depends upon the construction given the exception. Any allowance of intentional destruction of unborn persons would deny due process and equal protection to such persons. Missouri's general statement of intention, however, requires that statutory provisions should be construed "to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." Mo. Rev. Stat. § 188.010 (1986). Thus the "life of the mother" exception could be interpreted narrowly so as to exempt only those actions—removal of an ectopic pregnancy or a cancerous uterus, for example—which do not directly destroy the unborn child, which seek to preserve the child if possible, and which result in the death of the child, if at all, only as an unintended consequence of an independently justified operation. Such a permissibly narrow construction would suffice to defeat a facial challenge to the Missouri statutes. *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987) (constitutional challenge must establish that no set of circumstances exist under which statute is valid).

See Brown v. Board of Educ., 349 U.S. 295 (1955) (*Brown II*). Recognition of the constitutional rights of unborn children would, like the holding in *Brown I*, represent a very significant vindication of fundamental human rights. Thorough review of the ramifications of this holding, as well as the proper means of upholding these rights in the case at bar, would therefore be wise.

CONCLUSION

There is no valid basis for excluding unborn children from the fundamental protections afforded all persons under the fourteenth amendment to the United States Constitution. This Court should therefore overrule *Roe v. Wade*, 410 U.S. 113 (1973), and set this case for further briefing and reargument on the issue of the proper disposition of this appeal.

Respectfully submitted,

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BRIEF

(15)

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM L. WEBSTER, et al., - - - Appellants,

versus

REPRODUCTIVE HEALTH SERVICES, et al., - - - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CHRISTIAN ADVOCATES SERVING EVANGELISM AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Cases:

Ashwander v. TVA, 297 U.S. 288 (1936) 10

Bering v. SHARE, 106 Wash. 2d 212, 721 P.2d 918 (1986) (en banc), *cert. dismissed*, 479 U.S. 1050 (1987) 15-17, 18

Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979) 23

Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984), *aff'd on rehearing*, 108 Idaho 253, 698 P.2d 315 (1985) 23

Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 107 S.Ct. 2568 (1987) 15

Bowers v. Hardwick, 478 U.S. 186 (1986) 8

Branzburg v. Hayes, 408 U.S. 665 (1972) 8

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 12

Brown v. Davis, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984) 20

Buchanan v. Jorgensen, Docket No. 87-Z-213 (D. Colo. 1987) 19

City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983) ..... 5, passim

City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982) 26

Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981) 26

Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 469 U.S. 846 (1983) 23

Crozer Chester Medical Center v. May, 352 Pa. Super. 51, 506 A.2d 1377 (1986) 20

Diamond v. Charles, 476 U.S. 54 (1986) 11

DiNatale v. Lieberman, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982) 23

Doe v. Bolton, 410 U.S. 179 (1973) 9, 13

Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) 23

Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981), *leave denied*, 414 Mich. 875 (1982) 23

Fairfield Commons Condo. Ass'n v. Stasa, 30 Ohio App. 3d 11, 506 N.E.2d 237 (1985) 26

Gaetano v. United States, 406 A.2d 1291 (D.C. 1979) 26

Griswold v. Connecticut, 381 U.S. 479 (1965) 9

Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977) 21

Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983) (en banc) 23

Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980) 21

Hickman v. Group Health Plan, Inc., No. 84-15376 (Minn. Dist. Ct. Aug. 15, 1985), *rev'd*, 396 N.W.2d 10 (Minn. 1986) (en banc) 23

Hoffart v. State, 686 S.W.2d 259 (Tex. Ct. App. 1985) 26

Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) 24-25

Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832 (1987) 20

Jacobs v. Thiemer, 519 S.W.2d 846 (Tex. 1975) 23

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 8

James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) 23

Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc) 21

Kugler v. Ryan, 682 S.W.2d 47 (Mo. Ct. App. 1984) 20

Markley v. State, 507 So. 2d 1043 (Ala. Crim. App. 1987) 25

Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) ... 23

Nelson v. Peterson, 542 P.2d 1075 (Utah 1975) 21

New York v. Ferber, 458 U.S. 747 (1982) 8

O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc., 64 A.D.2d 894, 407 N.Y.S.2d 903 (1973) 18

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 15, 18

Parkmed Co. v. Pro-Life Counselling, Inc., 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) 18

People v. Krizka, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980) 26

People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) 24

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 15

Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983) 5

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 5, 7, 8, 9, 13

Planned Parenthood of Monmouth County v. Cannizzaro, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985) 20
Portland Feminist Women's Health Center v. Advocates for Life, 859 F.2d. 681 (9th Cir. 1988) 17-18
Prince v. Massachusetts, 321 U.S. 158 (1944) 8
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 19, 20
Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988) 11
Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980) 20
Roe v. Wade, 410 U.S. 113 (1973) ..... 1, passim
SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) 20
Sigma Reprod. Health Center v. Maryland, 297 Md. 660, 467 A.2d 483 (1983) 26
Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987) 24
State v. Andrews, No. 86-1663 (Escambia County Cir. Ct. sentence entered Sept. 24, 1986) 25
State v. Brown, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986) 20
State v. Brown, 378 So. 2d 916 (La. 1979) 25
State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987) 26
State v. Horn, 139 Wis. 2d 473, 407 N.W.2d 854 (1987) .. 20, 26
State v. Kerr, Nos. 59084A, 59084C (Fulton County, Ga. State Ct. Jan. 31, 1989) 25
State v. Roberts, Nos. 59082A, 59082C (Fulton County, Ga. State Ct. Jan. 31, 1989) 26
State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed*, 455 U.S. 100 (1982) 20
Terry v. Ohio, 392 U.S. 1 (1968) 8
Thornburgh v. American College of Obstets. & Gynecs., 476 U.S. 747 (1986) ..... 3, passim
Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1976) 22
Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) 23

United States v. Salerno, 107 S. Ct. 2095 (1987) 12
Valenzuela v. Aquino, No. 13-88-184-CV (Tex. Ct. App. Dec. 15, 1988) 18
Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134 (1980) ... 22
Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985). 22

Constitutional, Statutory, and Ordinance Provisions:

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Mo. Rev. Stat. 1.205.1(1)-(2) 11
U.S. Const. amend. I. 14
Wis. Stat. Ann. §§ 939.46, 939.47 (West 1980) 27

Other Authorities:

Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978) 21
Abortion and the Constitution: Reversing Roe v. Wade Through the Courts (1987) 4
Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974). 26
A. Bickel, *The Morality of Consent* (1975) 4
Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989) 3, 10, 24
Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 19
Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 Hum. Life Rev. 5 (Spring 1975) 4
Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973) 4
A. Cox, *The Role of the Supreme Court in American Government* (1976) 4
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 4
Epstein, *Substantive Due Process by Any Other Name: the Abortion Cases*, 1973 Sup. Ct. Rev. 159 ..... 4, 11

Gorby, *The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1 4

Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 St. Louis U. Pub. L. Rev. 229 (1987) 4

S. Krason & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted* (1984) 4

S. Krason, *Abortion: Politics, Morality and the Constitution* (1984) 4

Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich L. Rev. 1724 (1979) 4

J. Noonan, *A Private Choice: Abortion In America in the Seventies* (1979) 4

Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983) 19

Rice, *The Dred Scott of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973) 4

INTEREST OF AMICUS

Christian Advocates Serving Evangelism (CASE) is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel of Jesus Christ in public places.

Counsel for amicus have specialized in litigation in both state and federal courts with regard to various First Amendment issues. Mr. Jay Alan Sekulow serves as counsel with CASE, and has appeared before the Court in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 107 S.Ct. 2568 (1987). Amicus believes that the experience of its counsel will be of assistance to the Court in this case.

Amicus is particularly concerned by a disturbing tendency to undermine cherished First Amendment freedoms by wrongly using the right of privacy in matters involving abortion.

The parties to the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-605

WILLIAM L. WEBSTER, ET AL., - - - *Appellants,*
v.
REPRODUCTIVE HEALTH SERVICES, ET AL., - *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), purported to convert the crime of abortion into a constitutional right. This fundamental inversion of the law has led to distortions of substantive and procedural matters in *Roe* and in subsequent Supreme Court decisions on abortion. *Roe* has also produced a distortion in lower court cases relating, directly or indirectly, to abortion.

Supreme Court abortion cases have yielded a distorted jurisprudence. The Court has rendered inconsistent decisions and applied inconsistent standards in reviewing abortion legislation. The Court has treated abortion as a virtually absolute right not subject to the limitations placed upon other asserted privacy rights. Furthermore, the Court has repeatedly disregarded or misapplied doctrines of standing, mootness, finality, overbreadth, and statutory construction in an apparent eagerness to reach out and overturn restrictions on abortion.

Lower court cases following the Supreme Court abortion decisions necessarily reflect this distorted jurisprudence. The "abortion distortion factor" has also carried over, however, into areas of the law other than the regulation of abortion. Thus, for example, the warping influence of *Roe* appears in lower federal and state court decisions involving the right of free speech, the law of torts, and the criminal law.

In free speech cases, courts have regularly subordinated the rights of those engaged in expressive activities opposing abortion to the apparent goal of facilitating abortion.

In the law of torts, *Roe* has hindered the recognition of a wrongful death cause of action for children who die before birth. *Roe* has also spawned judicial acceptance of the torts of wrongful birth and wrongful life, in which failure to abort or be aborted is asserted as an injury.

In the criminal law, *Roe* has impeded the application of homicide laws to offenders who kill unborn children against the will of their mothers. Exaggerated deference to *Roe* has also prompted courts to issue excessively harsh sentences to those convicted for resisting abortion. *Roe*, moreover, has led to the frequent denial of the defense of justification for those who technically break the law in order to save unborn children threatened with death by abortion.

Adherence to *Roe* has produced instability and distortion in the law, both in this Court and in the lower federal and state courts. This destructive influence appears not only in the law of abortion, but also in completely distinct areas of law. This Court should now overrule *Roe* in order to preserve the rule of law and the integrity of the judiciary.

ARGUMENT

The decisions of this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, purported to convert what had long been a crime — abortion — into a fundamental constitutional right. This radical inversion of the law has warped the legal landscape and corroded the rule of law, not just in the area of substantive state regulation of abortion, but in a wide variety of contexts. *Roe* is manifestly a destructive and destabilizing force in the law. This Court should therefore overrule *Roe v. Wade*.

Justice O'Connor has observed that "[t]his Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence." *Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). This "abortion distortion" has extended to non-constitutional questions as well. Commentators have thoroughly documented the "abortion distortion factor" in Supreme Court jurisprudence in such areas as stare decisis, standing, procedure, privacy, legal protection for unborn children, and the regulation of medical practice,[1] confirming Justice O'Connor's conclusion that "it [is] painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). Furthermore, the distorting influence of *Roe v. Wade* has also affected the adjudication in the lower courts of a broad range of cases which touch, directly or indirectly, upon the subject of abortion. *See* Bopp & Coleson, *supra* note 1.

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[1] *See generally* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute and Ripe for Reversal*, 3 B.Y.U.J. Pub. L. 191 (1989) (forthcoming).

I. ROE v. WADE HAS DISTORTED THE ADJUDICATION OF ABORTION CASES IN THE SUPREME COURT.

Roe v. Wade, 410 U.S. 113 (1973), itself represented a major aberration in constitutional law. Criticism of its reasoning, result, and supposed historical research have been widespread and severe.[2] Subsequent abortion cases, moreover, have multiplied the flaws of this Court's abortion jurisprudence, further illustrating the fundamental defects of the seminal decision in *Roe*.[3]

A. The Abortion Cases Have Created Inconsistency Antithetical to Stare Decisis and the Rule of Law.

Perhaps the primary hallmark of this Court's abortion jurisprudence has been the failure of the Court to provide consistent, reliable guidance for state legislatures. It has become virtually impossible for states to pass abortion laws that will withstand judicial review

[2] *See, e.g.*, Rice, *The Dred Scott of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government* 113-14 (1976); A. Bickel, *The Morality of Consent* 27-28 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 Mich. L. Rev. 1724 (1979); Gorby, *The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement*, 1979 S. Ill. U.L.J. 1; Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 St. Louis U. Pub. L. Rev. 229 (1987); *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (1987); Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 Hum. Life Rev. 5 (Spring 1975); S. Krason & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted* (1984); S. Krason, *Abortion: Politics, Morality and the Constitution* (1984).

[3] *See, e.g.*, J. Noonan, *A Private Choice: Abortion In America in the Seventies* (1979). *See generally* Bopp & Coleson, *supra* note 1.

because this Court repeatedly changes the relevant case law. *See Thornburgh*, 476 U.S. at 798 (White, J., dissenting) ("the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of mens rea. The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have seemed permissible").

1. Inconsistent Results

Thus, in one case the Court suggested that a hospitalization requirement would be a permissible regulation of abortion after the second trimester, *Roe*, 410 U.S. at 163, but in a later case the Court overturned just such a requirement, *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 437-39 (1983). In one case, the Court sustained the requirement that a woman give informed consent to abortion, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66-67 (1976), but in subsequent cases the Court struck down statutes geared to ensuring such informed consent, *Akron*, 462 U.S. at 442-49; *Thornburgh*, 476 U.S. at 759-65. In one case, the Court sustained record-keeping requirements, *Danforth*, 428 U.S. at 80-81, but in a later case the Court invalidated similar requirements, *Thornburgh*, 476 U.S. at 765-68. In one case, the Court upheld a second-physician requirement for post-viable abortions, *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 485-86, 505 (1983) (plurality and concurring opinions), but just three years later the Court held unconstitutional an effectively identical provision, *Thornburgh*, 476 U.S. at 769-71.

2. Inconsistent Standards

Nor is the inconsistency of the abortion decisions confined to the mere application of the standards set forth in *Roe* — those standards themselves shift from case to case. Thus the Court established, in *Roe*, a detailed trimester system for reviewing legislation, 410 U.S. at 164-65, only to invoke a new standard — "accepted medical practice" — in the *Akron* case, 462 U.S. at 431, and then yet another standard — risk of discouraging abortion — in the *Thornburgh* case, *see* 476 U.S. at 759 ("effort to deter"), 762 ("attempt to . . . discourag[e] abortion"), 763 ("discouragement for the abortion decision"), 766 (requirements make woman "more reluctant to choose an abortion"), 768 ("danger of deterring" abortion). In *Roe*, the Court declared that the State has a "compelling interest" in protecting viable unborn children, 410 U.S. at 163, and may therefore *prohibit*, after viability, any abortions *not necessary* to preserve the woman's health, *id.* at 165; in *Thornburgh*, however, the Court effectively abolished restrictions on post-viable abortions, when it repudiated limitations that might advance fetal survival while posing any "increased medical risk" to the woman, 476 U.S. at 769. And in *Roe* the Court emphasized the central role of physician consultation in abortion decisions, 410 U.S. at 163, yet in *Akron* the Court saw no need "for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient . . .," 462 U.S. at 448.

This inconsistent application and distortion of constitutional jurisprudence flows directly from *Roe v. Wade*: "That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, . . . since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade* . . . ." *Thornburgh*, 476 U.S. at 814-15 (O'Connor, J., dissenting) (citation omitted). So long as this Court acts as an " 'ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States,' " *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting) (quoting *Danforth*, 428 U.S. at 99 (White, J., concurring in part and dissenting in part)), the inevitable results will be endless litigation, legislative frustration, and increasing disrespect for a Court seemingly engaged in result-oriented adjudication.

B. The Abortion Cases Have Accorded Abortion a Status Inconsistent with the Jurisprudence of Privacy Rights.

The *Roe* Court held that implicit privacy guarantees in the Constitution included a right to abortion. 410 U.S. at 153. The Court cautioned, however, that "[t]he pregnant woman cannot be isolated in her privacy" — she carries her offspring in her womb — and that therefore the abortion context is "inherently different" from past privacy cases involving "marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education," *id.* at 159 (citations omitted). The consequence of this inherent difference was, in theory, that abortion enjoyed a lesser constitutional status than activities previously recognized as privacy rights: "The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Id.* Yet in practice, the Court has granted greater protection to abortion than to any right of privacy asserted before or after *Roe*. Abortion, in short, has received an anomalous,

"super-protected" status. Ely, *supra* note 2, at 935.

No more than a brief survey is necessary to demonstrate the willingness of this Court, in cases not involving abortion, to accept a wide variety of limitations on asserted privacy rights. The Court has upheld a ban on the distribution of child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), has sustained the power of criminal investigators to compel a journalist to reveal his source of information, *Branzburg v. Hayes*, 408 U.S. 665 (1972), has upheld a warrantless police stop and search, *Terry v. Ohio*, 392 U.S. 1 (1968), has allowed compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), has approved a ban on literature distribution by children even where accompanied by parents, *Prince v. Massachusetts*, 321 U.S. 158 (1944), and has sustained a ban on homosexual sodomy, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Analogous degrees of restriction on abortion could never pass muster under the line of cases begun with *Roe v. Wade*. In *Danforth*, for example, the Court overturned requirements of parental consent for minors, spousal consent, and a ban on the use of saline amniocentesis abortions. The *Akron* Court overturned a hospitalization requirement for abortions after the first trimester, a parental consent requirement for girls fourteen years old and younger, informed consent provisions, a twenty-four hour waiting period, and a requirement of humane disposition for bodies of aborted babies. *Thornburgh* overturned informed consent and recordkeeping requirements and a requirement that a second physician attend the abortion of a viable unborn baby. Indeed, this Court has

even refused to let competing privacy rights disturb what it apparently has viewed as the constitutional preeminence of abortion. *See Danforth,* 428 U.S. at 69-71 (rejecting marital privacy interests as justification for spousal consent law); *id.* at 72-75 (rejecting parental rights as justification for minor consent law).

A comparison with the permissible regulation of marriage, "a right of privacy older than the Bill of Rights . . . and intimate to the degree of being sacred," *see Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), is illustrative of the disparity between abortion and general privacy jurisprudence. As commentators have observed,

> while states may require marriages to be licensed, [*Doe v.*] *Bolton* declared that states could not require hospitals performing abortions to be licensed. [410 U.S. 179, 194 (1973).] Although waiting periods of three to five days from the time of receiving the marriage license to the time of the ceremony are common, *Akron* held that a twenty-four hour waiting period from the time a woman contacted an abortionist to the abortion was unconstitutional. [462 U.S. at 450-51.] Despite residency requirements for marriage and divorce, *Bolton* rejected state residency requirements for abortion. [410 U.S. at 200.] Ignoring the requirement of parental consent for minors to marry, *Danforth* struck down a state statute requiring parental consent for minors to obtain abortions. [428 U.S. at 75.] While extensive recordkeeping is permitted in marriage regulation, *Thornburgh* declared state recordkeeping regulations for abortion unconstitutional, even though confidentiality was guaranteed in the statute. [476 U.S. at 765-68.] And, despite the medical examinations and

> tests required for marriage, *Akron* struck down a statute requiring a physician to tell a woman "[t]hat according to his best judgment . . . she is pregnant" before performing an abortion procedure on her. [462 U.S. at 423 n.5, 445 n.37.]

Bopp & Coleson, *supra* note 1, at 61-62 (manuscript pagination) (footnotes omitted) (bracketed citations added).

C. The Abortion Cases Have Disregarded General Limitations on the Adjudication of the Merits of a Constitutional Challenge.

The Supreme Court has repeatedly recognized a number of limitations, whether constitutionally mandatory or merely prudential, on the propriety of federal court adjudication of the merits of a constitutional claim. *See Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). In abortion cases, however, these limitations vanish in favor of an apparent eagerness to strike down regulations of abortion.

1. Standing

The plaintiff in *Roe v. Wade* failed to meet the most basic requirement of standing — that the person challenging a law be somehow injured by that law. Jane Roe alleged that she was pregnant and wanted an abortion. Yet under Texas law, "the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151 (footnote omitted). Thus, the obstacle Roe faced was not the Texas law, but the unwillingness of an abortionist to challenge

that law. The Court nevertheless granted Roe standing to bring suit. *Id.* at 124-25.[4]

2. Mootness

The mootness doctrine should also have barred Jane Roe from pursuing her claim, at least on appeal. She brought suit in March of 1970; obviously, her pregnancy must have ended no later than the latter part of that year. 410 U.S. at 124. No exception from general mootness principles was necessary because the issue was not necessarily "capable of repetition, yet evading review." An abortionist — who, unlike Jane Roe, actually faced the threat of prosecution — could, and in *Roe* itself did, *id.* at 125-26, litigate precisely the same challenge to abortion laws. Yet the Court disregarded the mootness of Roe's case and proceeded to the merits. *Id.* at 125. *See* Epstein, *supra* note 2, at 162-64 (*Roe* erred in disregarding mootness).

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[4] The destructive impact of this holding on the doctrine of standing appears vividly in the case now before this Court. The court of appeals struck down a statute, Mo. Rev. Stat. § 1.205.1(1)-(2), which merely declares the humanity and protectability of unborn children. *Reproductive Health Services v. Webster*, 851 F. 2d 1071, 1075-77 (8th Cir. 1988). The statute has no substantive effect whatsoever. *Id.* at 1076 (statute is "introductory and foundational *comment*" and an "*adoption of a theory*") (emphasis added), and thus plainly could not restrict or injure anyone. The court of appeals nevertheless announced that "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases," *id.* at 1075 (internal quotation marks and citations omitted), and concluded that "[n]o persons are better situated to attack the constitutionality of this [statute]" than those parties who, like plaintiffs, offer or seek abortions, *id.* at 1076 & n.6. The assumption of the court seems to be that, in abortion cases, someone must always have standing to challenge a statute, and that therefore the only issue for the court is the identification of which parties are best situated to bring suit. In essence, standing no longer has relevance in abortion cases, except perhaps to exclude those seeking to *defend* abortion laws. *See Diamond v. Charles*, 476 U.S. 54 (1986) (denying standing to appeal to private intervenors defending abortion statutes).

3. Finality

The *Thornburgh* Court should not have rendered a final determination on the merits of that challenge to abortion regulations. In *Thornburgh* the Court improperly used a preliminary record and interlocutory appeal as a vehicle for finally adjudicating the constitutionality of the challenged statues. *See* 476 U.S. at 756-57; *see also id.* at 815-26 (O'Connor, J., dissenting) (criticizing the majority's disregard of the normal standard of review for appeals from preliminary injunctions). The error in *Thornburgh* was especially egregious because of the fact that the parties had expressly stipulated that the preliminary record was not to be binding on the parties in further proceedings. *Id.* at 815-16 (O'Connor, J., dissenting).

4. Overbreadth

The Court has misapplied overbreadth jurisprudence in abortion cases.

The overbreadth doctrine enables litigants to "challenge a statute, not because their own rights . . . are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain" from protected activity. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

This Court has declared, however, that it "ha[s] not recognized an 'overbreadth' doctrine outside the limited scope of the First Amendment." *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987) (citation omitted). The fact that a law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." *Id.*

Nevertheless, this Court has employed the overbreadth doctrine in abortion cases. *E.g.*, *Roe*, 410 U.S. at 164 (anti-abortion statute "sweeps too broadly"); *Doe v. Bolton*, 410 U.S. at 195 (hospitalization requirement "fails to exclude the first trimester of pregnancy"); *Danforth*, 428 U.S. at 74-75 (parental consent law for minors fails to exclude mature minors).

5. Statutory Construction

This Court has also disregarded, in abortion cases, the rule that a state law should be interpreted so as to avoid constitutional difficulties. In *Thornburgh*, for example, the Court overturned a requirement that a second physician attend the abortion of a viable child. The Court held that the law contained no emergency exception, even though the statute provided a general defense for abortions necessary for the life or health of the mother. 476 U.S. at 770-71. And in *Danforth*, the Court overturned a statute requiring the abortionist to exercise care to preserve the life and health of the unborn child, even though the law could have been viewed as applying only when the child had a chance of surviving, i.e., might be viable. *See* 428 U.S. at 82-83; *id.* at 99-100 (White, J., dissenting). Rather than seeking constitutionally acceptable interpretations of state law, the Court has employed "an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Thornburgh*, 476 U.S. at 812 (White, J., dissenting).

In sum, the Court seems to have embraced "the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion." *Danforth*, 428 U.S. at 98 (White, J., dissenting). As Justice O'Connor observed in *Thornburgh*, "[i]f this case did not involve state regulation of abor-

tion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents." 476 U.S. at 826.

II. *ROE v. WADE* HAS DISTORTED THE ADJUDICATION OF CASES THAT INVOLVE ABORTION DIRECTLY OR INDIRECTLY IN THE LOWER COURTS.

The "abortion distortion factor" characterizing *Roe v. Wade* and other Supreme Court abortion cases has necessarily warped the abortion jurisprudence of lower courts following these precedents. The distortion has also spilled over, however, into cases that touch only indirectly upon the subject of abortion. In free speech litigation, tort law, and criminal law, for example, legal doctrines have been bent, ignored, or molded in an apparent effort to reshape the entire legal landscape to accommodate the erroneous principles of *Roe*.

A. *Roe v. Wade* Has Distorted the Law of Free Speech

Roe v. Wade and the cases following it have bestowed increasingly absolute protection upon the practice of abortion. One of the competing rights to give way in the judicial expansion of abortion is the right of free speech under the federal and state constitutions.

1. Federal Free Speech Rights

Lower state and federal courts have discarded established first amendment principles in an effort to restrict the speech of pro-life activists.

The first amendment to the United States Constitution provides explicit protection for "freedom of speech." U.S. Const. amend. I. The Supreme Court has construed this broad provision to provide varying

protection for expressive activity depending upon the location of the activity and the scope and nature of the restriction. Maximum protection applies to speech in traditional public forum property. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2569 (1987). The "quintessential" public fora are public streets and sidewalks. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The least permissible scope of restriction on speech is either a total ban or a restriction based on the content of the expression. *Jews for Jesus*, 107 S. Ct. at 2571; *id.* at 2572 (restriction that "purports to create a virtual 'First Amendment Free Zone' " is unconstitutionally overbroad). And the most disfavored restriction of all is the prior restraint — the injunction or licensing requirement. Prior restraints forbid speech in advance, while the more typical legislative restriction only applies when the government can prove, after the fact, the unlawfulness of the speaker's conduct. Prior restraints must overcome a strong presumption of unconstitutionality. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Thus, the least justifiable, most constitionally suspect restriction on expressive activity would be a prior restraint concerning content or creating a "speech-free zone" in a public forum. In cases involving pro-life citizens engaged in expressive activity outside abortion businesses, courts have issued precisely such restrictions.

Perhaps the most flagrant example appears in the recent decision of the Supreme Court of Washington in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986) (en banc), *cert. dismissed*, 479 U.S. 1050 (1987). In *Bering*, the trial court enjoined all picketing, demonstrating, and sidewalk counseling anywhere in front

of an office building housing an abortion business. *Id.* at 219, 721 P.2d at 923. The trial court limited expressive activity to a portion of the sidewalk around the corner and set back from the street running in front of the building. *Id.* The trial court also forbade the enjoined individuals from speaking the words "murder," "kill," and their derivatives while at the designated picket site. *Id.* at 219, 721 P.2d at 924.

The state supreme court upheld the creation of a "speech-free zone" along the sidewalk in front of the office building, *id.* at 221-33, 721 P.2d at 924-31, even though the court acknowledged that "only anti-abortion picketers are bound by the geographic restriction," *id.* at 223, 721 P.2d at 925, and even though the court conceded that "[a] similar restriction which enjoined all picketers of any persuasion, regardless of their conduct, would have been overly broad," *id.* (citations omitted).

The state supreme court relied heavily upon *Roe v. Wade* and its progeny, *see Bering*, 106 Wash. 2d at 227-30, 721 P.2d at 927-29, to justify these restrictions. The *Bering* court admitted that private expressive activity "does not constitute State action," *id.* at 227 n.3, 721 P.2d at 927 n.3, but nonetheless ruled that such activity "can be expected to impinge upon a woman's right to privacy," *id.* at 228, 721 P.2d at 928. Applying the *Thornburgh* notion that discouraging abortion is unconstitutional, the *Bering* court further reasoned that if picketing were allowed in front of the building, physicians "eventually might refuse to participate in a woman's abortion decision." 106 Wash. 2d at 229, 721 P.2d at 929. The court held that the state had "a *compelling* interest in protecting a woman's ability to effectuate her constitutional right to obtain an abortion by mitigating the harassing ef-

fect of anti-abortion picketers," *id.* at 230, 721 P.2d at 929 (emphasis in original), and concluded that "[a]n injunction which permitted *any* anti-abortion picketing on the [front] sidewalk would not adequately serve the State's compelling interest in protecting a woman's constitutional right to privacy . . .," *id.* at 231, 721 P.2d at 930 (emphasis added).[5]

The *Bering* court also upheld, in principle, the injunctive ban on the spoken use of the words "murder" and "kill," *id.* at 234-42, 721 P.2d at 932-36, even though it conceded that a similar ban on the printed use of these words on picket signs would be unconstitutional, *id.* at 237, 721 P.2d at 933. The court held that the trial court's content-based injunction must be narrowed, however, to apply only in the presence of children. *Id.* at 241-42, 721 P.2d at 935.

A similar, if somewhat less outrageous, distortion of first amendment analysis appeared in a recent decision of the United States Court of Appeals for the Ninth Circuit. *See Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681 (9th Cir. 1988). In *Portland Feminist*, the district court had issued a preliminary injunction that forbade "demonstrating or distributing literature" in front of the abortion center in a "free zone" extending twenty-five feet along the public sidewalk. *Id.* at 684, 686. The court of appeals sustained this creation of a speech-free zone. *Id.* at 686. Disregarding the injunctive nature of the restriction, the court applied the standard for review-

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[5] The Supreme Court of Washington completely ignored the fact that it was reviewing a court injunction and not a legislative enactment. The furtherance of state interests via substantive regulations is a matter of legislative prerogative, and not a proper judicial function. If this were not so, courts of equity would possess full legislative powers.

ing legislative regulations of the time, place, and manner of speech, *id.*,[6] and upheld the injunctive provision.

The distortion evident in *Bering* and *Portland Feminist* has surfaced in other injunction cases as well, particularly in the readiness of trial courts to issue broad prior restraints against pro-life speech. Thus in *O.B.G.Y.N. Association v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1973), the trial court had enjoined "the use of the words 'murder,' 'kill' and similar words on placards," 64 A.D.2d at ___, 407 N.Y.S.2d at 906 (quoting trial court order), had enjoined the pro-life defendants from " 'engaging in conversation with anyone at or in front of' " the abortion business, *id.* at ___, 407 N.Y.S.2d at 906 (quoting trial court order), and had ordered the pro-lifers to "keep[ ] the streets free of their pamphlets or literature," *id.* at ___, 407 N.Y.S.2d at 907. In another New York case, *see Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982), the trial court had enjoined pro-life activists from all demonstrating and picketing in the "quasi-public area" in front of an abortion business. *Id.* at ___, 457 N.Y.S.2d at 29. And in a Texas case, *see Valenzuela v. Aquino*, No. 13-88-184-CV (Tex. Ct. App. Dec. 15, 1988), the trial court had temporarily enjoined pro-life defendants from "engaging in any type of picketing or protest conduct within one-half mile of appellees' home." Slip op. at 1. In these latter three cases, the reviewing courts all modified or overturned the objectionable injunctive provisions. None of these

[6] The Supreme Court has never applied the time, place, and manner test to injunctive restrictions, but instead has examined such restrictions under the doctrine of prior restraints. *E.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

reviewing courts, however, rejected the authority of the lower courts, in principle, to grant substantive injunctive restrictions on pro-life citizens engaged in expressive activities.[7]

2. State Constitutional Free Speech Rights

The abortion distortion factor has also had a visible impact upon the litigation of free speech rights under state constitutions.

Recent years have witnessed a burst of activity in the state courts regarding the interpretation of state constitutional guarantees of civil liberties. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983). The decision of this Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), has prompted special at-

[7] The distortion of first amendment cases involving pro-life speakers is not confined to the issuance of injunctions. Courts have also sustained legislative enactments geared to suppress pro-life speech. In Colorado, for example, a federal district court refused to grant a preliminary injunction against the enforcement of the following city ordinance.

> *Section 1.* A new Section 5-3-10 is enacted to read:
>
> 5-3-10 *Harassment Near Health Care Facility.*
>
> No person seeking to pass a leaflet or handbill to or display a sign to or engage in conversation, protest, counseling, or other verbal exchange with a second person, within one hundred feet of a health care facility, shall approach closer than eight feet of such person, unless such second person gives express oral consent to do so; and upon request of such second person, no such first person shall fail to withdraw to at least eight feet from such second person or in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such conversation, protest, counseling, or other verbal exchange. For the purposes of this subsection, distance shall be measured from any extension of the first person's body, including without limitation a sign, to any part of the second person's body.

Boulder City Ordinance No. 4982 (1986). *See Buchanan v. Jorgensen*, Docket No. 87-Z-213 (D. Colo. 1987).

tention to the question whether state constitutional protection of free speech extends to expressive activity on private property.

State courts have divided over the availability of such protection. *Compare, e.g., Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (state constitution protects speech in private shopping center), *aff'd on other grounds*, 447 U.S. 74 (1980); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980) (state constitution protects speech on private college campus), *appeal dismissed*, 455 U.S. 100 (1982), *with SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) (state constitution does not protect speech against restrictions by private shopping center); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987) (same).

The reported decisions are unanimous, however, in rejecting state constitutional free speech claims brought by pro-life activists. *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. Ct. App. 1984); *State v. Brown*, 212 N.J. Super. 61, 513 A.2d 974 (App. Div. 1986); *Planned Parenthood of Monmouth County v. Cannizzaro*, 204 N.J. Super. 531, 499 A.2d 535 (Ch. Div. 1985); *Brown v. Davis*, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984); *Crozer Chester Medical Center v. May*, 352 Pa. Super. 51, 506 A.2d 1377 (1986); *State v. Horn*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

B. *Roe v. Wade* Has Distorted Tort Law.

Roe's denial of unborn personhood and declaration of a right to abort has simultaneously dampened the recognition of torts that result in the *death* of the unborn and spurred recognition of "torts" that produce *life* or *birth*.

1. Wrongful Death

A clear majority of jurisdictions recognize a cause of action for the wrongful death of a viable child killed in the womb. Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978). The distorting effect of *Roe* in this area of the law appears in two ways: first, in the rejection of the wrongful death cause of action for unborn children in a minority of jurisdictions; and second, in the requirement, in most other jurisdictions, of a showing of viability as a prerequisite to recovery.

The issue in a statutory wrongful death action is whether the child killed in the womb is a "person" within the meaning of the statute. *Roe* dealt with the term "person" under the fourteenth amendment, not state law; hence, *Roe* does not govern the wrongful death question. Nonetheless, courts denying a cause of action for children wrongfully killed before birth cite *Roe* in support of their decision. *E.g., Justus v. Atchison*, 19 Cal. 3d 564, 577, 565 P.2d 122, 130-31, 139 Cal. Rptr. 97, 105-06 (1977) (en banc); *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980); *Hamby v. McDaniel*, 559 S.W.2d 774, 777-78 (Tenn. 1977); *cf. Nelson v. Peterson*, 542 P.2d 1075, 1077 (Utah 1975) (reserving question) (evidence of illegitimacy of child relevant to damages for prenatal death of such child because "many women undergo abortions in such a situation").

The viability criterion set forth in *Roe* as a prerequisite for a compelling state interest in protecting unborn children likewise has no necessary connection with the limitation of third-party torts against unborn children. Yet state court decisions adopting viability as a prerequisite for wrongful death recovery

clearly show the marks of *Roe*. A Michigan appellate court, for example, in denying a cause of action for the death of a nonviable unborn child, asserted that there would be an inherent conflict where someone could be held liable for the death of a child the mother could abort. *Toth v. Goree*, 65 Mich. App. 296, 303, 304, 237 N.W.2d 297, 301 (1976). The state supreme court in New Hampshire, also denying a cause of action for the death of a nonviable unborn child, said that "it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus . . . and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts." *Wallace v. Wallace*, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) (citation omitted).[8] And the supreme court in Ohio, in allowing a cause of action for the death of a viable unborn child, cited *Roe* in support of the viability standard it applied to the tort action. *Werling v. Sandy*, 17 Ohio St. 3d 45, 49, 476 N.E.2d 1053, 1056 (1985).

2. Wrongful Birth and Wrongful Life

Roe declared the destruction of unborn children to be a constitutional right, and not a crime. This radical inversion of the law has spawned judicial acceptance of the notion that birth, and even life itself, can be compensable harms.

In a wrongful birth suit, parents claim that, but for the negligence of the defendant physician, they would have sought to abort their child. The live birth of this child thus constitutes the injury. Such a cause

[8] The *Toth* and *Wallace* courts both based their reasoning upon the assumption, no longer tenable, that *Roe* and its progeny only sanctioned abortion prior to viability.

of action sharply conflicts with common understandings of harm and benefit. The recognition of such a tort, moreover, unless counterbalanced by a strong doctrine of wrongful abortion (i.e., wrongful death of unborn children), creates incentives for physicians to advocate, or at least suggest, abortion as an option for all obstetrical patients. Yet in the wake of *Roe v. Wade*, many state courts have recognized a wrongful birth cause of action.[9] Indeed, one state trial court went so far as to hold wrongful birth suits to be constitutionally required, and thus actionable despite a contrary statute. *Hickman v. Group Health Plan, Inc.*, No. 84-15376 (Minn. Dist. Ct. Aug. 15, 1985), *rev'd*, 396 N.W.2d 10 (Minn. 1986) (en banc).

A wrongful life cause of action presents a claim by a child that he should have been aborted. The person bringing suit asserts that his own life is a compensable injury. Despite the plainly bizarre nature of such a theory of tort liability, some courts have, after *Roe*, upheld wrongful life claims. *E.g.*, *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Harbeson v. Parke-Davis, Inc.*

C. *Roe v. Wade* Has Distorted the Criminal Law.

The principal deleterious effect of *Roe* has been the virtually total negation of criminal laws against

[9] *E.g.*, *DiNatale v. Lieberman*, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982); *Blake v. Cruz*, 108 Idaho 253, 698 P. 2d 315 (1984), *aff'd on rehearing*, 108 Idaho 253, 698 P.2d 315 (1985); *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E. 2d 385, *cert. denied*, 469 U.S. 846 (1983); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981), *leave denied*, 414 Mich. 875 (1982); *Berman v. Allen*, 80 N.J. 421, 404 A. 2d 8 (1979); *Jacobs v. Thiemer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983) (en banc); *James G. v. Caserta*, 332 S.E. 2d 872 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 69 Wis. 29 766, 233 N.W. 2d 372 (1975).

abortion. *Roe's* impact has also disrupted the law of prenatal homicide outside the abortion context, yielded escalated sentences against those who act in conscientious resistance to abortion, and suppressed the justification defense against those acting to protect unborn children.

1. Prenatal Homicide

The decision in *Roe v. Wade*, sanctioning abortion with the consent of the mother, theoretically should not bar homicide prosecutions for the nonconsenual destruction of a woman's prenatal child. *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987). Nevertheless, *Roe's* relegation of unborn children to the status of constitutional nonentities has severely deterred state courts from applying homicide statutes to unborn children, even in the final days of pregnancy. Bopp & Coleson, *supra* note 1, at 99-105, 116 (manuscript pagination). A California appellate court, for example, affirming dismissal of a prosecution for the murder of a nonviable unborn child, declared:

> The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.

People v. Smith, 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976). The highest court of Kentucky, disallowing a prosecution for the murder of an unborn child in the third trimester of pregnancy, asserted that "this Court has no authority to disagree with a decision of the United States Supreme Court interpreting the Federal Constitution." *Hollis v. Commonwealth*, 652 S.W.2d 61, 63 (Ky. 1983). *See also State v. Brown*, 378 So. 2d 916, 918 (La. 1979) (disallowing prosecution for homicide of unborn child) (citing *Roe*).

2. Excessive Sentencing of Pro-life Activists

Justice White has noted the Supreme Court's "insecurity over its handiwork in *Roe v. Wade* and the cases following that decision." *Thornburgh*, 476 U.S. at 813 (White, J., dissenting). "Aware that in *Roe* it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively." *Id.* at 813-14. This same insecurity manifests itself in the trial courts which issue excessively harsh sentences to individuals convicted for resisting the practice of abortion.

Thus Joan Andrews, a young woman who nonviolently entered an abortion business during working hours and attempted (and failed) to dismantle an abortion suction machine was convicted of burglary and sentenced to five years in prison. *State v. Andrews*, No. 86-1663 (Escambia County Cir. Ct. sentence entered Sept. 24, 1986). A priest who smashed another suction machine was convicted of burglary and criminal mischief and given two consecutive five-year sentences. *See Markley v. State*, 507 So. 2d 1043 (Ala. Crim. App. 1987). Fred Kerr, a Baptist minister convicted of trespass (two counts) and unlawful assembly (two counts) for participation in a single event at an abortion business received a sentence of four years and a fine of $1,760. *State v. Kerr*, Nos. 59084A, 59084C (Fulton County, Ga. State Ct. Jan. 31, 1989). Brenda Roberts, housewife and grandmother, convicted of two counts of trespass and one count of unlawful assembly, received a three-year sentence and a fine of

$1,320. *State v. Roberts*, Nos. 59082A, 59082C (Fulton County, Ga. State Ct. Jan. 31, 1989).

3. Defense of Justification

The pro-life activist who blocks the entrance to an abortion business or dismantles an abortion suction machine comes squarely within the terms of the defense of justification. Such a person acts to prevent the imminent destruction of a helpless unborn baby. Yet reported state court decisions uniformly reject the defense in the abortion context.

Justification, or necessity, is an affirmative defense to a criminal prosecution. The defendant asserts that his technical violation of the law was necessary to prevent a greater harm that was both imminent and otherwise unavoidable. Thus, for example, justification exonerates someone who trespasses on private property to rescue a drowning child, or who breaks and enters a burning building to save an infant trapped there. *See generally* Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974).

The defense of justification is the obvious and natural plea of pro-life activists facing trespass, obstruction, or similar charges for their efforts to save children slated for abortion. State appellate courts, however, uniformly reject the defense when the harm threatened is the abortion of an unborn child.[10] This

[10] *E.g., Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *Gaetano v. United States*, 406 A.2d 1291 (D.C. 1979); *People v. Krizka*, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980); *Sigma Reprod. Health Center v. Maryland*, 297 Md. 660, 467 A.2d 483 (1983); *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. Ct. App. 1982); *Fairfield Commons Condo. Ass'n v. Stasa*, 30 Ohio App. 11, 506 N.E.2d 237 (1985); *Hoffart v. State*, 686 S.W.2d 259 (Tex. Ct. App. 1985); *State v. Horn*, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985), *aff'd on other grounds*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

pattern cannot be explained as anything other than the reflexive deference of lower courts to the central ideological presupposition of *Roe v. Wade*, namely, that unborn human life is not worth legal recognition or protection.[11]

CONCLUSION

The line of abortion cases begun with *Roe v. Wade* have distorted the law and debilitated the judicial system. This Court should therefore overrule *Roe v. Wade*.

Respectfully submitted,

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[11] In some states the defense of justification does not even require objective reasonableness of the defendant's conduct. In Wisconsin, for example, the defendant need only "reasonably... believe" that the conduct in question was necessary to preserve human life. Wis. Stat. Ann. §§ 939.46, 939.47 (West 1980). The rejection of the justification defense in such states is tantamount to a holding that pro-life beliefs are unreasonable as a matter of law.

AMICUS CURIAE

BRIEF

FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

(16)

No. 88-605

IN THE

Supreme Court Of The United States

October Term, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether reconsideration of *Roe v. Wade* so as to recognize States' authority to protect pre-viable fetal life is needed to alleviate social unrest, and to preserve the Court's institutional legitimacy, as a properly neutral referee in the abortion debate?

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Cases: *Page*

Bellotti v. Baird, 443 U.S. 622 (1979) 12

Bowers v. Hardwick, ___ U.S. ___, 106 S.Ct. 2841 (1986) 7, 8

Brown v. Board of Education, 349 U.S. 294 (1955) 24

Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) 18

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 6, 9

Colautti v. Franklin, 439 U.S. 379 (1979) 9

Cooper v. Aaron, 358 U.S. 27 (1958) 24

Doe v. Israel, 482 F.2d 156 (1st Cir. 1973) 18

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8

Gober v. City of Birmingham, 373 U.S. 374 (1962), *rev'g,* 41 Ala. App. 313 (1961) 4

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 4

H.L. v. Matheson, 450 U.S. 398 (1981) 12, 14

Harris v. McRae, 448 U.S. 297 (1980) 13, 14

Hunter v. Underwood, 471 U.S. 222 (1985) 4

Johnson v. Santa Clara Transportation Agency, ___ U.S. ___, 107 S.Ct. 1442 (1987) 17

Lochner v. New York, 198 U.S. 45 (1905) 4

Lombard v. State of Louisiana, 373 U.S. 267 (1963) 4

Morgentaler v. Her Majesty The Queen,, 1 S.C.B. 30, 44 D.L.R. 4th 385 (1988) 7

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 8

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 17

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Cases: *Page*

Peterson v. City of Greenville, 373 U.S. 244 (1963) 4

Planned Parenthood v. Ashcroft, 462 U.S 476 (1983) 9

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 17

Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983); 789 F.2d 1348 (9th Cir. 1986), *aff'd sub nom., Babbitt v. Planned Parenthood of Central and Northern Arizona,* ___ U.S. ___, 107 S.Ct. 391 (1986) 18

Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988) 18

Roe v. Wade, 410 U.S. 113 (1973) ..... passim

Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963) ... 4

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) 4

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) ..... passim

United States v. Paradise, ___ U.S. ___, 107 S.Ct. 1053 (1987) 17

Walker v. City of Birmingham, 388 U.S. 307 (1967) 3

Miscellaneous:

Abortion Protestors Arrested in 3 Cities, The Sunday Oklahoman 5A, col. 5 (Jan. 15, 1989) 7

C. Allen, *Anti-Abortion Movement's Anti-Establishment Face,* Wall St. J. A22, col. 3-6 (Dec. 8, 1988) 22

L. Arey, *Developmental Anatomy* 55 (Rev. 7th ed. 1974) .. 10

Blake, *Abortion and Public Opinion: The 1960-1970 Decade,* 171 Science 540 (1971) 16

TABLE OF AUTHORITIES — (Continued)

Miscellaneous: *Page*

E. Blechschmidt, *The Beginning of Human Life,* (1977) 10

W. Brennan, *State Constitutional Rights and the Protection of Individual Rights,* 90 Harv. L. Rev. 489 (1977) 8

The Connecticut Mutual Life Report on American Values in the 80's (1981) 15

C. Corliss, *Patten's Human Embryology: Elements of Clinical Development* (1976) 10

R. Cowden-Guido, ed., *You Reject Them, You Reject Me: The Prison Letters of Joan Andrews* (1988) 19, 20, 21

A. Cox, *The Role of the Supreme Court in American Government* (1976) 22, 23

A. Dworkin, *Right Wing Women* (1983) 16

J. Ely, *Democracy and Distrust* (1980) 4

J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 4

G. Gallup, Jr., *The Gallup Poll: Public Opinion 1986* 49 (1987) 15

Garrison, *Anti-Abortion Movements Claim Kinship to Civil Rights,* The Birmingham News 6E, col. 1 (Nov. 25, 1988) 22

C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) 16

M. Glendon, *Abortion & Divorce in Western Law* (1987) 7, 15, 16

M. Glendon, *A World Without Roe,* New Republic 19 (Feb. 20, 1989) 25

Greenhill & Friedman, *Biological Principles and Modern Practice of Obstetrics* (1974) 10

TABLE OF AUTHORITIES — (Continued)

Miscellaneous: *Page*

Hargrove, *Priest in Jail After Taking His Faith to the Streets,* The Birmingham News D1, Col. 4 (Nov. 21, 1988) 22

E. Hemingway, "Hills Like White Elephants," in Hemingway, *Men Without Women* (1927) 16

M. L. King, *Why We Can't Wait,* Letter from Birmingham Jail (1964) (Mentor) 19

Kleinman, *When Abortion Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances,* B1, col. 1 (Feb. 15, 1984) 24

K. Luker, *Abortion and the Politics of Motherhood* (1984) 15

A. MacIntyre, *After Virtue* (2d ed. 1984) 5

C. MacKinnon, *Feminism Unmodified* (1987) 15, 16, 17

M. Meehan, *Joan Andrews and Friends,* 14 Human Life Review 7 (1988) 21, 22

J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 16

K. Moore, *The Developing Human: Clinically Orientated Embryology* (3rd ed. 1982) 10

J. Noonan, *A Private Choice* (1979) 16

E. O'Neill, Abortion 1914, in O'Neill, *Lost Plays* (1958) 16

T. Sadler, *Langman's Medical Embryology* (5th ed. 1985) 10

A. Sachs, *Abortion on the Ropes,* Time (Dec. 5, 1988) 22

L. Tribe, *American Constitutional Law* (1988) 10

L. Tribe, *God Save This Honorable Court* (1985) 23

TABLE OF AUTHORITIES — (Continued)

Miscellaneous: *Page*

Statement of Prof. William Van Alstyne, *The Human Life Bill: Hearings on S. 158 Before the Subcom. on Separation of Powers, of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 276 (1981) 14

West's *Federal Practice Digest,* 2nd ed. 18

West's *Federal Practice Digest,* 3rd ed. 18

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BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Amicus curiae, The Southern Center for Law & Ethics (the "Center") is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. Written consent of all parties to the Center's filing of this brief accompanies it.

The purpose of the Center is to develop and assist members of the legal and lay communities in understanding how to integrate a world and life philosophy with law and social ethics. Its geographic focus is principally the State of Alabama. Policies are set by a board of directors composed of

four lawyers and two laymen. Activities are conducted by Executive Director J. Scott Houser, a well-known figure locally in public affairs. Houser's activities for the Center include public speaking, interaction with interested law students and members of the academic community, publication of articles, and identification and engagement of lawyers for participation in litigation on important public issues related to the Center's purposes.

The Missouri statutes at issue here and potential reconsideration of *Roe v. Wade,* 410 U.S. 113 (1973), are of particular interest to the Center for two reasons. The executive director of the Center has counseled numerous people in the Birmingham area considering passive civil disobedience in response to inaction by State and local government on the problem of abortion. Nearly three hundred people have been arrested in Birmingham engaging in passive civil disobedience since November 1988. As a result of this experience and review of the *Roe* doctrine, the Center believes that this Court's involvement in the abortion controversy has created a new set of ethical dilemmas to the rules announced by this Court and the obvious instinctive desire to protect life, albeit life perceived in the womb.

The Center's interest is not to legitimate civil disobedience, but to create new institutional mechanisms for people to express themselves as citizens. The Center therefore is interested in the *Roe* doctrine to the extent it takes away from the citizenry meaningful opportunities for effective expression in democratic State Governmental institutions.

SUMMARY OF ARGUMENT

Roe v. Wade has taken the Court far into democratic processes by denying States the authority to entertain theories of when human life begins. As a result, the Court has assumed a vulnerable position in the public mind, as increasing numbers of citizens weigh disloyalty to the Court's rules and choose passive civil disobedience to protect fetal life.

The Court's previous choice of viability as the point at which fetal life is protectible is so subjective and so tied to changing medical technology as to imply disrespect for fetal life. Thus, the Court is hard-pressed to bolster its posture in the controversy with a claim of neutrality.

Retention of the viability standard is not justified as a way to free women from dominance by men. The equal protection standards of this Court provide a less institutionally risky device if State anti-abortion laws become subterfuge for legislative subjugation of women.

Public discontent with *Roe v. Wade* is widespread. Since 1987, over ten thousand have been arrested and jailed for trespass in nonviolent efforts to block access to abortion facilities. These citizens intend to symbolize and vicariously experience the States' indifference to fetal life. Identified leaders of the civil disobedience movement make appeals to "higher law" in ways reminiscent of similar past movements.

Reconsideration and acceptance of genuinely protectible State interests in fetal life will open the political process to these citizens, and provide a level playing field for the apparently intractable features of the abortion controversy. The necessarily tentative quality of the wins and losses of that process provides the hope and fear of another day for the participants. Even though there will be some dissatisfied with increased democratic opportunities, these people will lose the psychological appeal presented by the *Roe* doctrine's mandate to ignore fetal life. New democratic opportunities on abortion will enhance the Court's legitimacy and authority as an institution.

ARGUMENT

Introductory Statement

Alabama is no stranger to civil disobedience, or to this Court's role as an agent for the preservation of social order.[1]

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[1]*See, e.g., Walker v. City of Birmingham,* 388 U.S. 307, 322-23 (1967) (disobedience of court injunction against parades and "kneel-in" at churches where blacks unwanted).

In this century, many of its citizens have been locked out of the political process by all manner of devices.[2] The decisions of this Court also document some of that history in reasonably good fashion, including a record of the courageous nonviolent citizens willing to step forward and challenge the exclusionary features of State law.[3]

The Court's work plainly opened up the democratic process to operate effectively even as it made that process less homogeneous. But that is the way things should be. Justice Holmes counseled long ago that a constitution "is made for people of fundamentally differing views."[4] Dean Ely has explained that the function of the Supreme Court is to serve as a referee of the combatants in the political process, while leaving the disposition of controversial value choices to that process.[5]

With respect to the abortion controversy, the Court has effectively exchanged its referee's role for that of participant. However well intended in original form, the abortion doctrine in *Roe v. Wade* and its progeny are regarded as having foreclosed the constitutional processes which the Founders designed to mediate the "fundamentally differing views" of our nation's citizens. This foreclosure of the democratic process has not been without cost to the nation or to the Court itself. The nation has suffered intense social division, which has been compounded both by the sentiment that the abortion issue has not been resolved in accordance with our

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[2]*See, e.g., Hunter v. Underwood,* 471 U.S. 222 (1985) (intentional disenfranchisement of blacks by facially neutral 1901 Alabama Constitution provision); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (drawing municipal boundaries to exclude black residences).

[3]*See Gober v. City of Birmingham,* 373 U.S. 374 (1962), *rev'g,* 41 Ala. App. 313 (1961) (trespass convictions for lunch counter sit-ins); *Shuttlesworth v. City of Birmingham,* 382 U.S. 87 (1965); *Shuttlesworth v. City of Birmingham,* 373 U.S. 262 (1963).

For further experience of the Court with civil disobedience, see *Peterson v. City of Greenville,* 373 U.S. 244 (1963), and *Lombard v. State of Louisiana,* 373 U.S. 267 (1963).

[4]*Lochner v. New York,* 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[5]J. Ely, *Democracy and Distrust* (1980). *See generally,* J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920 (1973).

democratic heritage, and also by the frustration attendant upon the Court's interposition of itself between the electorate and the democratic process through which volatile issues are usually resolved. Not surprisingly, the Court's intervention has diminished its stature as an institution "above politics," with a corresponding diminution of faith in the rule of law. Finally, large numbers of citizens, frustrated by their inability to participate meaningfully in the formation of national policy, have turned to various forms of civil disobedience in an effort to find a way to effect a change in the law.

The present case offers to the Court an opportunity to reexamine the doctrine, first announced some sixteen years ago in *Roe*, that a woman's freedom to abort her pregnancy effectively overrides State interests in protecting fetal life. Since that time, the abortion controversy has generated the largest civil disobedience movement since the civil rights movement, a movement which taxes severely the capabilities of local law enforcement officials. Intended as a solution to a vexing problem, *Roe* instead exacerbated social divisions.

I. The Court's Attempted Solution To The Abortion Controversy Has Failed Because Only Democratically Accountable Legislative Bodies Adequately Can Address The Intractable Abortion Debate.

Numerous respected commentators have noted the apparently intractable nature of the abortion controversy. The pro-life community views legalized abortion on demand as the legalized mass murder of innocent unborn children; the pro-choice community views the abortion right as fundamental, and as essential to the equality and freedom of women. Given such a fundamental value conflict, many have despaired of a solution.[6]

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[6]*See, e.g.,* A. MacIntyre, *After Virtue* 6-7 (2d ed. 1984).

A. *The* Roe *Doctrine Is Not Really Neutral, As It Originally Purported To Be, On The Question Of When Human Life Begins.*

The Court in *Roe* purported to take a neutral stance regarding the fundamental issues at stake in abortion; this supposed neutrality was presented in the form of agnosticism regarding the question of when human life begins. The Court's famous passage in *Roe* stated:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.
>
> . . . .
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> . . . we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. . . . "

Roe, 410 U.S. at 159-62. The Court now regards the *Roe* doctrine as a mandate of legislative agnosticism. *See, City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 444 (1983) ("a State may not adopt one theory of when life begins").

Remarkably, the Court acts as if its recognition of a State interest in the protection of fetal life would imply judicial adoption of a theory of life. Thus, in the present case, a declaration by the Missouri legislation on when life begins, is now subject to censorship by the Court. The very presence of this issue reveals that the Court's purported agnosticism and neutrality regarding abortion merely obscured temporarily the effect *Roe* would have on the democratic process, and citizen ability to recognize the actual role of the Court in the abortion controversy.

Other Western nations have settled their own passionate

abortion controversies through the legislative process. *See* M. Glendon, *Abortion & Divorce in Western Law* 2, 10-63 (1987). Professor Glendon has documented how compromise legislative solutions to the abortion controversy have diffused national divisions even where the purported compromise is analytically self-contradictory. *Id.* at 18-19, 40. Indeed, among the twenty Western nations surveyed by Glendon, only two nations had constitutionally invalidated legislative solutions. *Id.* at 25. Glendon further indicates that the United States has "less regulation of abortion in the interest of the fetus than any other Western nation." *Id.* at 2. Other nations, even as they adopt compromise legislative solutions, are willing to "[name] the underlying problem as one involving human life, not as a conflict involving a woman's individual liberty or privacy and a non-person." *Id.* at 19. The United States, concludes Professor Glendon, is unique in the degree to which it has precluded further legislative development in the abortion area. *Id.* at 25.[7]

1. State governments are the appropriate arenas for the abortion debate.

The institutional inappropriateness of the *Roe* "solution" is further evidence by the Court's own descriptions of its proper role. In *Bowers v. Hardwick,* 106 S.Ct. 2841, 2846 (1986), the Court acknowledges that it

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[7]Professor Glendon's survey was completed prior to the recent Canadian decision, which is similar in some respects to *Roe. See Morgentaler v. Her Majesty The Queen,* 1 S.C.R. 30, 44 D.L.R. 4th 385 (Canada S. Ct. 1988). Professor Glendon's overall assessments as to the unusual nature of the American approach to abortion law, in comparison to other Western nations, remain accurate. The recent Canadian decision may prove as divisive to Canadian society, as *Roe* has proven to be to American society. Thus, while the Canadian Courts recently have found *Roe* worthy of imitation, Canadian citizens recently have found the American civil disobedience movement also to be worthy of imitation. *See Abortion Protestors Arrested in 3 Cities,* The Sunday Oklahoman 5A, col. 5 (Jan. 15, 1989) (80 arrested in Toronto).

Canadian abortion law remains unsettled. *See* Comments, 7 Can. J. Fam. L. 131-82 (1988).

> is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Bowers recounts the Court's retraction in the 1930's of the "substantive gloss" placed by the Court on open-ended phrases in the Constitution. In setting out new rights deemed fundamental, "the Judiciary necessarily takes to itself further authority to govern the county. . . ." *Id.* The legitimacy of the Court's authority is threatened by its appropriation of authority regarded by the citizenry of a democratic society as rightfully their own.

With respect to the abortion controversy now before the Court, the foregoing principles suggest that any judicial scrutiny of State legislative solutions to the controversy will be unsuccessful in diffusing national tensions until States are free again to protect fetal life. Obviously, many States may choose not to respect fetal life, and may even find a State right to abortion. *Accord,* W. Brennan, *State Constitutional Rights and the Protection of Individual Rights,* 90 Harv.L.Rev. 489, 495 (1977) (recounts State response to U.S. Supreme Court narrowing rights).

While it is possible that a national consensus may someday emerge which would delegate responsibility for abortion issues to the federal judiciary, such a consensus will not emerge unless and until the controversy is fully debated through the political processes. Indeed

> [t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 547 (1985) (rejecting ability of judiciary to evaluate State interests, defers to protections of national legislative process). *See also, New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. *Roe*'s viability standard made value assessments which unnecessarily denied legislative power, as if States' action on fetal life could not be rational.

In *Roe,* the Court mixed medical issues with the philosophical and theological issues posed by abortion. As a result, the Court chose viability as the only relevant fetal characteristic for State protection. This high-mindedness obscured the biological facts.

To the Court, viability is not so much an identifiable characteristic of the fetus, but of the relationship of the fetus to developing medical technology and the physician. This Court is quite familiar with the instability caused by tying a constitutional standard to changing medical technology. *See City of Akron v. Akron Center for Reproductive Health,* 462 U.S. at 453-75 (O'Connor, J., dissenting).

Viability must be measured by the subjective discretion of the attending physician hired to relieve parents of an unwanted child-rearing responsibility:

> [N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as the determinant of when the State has a compelling interest in the life or health of the fetus.

Colautti v. Franklin, 439 U.S. 379, 388 (1979) (vagueness challenge to statute suggesting objective measures are possible).[8]

These features of the viability standard imply a disrespect for fetal life. In a real and practical sense, viability is a purely relational standard with no inherent tie to the objectively measurable physiological characteristics of human fetuses.

Medical texts state clearly, even today, that the development of the individual human organism begins at fertilization. The terms embryo and fetus, like the term neonate, are

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[8] *Cf., Planned Parenthood v. Ashcroft,* 462 U.S. 476, 482-86 (1983) (States may conclude abortionist not sufficiently concerned with preserving life of fetus born alive and therefore require second physician).

merely medical descriptions of stages of development in the individual biological organism. The genetically-unique, biologically-human, organism is formed at fertilization. This organism, whether developmentally an embryo, fetus, neonate, or human adult, is individually and genetically distinct from all other organisms, including the mother; it is clearly alive; it is clearly human. In the simple biological sense, human life does begin at conception.[9]

One need not be anti-abortion to accept this. A noted academic defender of the abortion right has summarized the matter: "Nor can one get anywhere on this issue by debating whether 'fetal life' is 'human life': what other form or species of life could it be?" L. Tribe, *American Constitutional Law* 1348-49 (1988).

Plainly then, there are separate moral, philosophical and theological questions relating to this human organism. These

[9]Blechschmidt writes in his text: "A human ovum possesses human characteristics as genetic carriers, not chickens or fish. This is now manifest: the evidence no longer allows a discussion as to if and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum." E. Blechschmidt, *The Beginning of Human Life* 16-17 (1977). Moore defines zygote as follows: "Zygote. This cell results from fertilization of an oocyte, or ovum, by a sperm, or spermatozoon, and is the *beginning of a human being*." K. Moore, *The Developing Human: Clinically Orientated Embryology* 1, 14 (3rd ed. 1982) (emphasis in original). Langman's Medical Embryology states that "[t]he development of a human being begins with fertilization, a process by which the *spermatozoon* from the male and the *oocyte* from the female unite to give rise to a new organism, the *zygote*." T. Sadler, *Langman's Medical Embryology* 3 (5th ed. 1985). Greenhill and Friedman state that the term "*conception* refers to the union of the male and female pronuclear elements of procreation from which a new living being develops." Greenhill & Friedman, *Biological Principles and Modern Practice of Obstetrics* 17 (1974). Patten states that "[i]t is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual." C. Corliss, *Patten's Human Embryology: Elements of Clinical Development* 30 (1976). Finally, Arey writes that "[t]he formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual." L. Arey, *Developmental Anatomy* 55 (Rev. 7th ed. 1974).

questions relate to the social *value* we place on various forms of human life, and the legal protection available. Thus, certain philosophers and social commentators may argue that the biologically-human organism lacks moral or legal rights if it lacks certain characteristics, such as consciousness, intelligence, the capacity to feel pain or emotion. This profoundly controversial question of what value to place on biologically-human life is at the heart of the public abortion controversy.

Subsequent defenses of the *Roe* doctrine recognize verifiable features of fetal life not tied to viability. This recognition implies that the viability standard is premised on the Court's own philosophical evaluation of the value of the fetus. Thus, Justice Stevens, joined by Justices Marshall and Brennan, wrote in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1987), as follows:

> Justice White is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth. . . . Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests. I should think it obvious that the state's interest in the protection of an embryo — even if that interest is defined as "protecting those who will be citizens," *ibid* — increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus — and pregnancy itself — are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

Id. at 778. (Stevens, J., concurring) (footnote omitted).

This passage clearly asserts a *philosophical* evaluation of the *State*'s interest in fetal life. It names four fetal characteristics which purportedly affect the nature of the State's interest in the fetus. The *Thornburgh* majority must rely on certain

philosophical evaluations of the characteristics of human fetal life in order to conclude that nonviable fetuses are not protectible by the States. The concurrence correctly restates the abortion question as follows: which human characteristics, if any, will deem the fetus worthy of governmental protection?

It is even more remarkable in that the *Thornburgh* concurring opinion's choice of protectible interests is at odds with *Roe*. The Court finds it "obvious" that a State's interest in fetal life varies according to four characteristics, or capacities: the capacity to feel pain, the capacity to feel pleasure, the capacity to react to its surroundings, and the capacity to survive. The Court in *Roe,* however, held that the State's compelling interest in fetal life depended only upon one isolated factor: the capacity of the fetus to survive outside the mother's body, termed viability. The other three characteristics named as obviously critical are totally ignored in *Roe*. Moreover, if considered, these characteristics could transform *Roe*, because the fetus clearly has the capacity to react to its surroundings in profound ways long before viability. Although the matter is controversial, it seems possible that the fetus also possesses the characteristics to feel pain and pleasure prior to viability. Acceptance of these four characteristics would therefore compel the view that the State's compelling interest in fetal life begins prior to viability.

Apparently, already recognizing some inadequacy of the viability standard, the Court has ignored it in cases involving pregnancy in minors. *See H.L. v. Matheson,* 450 U.S. 398 (1981) (parental notice for abortions on minors advances, throughout pregnancy, an interest protecting potential life without regard for viability). There is no good reason to ignore the viability standard for pregnant minors, but not pregnant adults.[10] The State interest in protecting life exists

[10]Obviously, State interests may be operative when the freedom of minors is restricted, and these would provide additional justification not present when adult freedoms are implicated. *See, e.g., Bellotti v. Baird,* 443 U.S. 622, 640-41 (1979). In other words, the differences between adults and minors are properly accounted for in balancing the freedom implicated with the State interest involved, not in identifying protectible State interests.

whether the fetus is carried in the womb of an adult or a minor.

In summary, viability is no standard at all, but an announcement of value assessments about fetal life characteristics. Making such assessments is a difficult responsibility, whether for the legislature or the judiciary. But when such decisions are made by the judiciary with little recognition for the existing institutions of representative government, one can expect confusion and unrest among the citizenry about their own relation to their government and its laws.

3. The viability standard is not needed to protect against imposition of religious views or a finding that the fetus is a "person."

Justice Stevens also states in *Thornburgh* that "unless the religious view that a fetus is a 'person' is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being." 476 U.S. at 779. However, there is nothing necessarily religious in a State adopting the philosophical position that it considers the biological nature of fetuses to entitle them to the same rights as the human neonate. It is well-established that the coincidence of State interests in protecting fetal life and the interests of certain religious bodies does not make the State interest a religious one. *See Harris v. McRae,* 448 U.S. 297, 319-20 (1980). Indeed, that the nine-month old fetus, and the neonate, differ only in relational and locational characteristics — one is dependent on the mother and in the uterus, the other is dependent on human nurture generally, and is no longer within the mother — suggests that the difference between the fetus and the human being is hardly "fundamental." Certainly, one could disagree with the *Thornburgh* characterization without resort to theology. The terms "person" and "human being" clearly may be used in different senses in different fields, including philosophy, law, medicine, and theology.

Justice Stevens further strains his argument in *Thornburgh* by claiming that if there were not a fundamental difference between the fetus and a human being, the Court would have to mandate that States protect the unborn child. *See* 476 U.S. at 779. Stevens' claim again confuses the medical, legal, philosophical, and theological issues presented by the abortion question. Legal scholars are said to be unified against the view Stevens asserts:

> I suggest to you that there is at least an issue which glues and cements [the scholars] together. It goes to the nonsequitur that if something can be rationally deemed "a human life" from some not irrational perspective, which it surely can . . . , then it may also be defined by Congress as a "person" as that word appears in the 14th Amendment.

The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers, of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. 276 (1981) (Statement of Prof. William Van Alstyne).

At least as early as *Roe*, States have sought to protect fetal life — which they called human life — even though the Fourteenth Amendment definition of "person" did not include the fetus. The term "person" within the Fourteenth Amendment does not, in other words, exhaust even the *legal* meaning attributable to terms such as "person," "human being," or "unborn child," as used in other legal contexts. There is nothing to prevent the States from valuing fetal life, based on certain secular, moral, and philosophical judgments. *See Harris v. McRae, supra; H.L. v. Matheson, supra.*

In summary, the recognition of a State interest in protecting fetal life throughout pregnancy is not unscientific, or necessarily religiously based. *Roe*'s parsimonious deference to this interest thrusts the Court into a broad national political debate that is best addressed by legitimating more individual State legislative choices. *Roe* is particularly troubling because it gives so little practical value to the strongly-felt views of the citizenry that fetal life should not be relegated to nothingness. Further, despite claims of uncertainty, *Roe* resolved all doubt against a protection of fetal life.

B. Roe's *Refusing States The Option To Protect Fetal Life Is Not Legitimate Even If Deemed A Court Effort To Equalize Men And Women.*

Some consider the *Roe* doctrine an appropriate mechanism for eliminating differences between men and women. Even if the doctrine serves this purpose, it does not justify denying State legislatures the prerogative to respect fetal life. Certainly, there is no consensus that non-recognition of fetal life is needed to accord women their due role in society.

Conceiving the abortion right as assisting women obscures the fact that "for the women who now constitute the great majority of activists in both camps, values central to their lives are at stake." M. Glendon, *supra*, at 47 (citing K. Luker, *Abortion and the Politics of Motherhood,* 158-61). Thus, this brief discusses at some length the actions and views of Ms. Joan Andrews, who is probably the most notable practitioner of nonviolent anti-abortion civil disobedience. Abortion divides women just as it divides men: survey data suggest that women are *not* more supportive of abortion rights than men.[11] While abortion is an issue which affects women differently than men, merely stating that fact does not inevitably lead to any particular conclusion. The desire to equalize men and women through legalized abortion constitutes a radical kind of social engineering which many women find repugnant and demeaning.

Indeed, even acceptance of the feminist view that men dominate women in the areas of sexuality and procreation does not necessarily lead to a pro-choice remedy. If, as some feminists claim, women are not really free in our society to make their own decisions concerning sexual activity and contraception,[12] then we cannot assume that they will be free to make their own decisions concerning abortion. Arguably, the "freedom" the abortion right gives women merely leaves

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[11] *See, e.g.,* The Connecticut Mutual Life Report on American Values in the '80's 92 (1981); G. Gallup, Jr., *The Gallup Poll: Public Opinion 1986* 49 (1987).

[12] *See* C. MacKinnon, *Feminism Unmodified* 94-96 (1987).

them at the mercy of their male companions, who may have purely selfish reasons to urge an abortion.[13] If men dominate the decision whether to engage in sexual activity to the extent that the decision is not truly consensual, we may expect that men will also dominate the decision to abort to the extent that this decision is not truly consensual. Literature and experience both testify that men urging reluctant women to undergo an abortion is commonplace.[14] In this sense, feminists may perceive elective abortion as a right instigated by men, for men, at the expense of women.[15]

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[13]Some feminists have noted that abortion makes women more sexually available to men, with less consequent responsibility. *See* C. MacKinnon, *Feminism Unmodified* 99 (1987) (citing A. Dworkin, *Right Wing Women* (1983)). It has also been noted that "the strongest supporters of abortion prior to *Roe v. Wade* were affluent white men." M. Glendon, *Abortion and Divorce in Western Law* 51 (1987) (citing Blake, *Abortion and Public Opinion: The 1960-70 Decade,* 171 Science 540, 544 (1971). Ms. Blake suggested that affluent white men favored abortion because "as a class they are especially vulnerable to being held financially and socially responsible for accidental pregnancies." Blake, *supra,* at 544.

[14]*See, e.g.,* E. O'Neill, *Abortion* (1914), in O'Neill, *Lost Plays* (1958); E. Hemingway, "Hills Like White Elephants," in Hemingway, *Men Without Women* 72-73 (1927). Professor Glendon speaking of Carol Gilligan's study of women's construction of moral problems, notes: "it is striking how many of Carol Gilligan's subjects in her chapter on the abortion decision stated that one of the reasons they were seeking abortions was because the men in their lives were unwilling to give them moral and material support in continuing with pregnancy and childbirth." M. Glendon, *Abortion and Divorce in Western Law* 52 (1987) (citing C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 81, 88, 89, 91 (1982)). The abortion right in combination with our nation's lax enforcement of child support, work together with gender inequality to coerce women to abort. *Cf.* M. Glendon, *supra,* at 53-58 (discussing abortion and dependency).

[15]Thus, Judge Noonan has noted: "When strong and comprehensive anti-abortion statutes were being enacted in nineteenth-century America, the militant feminists had been outspoken in their scorn and condemnation of abortion. Their journal, *Revolution,* urged anti-abortion measures upon the New York legislature in 1869. If the practice was resorted to at all, their leader, Elizabeth Cady Stanton said, it was because of 'the degradation of women by men.'" J. Noonan, *A Private Choice* 48 (1979) (citing J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 111, 113, 114 (1978)).

Contemporary feminists who remain pro-choice nonetheless often state

Further, merely recognizing the legitimacy of State interests in protecting fetal life would not authorize actual and intentional State legislative efforts to harm women. Plainly, irrespective of *Roe*, such efforts would remain subject to equal protection scrutiny. In the event the State is seeking to subjugate women, it may be argued that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Fenney,* 442 U.S. 256, 279 (1979) (quoted in, *Harris v. McRae,* 448 U.S. 297, 323 n.26 (1980) (refusal to fund non-therapeutic abortions not evidence of such intent)). *See also, Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 66-67 (1976) (singling out abortion is not by itself sufficient to conclude equal protection violated). And, if the State is not genuinely interested in protecting fetal life, it could not rely on this interest to justify restrictions on abortion.

Finally, the Center does not believe that the mere existence of State obstacles to abortion, which cause childbirth and attendant needed recovery time, should be construed as an effort to subjugate women. This is true even though such obstacles may put women at a disadvantage.[16] Generally, our law does not authorize judicially mandated equality of outcome, except in the most dire remedial circumstances.[17]

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that the abortion right was instigated by men, for men, and that men have been the primary beneficiaries. *See, e.g.,* C. MacKinnon, *Feminism Unmodified* 97-101 (1987). Ms. MacKinnon concludes: "So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. In other words, under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression." *Id.* at 99.

Some contemporary feminists, following these lines of thought, have adopted a pro-life position. Thus, the Court has received an amicus brief in the past sponsored by Feminists for Life.

[16]One might conclude evidence of subjugating intent from the absence of private and public social structures to assist women in need after childbirth.

[17]*Compare, United States v. Paradise,* 107 S.Ct. 1053 (1987), *with Johnson v. Santa Clara Transportation Agency,* 107 S.Ct. 1442 (1987) (O'Connor, J., concurring in the judgment) (quotas and affirmative action).

II. Passive Civil Disobedience Is An Expected Response To The Consistent Judicial Intervention Against Legislative Protection Of Fetal Life And Is Fairly Considered As A Factor In Reconsidering *Roe*.

The opinion of the court below demonstrates the overreach of the *Roe* doctrine. The Eighth Circuit panel ruled unconstitutional a mere finding that life begins at conception and instruction to courts to interpret State laws in light of that finding and the decisions of this Court. *See Reproductive Health Services v. Webster,* 851 F.2d 1071, 1075-77 (8th Cir. 1988).[18] A similar ruling issued against a legislative directive to physicians to conduct tests to determine viability, *see id.* at 1074, and against proscriptions against using public facilities to perform abortions, *see id.* at 1080-82.[19]

These State efforts at protecting fetal life and preventing State involvement with its destruction are a far cry from the rape victim denied an abortion in *Roe v. Wade.* The Eighth Circuit's treatment is symptomatic of a seemingly endless stream of abortion related litigation in the federal courts since 1973.[20] Plainly the overwhelming consensus of the courts has been that States were involved in efforts to protect fetal life prior to "viability." Injunctions are the norm rather than the exception.

It is no wonder that citizens feel without redress in their desire to protect fetal life; the fruits of their work in the legislature are enjoined at every turn. As Martin Luther King, Jr. said of his experience in Birmingham in 1963, when he was arrested and jailed in protest over segregation:

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[18]Other courts have issued similar rulings. *See Doe v. Israel,* 482 F.2d 156 (1st Cir. 1973). *But see, Charles v. Carey,* 627 F.2d 772, 778-779 (7th Cir. 1980).

[19]*Amicus* does not address the ruling concerning the use of public funds to engage in speech to a woman encouraging an abortion, as it may raise additional First Amendment concerns. *See* 851 F.2d at 1077-79; *see also, Planned Parenthood v. Arizona,* 718 F.2d 938, 942-48 (9th Cir. 1983); 789 F.2d 1348 (9th Cir. 1986), *aff'd sub nom., Babbitt v. Planned Parenthood,* 107 S.Ct. 391 (1986).

[20]West's *Federal Practice Digest* 2nd edition and 3rd edition list 264 cases under the heading "Abortion & Birth Control."

> As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us. We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means for laying our case before the conscience of the local and the national community.
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> ***
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> One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

M. L. King, *Why We Can't Wait,* Letter From Birmingham Jail, 78, 83-84 (1964) (Mentor).

A. *The Large Number Of Pro-Life Civil Disobedients And The Character Of Their Actions Reflect Serious Concerns About This Court's Public Legitimacy.*

Joan Andrews is probably the most exceptional individual of the pro-life civil disobedience movement. As of December 1985, she had been arrested 105 times for such conduct as summary trespassing. In Bridgeton, Missouri, where most of her arrests occurred, she was not considered violent or dangerous. *See* Presentence Report of the Adult Probation Office of the Court of Common Pleas, County of Allegheny (Dec. 24, 1985) (quoted in R. Cowden-Guido, ed., *You Reject Them, You Reject Me: The Prison Letters of Joan Andrews* 67-77 (1988)).

Her attitude is most revealing:

> The rougher it gets for us, the more we can rejoice that we are succeeding; no longer are we being treated so much as the privileged born, but as the discriminated against preborn. We must become aligned with them completely and totally or else the double standard separating the preborn from the

rest of humanity will never be eliminated. I don't want to be treated any differently than my brother, my sister. You reject them, you reject me.

We do not expect justice in the courts. Furthermore we do not seek it for ourselves when it is being denied our beloved preborn brothers and sisters. Thus I plead a case for complete and total vulnerability in court by refusing self defense and all legal argumentation for *self* protection. We should in truth tell the court that we, as defenders and friends of the preborn, expect no justice and no compassion, as the true defendants, the preborn children, received none and were killed without due process on the day of the rescue attempt. We only stand here in their stead, being substitute defendants by a compelling and painful logic. They died for the crimes of being preborn and unwanted. We expect no justice from a judicial system which decrees such savagery and a government which allows it. If it is a crime punishable by death to be unwanted, maybe it should be a crime, punishable by death, to love the unwanted and to act to protect them.

R. Cowden-Guido, ed., *You Reject Them, You Reject Me* at 21. Local police officers apparently fulfilled Andrews' wish:

> . . . when I was arrested at Bridgeton for blocking doors at an abortion chamber, one of the arresting police officers went into a rage when I refused to walk out, and he locked me in a strangle hold by the neck and demanded I walk out. He kept choking me and almost got hysterical. Finally he just dragged me out because I wouldn't submit. He cursed and raged all the way back to the station. I always remain silent in the face of rage unless I am asked a direct question.
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> My throat and jaw was [sic] bruised for more than a week. Having faced this particular officer and others like him before, I think it is an inability for them to accept a disregard for their authority, which of course they don't have in this area. We are always polite with the police, but we obviously cannot accept or acknowledge their authority to force us to leave a death chamber while we are trying to rescue the victim; and some officers are just not able to accept that.

Id. at 60. Without *Roe*, the police officers could have been assisting, rather than arresting Ms. Andrews in her efforts to prevent abortion.

In March 1986, Ms. Andrews entered a Pensacola, Florida, abortion clinic, and tried unsuccessfully to remove the cord from an abortion suction machine. She had informed police and the clinic personnel of her intentions; the police therefore were waiting for her. She went limp upon arrest. She was convicted of burglary. The Florida judge gave her a five year sentence, citing her unrepentant attitude, and unwillingness to discontinue her anti-abortion activities. Joan Andrews continued her practice of nonviolent noncooperation after sentencing, with the result that she served a good deal of her sentence in solitary confinement in Broward Correctional Institute, a maximum security prison. Finally, after serving 31 months, Ms. Andrews was granted clemency by the State of Florida, and was released. *See,* M. Meehan, *Joan Andrews and Friends,* 14 The Human Life Review 7 (1988); R. Cowden-Guido, ed., *You Reject Them, You Reject Me, supra; Abortion foe freed on probation,* Tallahassee Democrat, A2 (Oct. 19, 1988).

Jim Pinto is an Episcopal priest in Birmingham. He is noteworthy in part because the church he pastors is genuinely racially integrated, and located in a low income community. Pinto is a leading spokesman on the abortion issue, and is inspired by Martin Luther King. While in jail after being arrested for nonviolent trespass at an abortion clinic in November 1988, Pinto wrote his own letter from a Birmingham jail. A part follows:

> In our city as well as the country, Dr. Martin Luther King, Jr and civil rights leaders obeyed God rather than man and paid the price to see that the laws of discrimination against black men and women would fall and that laws which were supportive would be realized and effective in giving opportunity to blacks and all people. . . .

> In the same way, it is the current law of the land through Roe v. Wade that the pre-born children are not human, though it is clear to many of us they are and have the right to life, liberty and the pursuit of happiness.

Garrison, *Anti-abortion movements claim kinship to civil rights,* The Birmingham News, 6E, col. 1 (Nov. 25, 1988). Pinto also said to fellow pastors while in jail: "The question is not why I am in here. The question is why you and the others are out there." Hargrove, *Priest in jail after taking his faith to 'the streets,'* The Birmingham Post-Herald, D1, Col. 4 (Nov. 21, 1988). Pinto continues in his pastorship at this writing.

Stories like Andrews' and Pinto's could plainly be repeated. Reports are that public unrest is growing. There were approximately 3200 arrests for anti-abortion civil disobedience in the 13 year period from 1975 to 1988.[21] In 1988, there were approximately 10,000 people arrested. *See* C. Allen, *Anti-Abortion Movement's Anti-Establishment Face,* Wall St. J. A22, col. 3-6 (Dec. 8, 1988); A. Sachs, *Abortion on the Ropes,* Time 58-59 (Dec. 5, 1988).

B. *Reconsideration Of* Roe v. Wade *Is Needed To Sustain The Court's Legitimacy On Cases Involving Abortion.*

The Court certainly must be aware of these deep divisions within the nation. As recently as 1986, the Court stated:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. . . . We recognized at the very beginning of our opinion in *Roe*, 410 U.S. at 116, that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those

[21] M. Meehan, *Joan Andrews and Friends,* 14 Human Life Review 7, 10 (1988).

> disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

Thornburgh, 476 U.S. at 771-72 (citation omitted). The Court has even gone so far as to suggest that adherence to *Roe* is necessary to the rule of law. *See City of Akron,* 462 U.S. 419-20 (*stare decisis* demands respect in a society governed by the rule of law).

But adherence to *stare decisis* can occur at a high price to the Court's legitimacy. "The most important quality of law in a free society is the power to command acceptance and support from the community so as to render force unnecessary, or necessary only upon a small scale against a few recalcitrants." A. Cox, *The Role of the Supreme Court in American Government* 103 (1976) (describing the 'power of legitimacy').

It should be obvious even to the Court that *Roe* will never gain acceptance and support from people such as Andrews and Pinto. Even some supporters of abortion such as Professor Tribe concede that the fetus can plausibly be described as a "genuine baby." *See* L. Tribe, *God Save This Honorable Court* 17 (1985). The Court cannot expect the Andrews and Pintos to allow babies to be killed in the name of privacy, even though such arguments may persuade pro-choice supporters.

The rule of law ultimately requires both sanction and persuasion; it cannot operate when large numbers of people are willing to suffer punishment to uphold their beliefs. In this sense, government continually operates, as some famous civil disobedients testified over 200 years ago in Philadelphia, "by consent of the governed." Because of the breadth of the civil disobedience arising out of the *Roe* doctrine, it is apparent that the Court has lost the most important quality of law.

1. Destruction of fetal life evokes too much moral outrage to justify continued denial of the States' interest in protection of fetal life.

In suggesting that civil disobedience is related to non-recognition of fetal life in *Roe* and its progeny, and further

support reconsideration, the Center is aware that "constitutional principles cannot be allowed to yield simply because of disagreement with them," *Brown v. Board of Education,* 349 U.S. 294, 300 (1955), and certainly not because of violence, *see Cooper v. Aaron,* 358 U.S. 27 (1958). The Center does not perceive passive civil disobedience as violent. Moreover, the Court is hardly of the unanimous views expressed in the civil rights cases, *see Thornburgh,* 476 U.S. at 782-85 (Burger, C. J., dissenting) (time has come to reexamine *Roe*).

Should then *Roe* be adhered to just as the landmark civil rights decisions were?

There was, of course, tremendous national and regional turbulence relating to *Brown* and its progeny. Yet, since at least the mid-1970's *Brown* has been accepted nationwide as one of the great decisions of the Court. *Brown* was ultimately successful because whites, particularly in the South, were persuaded over time of its moral correctness. Indeed, although issues such as affirmative action remain quite controversial, and though racism is doubtless still a very significant problem, there is no substantially organized opposition today to the constitutional principles articulated in *Brown.*

Roe is different because its opposition has, in the past sixteen years, grown in number and moral outrage. One cannot envisage a time in the future when legalized elective abortion through viability will not provoke the moral outrage of large, reputable, and significant segments of our society.[22] The Court simply cannot expect to win against the pro-life position the battle of persuasion that it won against the segregationist position.

There can be no doubt, of course, that the pro-choice community is also large, and also would be upset by genuine legislative competition with pro-life citizens. The outcome for the rule of law, however, would be far different. The pro-choice community has claimed for years that it represents the settled convictions of the vast majority of Ameri-

[22]*Cf.* Kleinman, *When Aboriton Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances,* NY Times at B1 Co. 1 (Feb. 15, 1984) (describing revulsion of hospital personnel at later abortions).

cans. If the *Roe* doctrine were changed, and the abortion question returned to the States, this conviction of the pro-choice community could be tested in the political arena. Present and future turbulence created by the reversal would be suitably channeled into legislative and political activities.

Professor Glendon has aptly stated about abortion: "[w]ith a social problem of such complexity, the best way to proceed is not through a showdown in court, where winner takes all, but by keeping dialogue alive in the nation's statehouses, where there is always another day." M. Glendon, *A World Without Roe,* New Republic 19, 20 (Feb. 20, 1989). The rule of law is served by such an approach because the losers in the state political process are never so totally and permanently defeated as to be completely alienated from the rest of the nation. They can always work and plan for another day, another opportunity to present their side.

At this time in our nation's history, however, the pro-life side has been, like the segregationist side of another generation, banished from the political landscape by creation of an ironclad constitutional rule. It is generally agreed today that the Court was right to banish the segregationist position and hold firm to the principle of racial equality. The question is whether the Court is similarly certain of the total lack of merit of the pro-life position. Is the belief that human fetal life deserves legal protection so morally unrespectable that it must, like the belief in racial segregation and racial superiority, be banished from active political dialogue?

The Court must determine whether it is so certain of the principle of elective abortion that it is willing to relegate the pro-life community to effective banishment.

CONCLUSION

Roe, Akron and *Thornburgh* amount to an end to any State-sponsored opportunity to even suggest that fetal life can matter in the abortion decision. Complementing the commonly acknowledged analytical flaws of the *Roe* doctrine, the current wave of civil disobedience is the tip of an iceberg

of popular frustration with no effective democratic means to deal with the abortion controversy. Whatever doctrinal path the Court follows with this and future abortion cases — strict scrutiny or rational basis scrutiny or some variant, this *Amicus* urges it to free the people to act legislatively for more protection of fetal life, and accord more respect for the legislative choice in any judicial review.

In reconsidering *Roe* as a response to passive civil disobedience, the Court might take comfort in Machiavelli's remarks about unrest in ancient Rome in his *Discourses:* "[I]f the quarrels were the reason for the creation of the [plebeian] tribunes, these quarrels merit the highest praise; for besides giving to the people its share of control in the administration, the tribunes were set up as caretakers of Roman liberty. . . . " In becoming fair ground in the abortion controversy, American legislatures may be regarded similarly by history.

Reverse the Eighth Circuit and instruct the lower courts not to enjoin State obstacles to abortion merely because they reflect a desire to protect fetal life.

Respectfully submitted,

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I hereby certify that on the 23rd day of February, 1989, three copies of this Brief *Amicus Curiae* in support of Appellants have been served on the parties of record via United States mail, first-class, postage prepaid and properly addressed as follows:

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BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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Appellees.

On Appeal From The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE CATHOLIC LAWYERS GUILD OF THE ARCHDIOCESE OF BOSTON, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS

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Harris v. McRae, 448 U.S. 297 (1980)..... 23

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Maher v. Roe, 432 U.S. 464 (1977) 25

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 20

Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978) 17, 19, 20

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Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 20

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Olmstead v. United States, 277 U.S. 438 (1928) 28

Palko v. Connecticut, 302 U.S. 319 (1937) 26

Patterson v. McLean Credit Union, ___ U.S. ___, 108 S.Ct. 1419 (1988) 18

Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) 15

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Roberts v. United States Jaycees, 468 U.S. 609 (1984) .16, 27

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Schmerber v. California, 384 U.S. 757 (1966) 16

Stanton v. Stanton, 421 U.S. 7 (1975) 27

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 18

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Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 20

Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986) 8, 26

Turner v. Dept. of Employment Security and Board of Review of Industrial Commission of Utah, 423 U.S. 44 (1975) 27

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Vasquez v. Hillery, 474 U.S. 254 (1986) 17, 20

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 27

Welch v. Texas Dept. of Highways and Public Transportation, 479 U.S. 811 (1987) 20

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Missouri Statutes Annotated §1.205.1-2 ..... 2, 5

BOOKS AND ARTICLES

Aristotle, *Rhetoric*, Book 1, Chapter 13 (1373b 4) (d. *circa* 323 B.C.) 11

Aristotle, *Nicomachean Ethics*, Book 5, Chapter 7 (1134b 18) 11

1 Blackstone, *Commentaries* 13

Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973) 21

Cicero, *De Re Publica*, III, xxii, 33 fl. 1st Century B.C. 11

Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976) 12, 17, 21

Declaration of Independence 11, 13

Douglas, "The Decline of Stare Decisis," *An Autobiography of the Supreme Court* (New York: MacMillan Co., 1963) 19

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 21, 24

Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 21

Gordon, "Genetical, Social and Medical Aspects of Abortion," *South African Medical Journal* (July, 1968) 9

TABLE OF AUTHORITIES – Continued

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Grisez, Abortion: The Myths, the Realities and the Arguments (New York: Corpus Books, 1970) 15

Gunther, Cases and Materials on Constitutional Law (9th ed. 1975) 21

Hellman & Pritchard, *Williams Obstetrics* (1971) 6

Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980) 23

Linsky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* (1975) 21

Locke, *The Second Treatise of Government* (J. Gough rev. ed. 1976) (3d ed. 1698) 11

Medical World News, October 3, 1977 7

Medical World News, September 14, 1981 7

Mill, *On Liberty* (G. Himmelfarb ed. 1975) 16

Nardone, "The Nexus of Biology and the Abortion Issue," *The Jurist* (Spring, 1973) 9

Nathanson, *Aborting America* (New York: Doubleday, 1979) 6

New England Journal of Medicine, January 23, 1975 7

New England Journal of Medicine, November 22, 1979 7

New England Journal of Medicine, March 6, 1986 ..... 6, 7

Pincus, *The Control of Fertility* (1963) 9

Prosser & Keeton, *Torts* (5th ed. 1984) 24

Providence Journal, January 10, 1988 7

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Reid, Ryan & Benirschke, *Principles and Management of Human Reproduction* (Philadelphia: Saunders Co., 1972) 7

Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973)..... 21

Roberts, *An Introduction to Medical Genetics* (London: Oxford University Press, 1965)..... 8

Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401 (1978)..... 24

Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989)..... 17

Tribe, *The Supreme Court, 1972 Term – Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) 21

Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330 (1985) 23

Woodward, "The Abortion Papers", *Washington Post*, January 22, 1989 10

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INTEREST OF THE CATHOLIC LAWYERS GUILD OF THE ARCHDIOCESE OF BOSTON, INC.

The Catholic Lawyers Guild of the Archdiocese of Boston, Inc. is an organization of over 400 attorneys. Its members ascribe, *inter alia*, to promote the science of ethics, particularly the systematic application of ethical principles to concrete legal issues and to seek to protect the legal and moral rights of all people. Owing to these ideals, the membership feels compelled to address certain issues necessarily underlying this appeal, specifically:

(1) the sanctity of human life, (2) the unalienable character of life, and (3) the supremacy of life over all other rights and privileges, constitutional or otherwise, in American legal heritage. As practitioners who, in part, define their identities as well as derive their livelihood from the system of American jurisprudence, the members of the Guild submit that they have a direct and substantial interest in this Court's resolution of the conflicting values presented by this appeal.[1]

STATEMENT

In 1986, the State of Missouri enacted a statute regulating abortions. Among its provisions, the statute contains a declaration that "[t]he life of each human being begins at conception," and a requirement that all state laws be construed to confer upon unborn children all the rights provided to other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court." Mo. Stat. Ann. §1.205. 1-2.

Five doctors and nurses and two corporations brought a class action suit challenging the constitutionality of the Missouri statute. The district court struck down the provisions, J.S. App. A1-A55, and the court of appeals affirmed. *Id.* at A56-A84.

[1] The written consents of counsel of record have been filed with the clerk of this Court.

The court of appeals concluded that the declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." *Id.* at A64. The court also rejected Missouri's reliance on the express qualification to the declaration which required compatibility with the Constitution and with Supreme Court decisional law. *Id.* at A64-A65. The court of appeals reasoned that a mere recitation of the Supremacy Clause "cannot . . . validate state laws that are in fact incompatible with the constitution."[2] *Id.* at A64. In invalidating this and all other provisions of the Missouri statute the court relied on the right to abortion guaranteed by this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. *Id.* at A61, A73, A79.

SUMMARY OF THE ARGUMENT

The trimester approach provided in *Roe v. Wade*, and relied upon by the court of appeals, does not provide a conceptually accurate or workable framework for analyzing either society's or women's interests regarding abortion. (pp. 5-17). The trimester approach is premised on the existence of determinate and definable "stages" of

[2] Judge Arnold dissented from this portion of the court's decision. J.S. App. A83-A84. Judge Arnold maintained that Missouri's declaration of when life begins should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or bringing fetuses within the protection of criminal law. *Id.* at A83-A84.

fetal life development which have been invalidated by advances in medical technologies. (pp. 5-8). In addition, the concept of trimesters or life "stages" is itself inherently arbitrary, because fetal development progresses in a continuum and because neither medicine, philosophy, nor law otherwise attribute identifiable, distinguishable or qualitative significance to any particular "stages" of fetal development. (pp. 8-10).

The determination that life has variant comparative values at different stages of fetal development, that variant comparative values may be allocated to life according to temporal criteria, and that innocent life may be deliberately terminated at an early stage of temporal development violates principles of Natural Law. (pp. 10-17). In this regard, the authority of Natural Law is supreme (pp. 11-13), the character of life is unalienable (pp. 13-15), and the nature of the privacy interests implicated are necessarily qualified. (pp. 15-17).

The Court has the obligation to reexamine *Roe v. Wade*. (pp. 17-28). Principles of *stare decisis* compel, rather than preclude, the Court from such reexamination. (pp. 17-20). Upon reexamination, the Court should overrule *Roe* and proclaim that fetuses are protected under the Fourteenth Amendment from the moment of conception because: (1) the rationale underlying *Roe* is no longer valid (pp. 20-22), (2) the fetuses' unalienable rights to life are paramount (pp. 22-25), and (3) women's basic liberties in areas other than abortion are properly secured by distinct laws and constitutional principles. (pp. 25-28).

ARGUMENT

I. The Trimester Approach Provided in *Roe v. Wade* Does Not Provide a Conceptually Accurate or Workable Framework for Analyzing Either Society's or Women's Interests Regarding Abortion.

The rationale expressed in *Roe v. Wade, supra,* assumes the existence of, and is necessarily premised upon, determinate and definable "stages" of fetal life development. 410 U.S. at 732. As the discussion *infra* reveals, this rationale is not supported by medical consensus, is intrinsically arbitrary, and is morally, philosophically and legally unsound. Accordingly, this Court should overrule *Roe v. Wade*, reverse the court of appeals in this case, and proclaim that Missouri's declaration that life begins at conception (Mo. Stat. Ann. §1.205. 1-2) is consistent with the Fourteenth Amendment.

A. Medical Technologies Have Evolved Since *Roe* and Have Invalidated the Criteria and Rationale Identified in *Roe* As Supporting the Concept of Finite Trimester "Stages."

As Justice O'Connor predicted in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462' U.S. 416 (1983),

> "[t]he *Roe* framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

Id. at 459 (O'Connor, J., dissenting).

The criteria used by the Court in *Roe* to estimate fetal viability are especially outdated. Dr. Bernard Nathanson, an obstetrician and gynecologist, a former member of the board of the National Abortion Rights League (which he helped found in 1969), and a former director of the largest abortion clinic in the world, has criticized the viability standards in *Roe* as being inaccurate and obsolete. "The concept [of viability] is fluid and is constantly being pushed backward." Nathanson, *Aborting America* (New York: Doubleday, 1979) at 207-208. Developments in medical technology which have advanced the point of viability include

> "sophisticated incubators with efficient oxygenators, humidifiers, temperature controls, cardiac-monitoring systems, artificial respirators, ventilators, methods for determining arterial blood gases, complex new intravenous feeding solutions and equipment for administering them, and an infinite variety of new diagnostic techniques such as ultrasonography and computerized X-ray scanning. . . ."

Id. at 280-281.

Medical studies continuously demonstrate increasingly earlier fetal viability. The *New England Journal of Medicine* has concluded that "[a]dvances in perinatal care have been accompanied by improved survival among infants born in the middle to late second trimester, who were previously considered nonviable." *New Eng. J. of Med.*, March 6, 1986 at 660. The 14th edition of L. Hellman & J. Pritchard, *Williams Obstetrics* (1971) at 493, on which the court relied in *Roe* for its understanding of viability, stated that "[a]ttainment of a [fetal] weight of 1,000 g. [or a fetal age of approximately 28 weeks' gestation] is . . . widely used as the criterion of viability." A three year

study at MacDonald Hospital in Cleveland, Ohio reported in the *New England Journal of Medicine* in 1986, however, concluded that the survival rate among infants weighing 750 to 999 g. was 67 percent (49 of 73) and 26 percent (20 of 77) among those weighing 500 to 749 g. *New Eng. J. of Med.*, March 6, 1986 at 660. Over a decade ago, the Children's Hospital Medical Center in Boston recommended that intensive supportive care be considered on fetuses weighing 600 g. *New Eng. J. of Med.*, January 23, 1975 at 4. A child weighing 440 g. at birth has survived. *Providence Journal*, January 10, 1988 at A-24.

Medical advances have unequivocally established that the criteria underlying the trimester framework in *Roe* have become conceptually incompatible and inconsistent, particularly with regard to fetal viability. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 457-458 n.5 (O'Connor, J., dissenting) (citing four medical treatises). See also *Medical World News*, September 14, 1981 at 30 ("[N]eonatologist Elizabeth R. Brown reported that among babies born in Harvard's joint neonatology program from 1975 to 1978, survival rates were 44% among those weighing 751 to 1,000 g."); *New Eng. J. of Med.*, November 22, 1979 at 1164 ("[I]ncreasing numbers of infants weighing less than 750 g. at birth are now being admitted to the nursery."); *Medical World News*, October 3, 1977 at 15 (At Cedars-Sinai Medical Center in Los Angeles, "of 75 low-birth weight babies who had been admitted to the hospital between 1973 and 1975 [,t]hirty of the infants (40%) survived, including six who had weighed less than 750 g. at birth."); Reid, Ryan & Benirschke, *Principles and Management of Human Reproduction* at 255 (Philadelphia: Saunders Co., 1972) ("Viability,

though, is a changing concept. Medical advances in the treatment of the premature make it possible to anticipate that even these very small abortuses of 20 weeks' gestation may soon have a greater chance of survival. . . .").

B. The Concept of Trimesters or Life "Stages" Expressed in *Roe* Is Itself Inherently Arbitrary.

The "line-drawing" inherent in *Roe's* trimester framework is not premised upon any medical, philosophical or legal principle or theory and is necessarily arbitrary in origin. As Justice White pointed out in *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 792 (1986) (dissenting opinion), "there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being." Medical science does not attribute identifiable, distinguishable or qualitative significance to any particular "stages" of fetal development. To the contrary, as a biological fact, fetal development progresses in a continuum: all cells essential to the fetus' development are present from the earliest stages of pregnancy.

Each person begins life as a single cell. The biological process which began at that moment in our life has continued without interruption to the moment that this sentence is being read. Modern genetics clearly substantiates that a new individual human life begins at fertilization. A human being originates in the union of two gametes, the ovum and the spermatozoon, which contain *all* characteristics and attributes which the new child has inherited genetically from his or her parents. Roberts, *An Introduction to Medical Genetics* (London: Oxford University Press, 1965) at 1. Children and ultimately adults are who they are because of the hereditary combination

which they originally received at the time of their fertilization.

> "[F]rom the moment of fertilization, when the deohyribose nucleic acids from the spermatozoon and the ovum come together to form the zygote, the pattern of the individual's constitutional development is irrevocably determined; his future health, his future intellectual potential, even his future criminal proclivities are all dependent on the sequence of the purine and pyrimidine bases in the original set of DNA molecules of the unicellular individual."

Gordon, "Genetical, Social and Medical Aspects of Abortion," *South African Medical Journal* (July, 1968) at 721-730.

The fertilized ovum represents a full human genetic package of 46 chromosomes, a unique combination of chromosomes which does *not* genetically change as fertilization is followed by cell division, growth, and systematic and orderly differentiation. Nardone, "The Nexus of Biology and the Abortion Issue," *The Jurist* (Spring, 1973) at 153. The assignment of the fertilized ovum to the biological species *homo sapiens* occurs at the moment of fertilization and "is determined not by the stage of development, but by the sum total of its biological characteristics – actual and potential – which are genetically determined." *Id.* at 154.

The *Roe* opinion's reference to the early fetus as merely a "potential life", unfairly characterizes the fetus' chances of surviving until birth. Once spermatozoon and ovum meet and the conceptus is formed, there is an 80 percent chance that, unless deliberately aborted, the being will be delivered as a living child. G. Pincus, *The Control of Fertility*, 197 (1963). All that is required for the fetus to grow is continued nourishment. It is significantly

more likely than not that conception will result in a live birth.

The trimester framework expressed in *Roe* is refuted by modern genetics, which attaches no distinguishable or qualitative significance to particular "stages" of fetal development. The trimester framework in *Roe* does not originate from any innate physiological process or condition, but is founded upon an artificial criterion applied by external forces of social policy and administrative convenience. See Woodward, "The Abortion Papers," *Washington Post*, January 22, 1989 at D-1 (correspondence among Justices acknowledging "arbitrary" character of trimester framework). Viability is not a characteristic of the fetus, but rather a condition external to the fetus. The value of a person should not be dependent upon a condition external to the person.

C. The Determination in *Roe* that Life Has Variant Comparative Values at Different Stages of Fetal Development Violates Ultimate Principles of Morality, Philosophy and Natural Law.

The right to abortion created in *Roe v. Wade* necessarily implicates value judgments about the sanctity and importance of human life itself. The decision of when a fetus is entitled to full protection as a person under the Fourteenth Amendment is ultimately not an exercise in evaluating fetal survivability or assessing the current state of the art in incubator science, as *Roe* implies. The determination of who a fetus is as a being is ultimately a judgment of who *we* are as a people and by what tradition, heritage and values, if any, we define our very identity and essence.

1. Supreme Authority of Natural Law.

Natural Law is as old as Aristotle, and as classical as Cicero. See Aristotle, *Rhetoric*, Book 1, Chapter 13 (1373 b 4) (d. *circa* 323 B.C.); Aristotle, *Nicomachean Ethics*, Book 5, Chapter 7 (1134 b 18); Cicero, *De Re Publica*, III, xxii, 33 fl. 1st century B.C. Since the inception of the United States of America, the Nation has defined its essential identity and ultimate being by reference to Natural Law. The supreme authority of Natural Law was first ordained as a self-evident and timeless tenet in our Declaration of Independence. See *Declaration of Independence*, pars. 1-2. As Justice Jackson wrote in *American Communications Association v. Douds*, 339 U.S. 382, 439 (1949), "[t]he men who led the struggle forcibly to overthrow lawfully constituted British authority found moral support by asserting a natural law under which their revolution was justified, and they broadly proclaimed these beliefs in the document basic to our freedom."

The supreme authority of Natural Law represents a fundamental premise underlying the very existence of the Constitution of the United States. See *Declaration of Independence*, pars. 1-2. See generally J. Locke, *The Second Treatise of Government* (J. Gough rev. ed. 1976) (3d ed. 1698). In quoting ancient treatises in *Geer v. Connecticut*, 161 U.S. 519 (1896), this Court noted that:

> "There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government. . . . (quoting Dig. bk. 41, tit. 1, *De Adquir. Rer. Dom.*).

> "The civil law, it is said, cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; but the civil law can restrict that which the natural law only permits. The greater part of all civil laws are nothing but restrictions on those things which the natural law would otherwise permit."

Id. at 523-524, quoting Pothier, *Traite du Droit de Propriete*, Nos. 27-28.

In noting that there is no calculus for determining which of the first eight Amendments are incorporated into the Fourteenth Amendment, Justice Frankfurter in *Adamson v. People of State of California*, 332 U.S. 46, 65, (1947) (concurring opinion) wrote

> "[i]n the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth."

See *Faretta v. California*, 422 U.S. 806, 831 n.39 (1975), quoting Thomas Paine on a *Bill of Rights*, 1777, reprinted in 1 Schwartz 316 ("[T]he civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation]. . . .") (parenthetical in original). See also Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976) at 31-32 ("Belief in natural rights and natural law were deeply ingrained in the eighteenth-century American mind. . . . The conviction that there were such natural rights made it easy to express them in a Constitution, and then to accept the notion that a duly enacted statute in conflict with natural rights was not a binding law. . . . This early belief in the supremacy of natural law and its

survival into our own time, albeit with different intellectual trappings and under other names, helped to secure acceptance of the legitimacy of judicial supremacy on matters of constitutional interpretation.").

2. Unalienable Right to Life.

As a matter of Natural Law, life is unalienable and necessarily supersedes any rights or privileges conferred by civil authorities. The issue of what is human life and when life can claim the protection of the law is not an inscrutably religious or theological concept or a matter of personal idiosyncratic choice. "Life is the immediate gift of God, a right inherent by nature in every individual. . . ." 1 Blackstone, *Commentaries* 129-130. The Declaration of Independence recognizes as a "self-evident" truth that all persons "are endowed by their Creator with certain unalienable Rights [and] that among these are Life. . . ." *Declaration of Independence*, par. 2.

Even if the disciplines of contemporary medicine, philosophy and theology are unable to arrive at a consensus as to *when* life begins for an individual human, this does not suggest that an ultimate answer or truth to this inquiry does not exist. The Court's admission that it cannot "solve the difficult question of when life begins," *Roe v. Wade*, 410 U.S. at 159, prudentially requires a presumption that personhood begins at conception.

> "Respect for the paramount sanctity of life lies at the center of Western civilization. However narrowly one defines life itself – however uncertain one may be about the correct definition – protecting the penumbra, 'near-life' or 'life becoming' would seem, to promote that central public purpose."

Archibald Cox, quoted in Wauck, *The Decline of Personhood*, 14 Human Life Rev. 54 (1988). Prudential certitude, that quantum of certitude sufficient to act with moral responsibility, is proportionate to the gravity of the matter at hand. Where the matter is serious and there is doubt of fact, there exists a moral obligation to take the safer course. Accordingly, the greatest prudential certitude is required when the lives of persons are at stake.

In light of modern genetics (see discussion *supra* at 8-10) and in the absence of any compelling medical or philosophical basis for attributing any distinguishable or qualitative significance to particular "stages" of fetal development, the process in *Roe* of defining life according to temporal criteria, of allocating variant comparative values to life in accordance with such temporal criteria, and of permitting the termination of innocent life at an early stage of temporal development is baseless, arbitrary, and without moral justification. Every person possesses a fundamental intrinsic worth and value which cannot and should not be diminished by reference to external criteria (e.g. viability, wealth or status) or abilities (e.g., ability to communicate or I.Q.). If the right to life is indeed unalienable, it must be based on the simple fact that a human being is a human being.

> "We may feel safe enough, personally in using the factual inequality and inferiority of the embryo as a ground for treating its life as expendable. After all, we are not now and never again will be unequal and inferior in just the way the embryo is. But in reasoning thus we are being arbitrary, for we are selecting as decisive the characteristics we prefer among all the differences of human beings. . . .

> "To decide that some of these differences, some of these inequalities, some of these ways of being inferior can so detract from the basic worth of a person as to warrant his destruction by another is essentially to decide that all persons have a certain definite and limited worth and that certain facts characterizing persons can lessen that worth in a definite and calculable way. Now, this is precisely the mistake of utilitarianism. It understands human worth not in terms of what is intrinsic to the person and his life – dignity – but in terms of what is extrinsic – value *for something*. Human goods can then be appraised and weighed, and the right to kill will depend upon computation. In effect, utilitarianism puts a price on every man's head. Every person in transformed into an object."

Grisez, *Abortion: the Myths, the Realities, and the Arguments* (New York: Corpus Books, 1970) at 304-305 (emphasis in original).

3. Qualified Nature of Privacy Interest.

Life, being unalienable, necessarily supersedes the right of privacy articulated in *Roe v. Wade*.[3] The right of privacy is derivative of, and dependent upon, Natural Law. See *Griswold v. Connecticut*, 381 U.S. 479, 510 n.1 (1965) (Black, J., dissenting) (" 'A right of privacy in matters purely private is . . . derived from natural law'."), quoting *Pavesick v. New England Life Ins. Co.*, 122 Ga. 190, 194, 50 S.E. 68, 70 (1905).

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[3] "If . . . personhood is established, the appellant's case [the demand for abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Roe v. Wade*, 410 U.S. at 156-157.

The strongest supporters of privacy interests recognize that such rights are qualified in nature and are *not* unalienable. "[T]he 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum. . . ." *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackman J., dissenting), quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). See J.S. Mill, *On Liberty*, at 141 (G. Himmelfarb ed. 1985) ("As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it. . . ."). This Court has recognized, for example, that physical intrusions into one's "bodily integrity" are constitutionally permitted in furtherance of important state interests. See *Schmerber v. California*, 384 U.S. 757 (1966) (upholding compulsory blood-test of an accused); *Jacobsen v. Massachusetts*, 197 U.S. 11, 26 (1905) (upholding compulsory vaccination law and rejecting purported "inherent right of every free man to care for his own body").

Accordingly, a mother's rights with respect to her own body and its uses may have a primacy – but *only* up to that point at which other human rights are involved. In abortion, the qualified right of the mother must necessarily give way to the life interest of the fetus *throughout* the developmental duration of the pregnancy, if the unalienable character of life under Natural Law is to be given any meaning.

> "Harm is arguably done, first of all to society, which is deprived of the person that the fetus would have become, and second to the fetus itself, which may after a point be a sentient being even if not a person. . . . In addition, there is a very important consequence for the father, who may against his will be deprived of having a child. Indeed, if it is the decision whether or not to beget a child that is protected, and if that decision is said to be central to a person's identity, then the father's own 'personhood' would appear to be violated whenever the mother has an abortion against his wishes."

Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 758 n.112 (1989).

II. This Court Has the Obligation to Reexamine *Roe v. Wade*, Overrule It, and Proclaim the Constitutional Rights of Fetuses from the Moment of Conception.

A. Principles Underlying *Stare Decisis* Compel, Rather than Preclude, a Reexamination of *Roe v. Wade* in the Circumstances.

As Justice Powell eloquently noted in *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 710 n.6 (1978) (concurring opinion), "the law has recognized the necessity of change, lest rules simply persist from blind imitation of the past." *Id.* "[H]istory does not impose any rigid formula to constrain the Court in the disposition of cases . . . [and] changes in society or in the law [may] dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). Precedent must be reexamined where "subsequent events have undermined its continuing validity," *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 256 (1970) (Stewart, J., concurring), as where medical studies have undermined the viability criteria underlying *Roe v. Wade*. Precedent should also be reexamined whenever Natural Law rights are implicated, such as the unalienable rights of fetuses in this case. See Cox, *The Role of the Supreme Court in American Government*,

supra at 112 ("Natural law . . . legitimizes change, if indeed it does not impel it; and it legitimizes for the public and perhaps even for the judge himself a measure of constitutional adjudication as an instrument of reform."). See also *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ("[W]e would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem. We believe that considerations of *stare decisis* should not deter us from this course. Unless inexorably commended by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.").

This Court has consistently recognized that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. at 242. See *Patterson v. McLean Credit Union*, ___ U.S. ___, 108 S.Ct. 1419, 1421 (1988); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). As Justice Jackson wrote in *American Communications Association v. Douds*, 339 U.S. 382, 439 n.11 (1949) (concurring in part and dissenting in part), "[u]nquestioning idolatry of the *status quo* has never been an American characteristic." Justice Douglas commented that:

> "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.
>
> This re-examination of precedent in constitutional law is a personal matter for each judge who comes along. . . . [It] is the necessary consequence of our system and to my mind a healthy one. The alternative is to let the Constitution freeze in the pattern which one generation gave it. But the Constitution was designed for the vicissitudes of time. It must never become a code which carries the overtones of one period that may be hostile to another."

William O. Douglas, "The Decline of Stare Decisis," *An Autobiography of the Supreme Court* (New York: MacMillan Co., 1963).

In reexamining *Roe v. Wade*, this Court need not be troubled by the frequency with which that case has been cited or the arguable "reliance interest" built upon it. Compare *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 420 n.1. The frequency with which a case has been cited is surely not justification alone for adherence to *stare decisis* nor does it warrant a refusal to reexamine the prior precedent. See *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. at 705 (Powell, J., concurring) (overruling *Monroe v. Pape*, 365 U.S. 167, despite fact that "[f]ew cases in the history of

the Court have been cited more frequently than *Monroe*. . . .").[4]

B. The Rationale Underlying *Roe v. Wade* Is Not Valid.

This Court should overrule *Roe v. Wade* since the trimester framework first advanced in that opinion is not supported by medical consensus, is intrinsically arbitrary, is morally and philosophically unsound, and violates Natural Law. The Court's rationale in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405-406 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), is particularly apt. Like *Roe*, the Court's earlier decision in *The Harrisburg*:

[4] Since *Roe v. Wade* purports to rest upon constitutional rather than statutory grounds, a reexamination of this ruling is particularly appropriate. It is "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases. . . ." *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273 n.18 (1980), quoting *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-408 (1932) ("The doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible.' "); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. at 260 (Black, J., dissenting) ("In the area of constitutional law, for example, where the only alternative to action by this Court is the laborious process of constitutional amendment and where the ultimate responsibility rests with this Court, I believe reconsideration is always proper."). See also *Welch v. Texas Dept. of Highways and Public Transportation*, 479 U.S. 811, 107 S.Ct. 2941, 2948 (1987); *Vasquez v. Hillery*, 474 U.S. at 267 (Powell, J., dissenting); *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. at 696; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627 (1974) (Powell, J., concurring); *United States v. Barnett*, 376 U.S. 681, 699 (1964).

> "rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and . . . has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason. . . ."

Moragne v. States Marine Lines, Inc., supra at 405-406.

The public and scholarly reactions to *Roe v. Wade* have been tumultuous and highly critical.[5] The rationale underlying *Roe* and the privacy right recognized in the opinion are especially vulnerable for lacking a substantive constitutional origin. See Tribe, *The Supreme Court, 1972 Term – Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on

[5] See, e.g., Cox, *The Role of the Supreme Court in American Government, supra* at 51-55; Linsky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* at 15-21, 99-100 (1975); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Espstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973). See generally G. Gunther, *Cases and Materials on Constitutional Law* 650-656 (9th ed. 1975).

which it rests is nowhere to be found."); Ely *The Wages of Crying Wolf: A Comment on Roe v. Wade, supra* at 932 n.79 ("Even reading the cases [*Roe*] cited 'for all that they are worth,' it is difficult to isolate the 'privacy' factor that unites them with each other and with *Roe*."). As the Court itself acknowledged recently in *Bowers v. Hardwick:*

> "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."

Bowers v. Hardwick, 478 U.S. at 194-195.

C. This Court Should Proclaim that Fetuses Are Protected under the Constitution from the Moment of Conception.

A pronouncement conferring the constitutional protections of the Fourteenth Amendment upon fetuses would be consistent with principles previously recognized by the Court as well as the unalienable tenets of Natural Law. The Fourteenth Amendment applies to those who "are humans, live, and have their being. . . ." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). This Court has previously acknowledged that the States' interests in protecting the "potentiality of life" exist "throughout the course of the woman's pregnancy." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 429; *Beal v. Doe*, 432 U.S. 438, 446 (1977). The States have an "important and legitimate interest in potential life." *Roe v. Wade*,

410 U.S. at 164. See *City of Akron v. Akron Center for Reproductive Health, Inc., supra* at 428-429. The States' interests in "encouraging childbirth except in the most urgent circumstances" are "rationally related to the legitimate governmental objective of protecting potential life." *H.L. v. Matheson*, 450 U.S. 398, 414 (1981); *Harris v. McRae*, 448 U.S. 297, 325 (1980).

The rights afforded to fetuses under Natural Law and in all legal contexts (other than the aberration created by *Roe v. Wade*) warrant and compel a pronouncement that life at *all* temporal stages is of compelling constitutional protection.[6] As medical technology has advanced, civil and criminal law have generally recognized fetuses as persons entitled to the full protections of the law. "The ideological history of prenatal injury law, and the more recent development of prenatal death law has consistently moved toward the affirmation of the unborn as a 'person' in the law. . . ." Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 640 (1980). In tort law, "[w]ith recent advances in embryology and medical technology, medical proof of causation in these cases [of prenatal injury] has become increasingly reliable, which argues for eliminating the viability or

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[6] "[I]t is at least arguable that the fetus could be regarded as a holder of rights under the due process clauses of the fifth and fourteenth amendments, as well as the equal protection clause of the latter. Any such 'right to life' could hardly be deemed alienable. . . . The inalienability of that right suggests that the government bears an affirmative duty to protect the interests of the fetus. . . ." Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330, 340-341 (1985).

other arbitrary developmental requirement altogether." Prosser & Keeton, *Torts*, §55 at 369 (5th ed. 1984). See also Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401, 1425 (1978) ("[T]he current weight of authority is with those courts which do not require live birth as a condition for maintaining a wrongful death action. . . ."). Similarly, "the criminal law and the laws pertaining to descent and distribution of property have acknowledged the separate existence of the unborn child from the moment of conception and the corresponding duty owed either to the state [criminal law] or to the child [property] for its protection from an early age.") *Id.* at 1404 n.21 (parentheticals in original).

A pronouncement conferring the protections of the Fourteenth Amendment upon fetuses is especially warranted and appropriate in light of this Court's tradition of affording special protection upon insular minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *supra* at 933-935 ("Compared with men, very few women sit in our legislatures. . . . But *no* fetuses sit in our legislatures. . . . [T]he Court should throw its weight on the side of a minority demanding in court more than it was able to achieve politically. But even assuming this suggestion can be given principled content, it was clearly intended and should be reserved for those interests which, *as compared with the interests to which they have been subordinated*, constitute minorities unusually incapable of protecting themselves. Compared with men, women may

constitute such a 'minority'; compared with the unborn, they do not.") (emphasis in original).

D. The Liberty Interests of the Mother as Promulgated in *Roe v. Wade* Do Not Warrant the Taking of Innocent Fetal Life.

Even under the reasoning of *Roe*, a mother's right to abortion was never perceived to be unqualified or absolute in character. *Roe v. Wade*, 410 U.S. at 154-155. See *Maher v. Roe*, 432 U.S. 464, 474 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion' "); *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.").

Upon reexamination of *Roe*, this Court should rule that the mother's qualified right to privacy not only "must be considered against important state interests in abortion," *Roe v. Wade*, 410 U.S. at 154; *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 428, but also must be weighed against the unalienable rights of the fetus to life.

This Court should not be troubled that the reversal of *Roe* would produce widespread ramifications on women's constitutional liberties generally. The purported maternal privacy right articulated in *Roe* was not specifically identified in the Constitution, see *City of Akron v. Akron Center for Reproductive Health, Inc.*, *supra* at 427, ("[The Constitution does not specifically identify this right [of privacy] . . . "), nor did the purported maternal privacy right fall within the contours of "fundamental"

liberties traditionally characterized by the Court. See *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 538 (1977) (Stewart, J., dissenting) ("implicit in the concept of ordered liberty."); *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). See also *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 789-791, (White, J., dissenting). Since the origin of the "*Roe* right" is itself unique and is not shared with the fundamental liberties of women, a reversal of that right would not jeopardize conceptually the fundamental constitutional liberties which protect women.

The basic liberties of women should not be considered dependent philosophically upon *Roe v. Wade*, since the purported right in *Roe* necessarily implicates the diametrically countervailing, irreconcilable, and unalienable natural right of life. No individual right is truly "fundamental" or worth preserving if it is inherently based upon the destruction of another person's life. "If . . . personhood is established, the appellant's case [the woman's demand for abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Roe v. Wade*, 410 U.S. at 157-158.

Under the law, the basic liberties of women are plainly not dependent upon *Roe v. Wade*. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), prohibits discrimination in any employment practice on the basis of sex. The Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), prohibits discrimination by covered employees on the basis of sex. The Equal Credit Opportunity Act prohibits discrimination "with respect to any aspect of a credit transaction on the basis of . . . sex." 15 U.S.C. §1691(a)(1).

Title IX of the Education Amendment Act of 1972 prohibits "discrimination under any education program or activity . . . on the basis of sex. . . ." 20 U.S.C. §1681(a). In addition, this court has decisively invalidated gender-based classifications. *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973). See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (state's compelling interest in eradicating gender-based discrimination superseded First Amendment associational freedoms of national civic membership organization); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (employer's policy of denying employees returning from pregnancy leave their accumulated seniority acts both to deprive them "of employment opportunities" and "to adversely affect [their] status as an employee" because of their sex in violation of §703(a)(2) of Title VII); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender-based distinction in eligibility for 42 U.S.C. §402(f)(1)(D) Social Security survivors' benefits violated Due Process Clause of Fifth Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (gender-based differential for age at which persons were permitted to procure alcohol constituted invidious discrimination in violation of Equal Protection Clause); *Stanton v. Stanton*, 421 U.S. 7 (1975) (support payments statute which identified 21 years as majority age for males and 18 as majority age for females violated Equal Protection Clause of Fourteenth Amendment); *Turner v. Dept. of Employment Security and Board of Review of Industrial Commission of Utah*, 423 U.S. 44 (1975) (unemployment compensation statute's conclusive presumption of incapacitation of pregnant woman for specified period violated due process); *Weinberger v. Wiesenfeld*, 420 U.S.

636 (1975) (gender-based distinction in survivors' benefits mandated by 42 U.S.C. §402(g) of Social Security Act violated Due Process Clause of Fifth Amendment); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women may not be systematically excluded or automatically exempted from jury service based solely on sex); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (mandatory termination provisions in maternity leave policy violates Due Process Clause of Fourteenth Amendment); *Reed v. Reed*, 404 U.S. 71 (1971) (provision in probate code which gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of decedent's estate violated Equal Protection Clause of Fourteenth Amendment).

CONCLUSION

This case profoundly challenges the Court to review Natural Law and, in a very real sense, to define our Nation's legal heritage, essence, and foundation. In *Bowers v. Hardwick*, it was said that "the most comprehensive of rights and the right most valued by civilized men" is "the right to be let alone." See *Bowers v. Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting), quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). While the right to privacy is no doubt important, the *amicus* Catholic Lawyers Guild calls upon the Court to assess whether our Constitution stands for any higher or more fundamental ideal than merely the "right to be let alone." See *id*. The *amicus* Catholic Lawyers Guild submits that the unalienable right to life is such an ideal, that the right to life intrinsically supersedes any

and all rights or privileges conferred by civil authorities, and that any and all doubts regarding the potentiality or definition of life must be properly resolved in favor of assuming the existence of human life from the moment of conception.

Accordingly, this Court should overrule *Roe v. Wade*, reverse the court of appeals in this case, and proclaim that all humans are entitled to the full protections of the Fourteenth Amendment from the moment of conception.

Respectfully submitted,

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APPENDIX

Fourteenth Amendment

"All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Doe v. Scott, 310 F. Supp. 688 (N.D. Ill. 1970) 6
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Harris v. McRae, 448 U.S. 297 (1980) 21
In re Baby M., 109 N.J. 396, 537 A.2d 1227 (1988) 24
Jacobson v. Massachusetts, 197 U.S. 11 (1905) 7, 8, 12, 13
Loving v. Virginia, 388 U.S. 1 (1967) 9
Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884) 5, 16
Meyer v. Nebraska, 262 U.S. 390 (1923) 2, 9, 10
Mitchell v. Maurer, 293 U.S. 237 (1934) 4
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 9
Palko v. Connecticut, 302 U.S. 319 (1937) 8, 9, 11
Parham v. J.R., 442 U.S. 584 (1979) 12
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 12
Poe v. Ullman, 367 U.S. 497 (1961) 9, 12
Prince v. Massachusetts, 321 U.S. 158 (1944) 10
Reproductive Health Services v. Webster, 655 F. Supp. 1300 (W.D. Mo. 1987) 4
Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988), *prob. juris noted*, 109 S.Ct. 780 (1989) 4, 5
Roe v. Wade, 410 U.S. 113 (1973) .....*passim*
Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) 8
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) .....*passim*

TABLE OF AUTHORITIES—Continued

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West Virginia State Board v. Barnette, 319 U.S. 624 (1943) 9

STATUTES:

28 U.S.C. § 1331 (1982) 4, 5, 6
28 U.S.C. § 1343 (1982) 4, 5, 6
42 U.S.C. § 1983 (1982) 4
42 U.S.C. § 300z(a) (6) (B) (1982) 23

BOOKS & STUDIES:

Abortion in the United States (D. Calderone ed. 1958) 15
B. Nathanson, *Aborting America* (1979) 15
B. K. Rothman, *The Tentative Pregnancy* (1986) .. 27
Bachrach, "Adoption As A Means of Family Formation: Data From the National Survey of Family Growth," 45 *J. Marr. & Fam.* 859 (1983) 24
Berger, "Abortion in America: The Effects of Restrictive Funding," 298 *New Eng. J. Med.* 1474-77 (June 29, 1978) 17
Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortions," 1 *International Journal of Psychoanalytic Psychotherapy* 79-96 (1972) 23
Callahan, "How Technology is Reframing the Abortion Debate," 16 *Hastings Center Report* 33-42 (1986) 19
Cates, U.S. Centers for Disease Control, Statement submitted to the U.S. Senate Judiciary Subcommittee on the Constitution, 2 *Constitutional Amendments Relating to Abortion* 439 (U.S. GPO Serial No. J-97-62) (1983) 17
Congressional Quarterly, *Independent Adoptions*, 2 Editorial Research Reports 647 (Dec. 11, 1987) 24
Del. Campo. "Abortion Denied—Outcome of Mothers and Babies," 130 *Journal of the Canadian Medical Association* 361 (1984) 26
E. Lenoski, *The Plight of the Children* (1981) 22

TABLE OF AUTHORITIES—Continued

Page

Gold and Cates, "Restriction of Federal Funds for Abortion: 18 Months Later," 69 *Am. J. of Public Health* 929 (Sept. 1979) 18

Grand and Murray, "Facts Don't Back Link of Abortion Death in Texas to Fund Cutoff," *Ob. Gyn. News* 1, 26 (Dec. 1, 1977) 18

Harlap, Shiono, Ramcharan, Berendes, and Pellegrin, "A Prospective Study of Spontaneous Fetal Losses After Induced Abortion," 301 *New Eng. J. Med.* 677 (1979) 20

Harrison, *et al.* "Fetal Treatment 1982," 307 *New Eng. J. Med.* 1651-52 (1982) 19

Hilgers and O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis,* New Perspectives On Human Abortion 69-91 ..... 16, 18

J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977) 14

J. Leggo, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* (1985) 16, 17

J. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979) 10, 11

J. Noonan, *The Experience of Pain by the Unborn,* New Perspectives On Human Abortion 205-16.. 14

Jancin, "Prenatal Gender Selection Appears to be Gaining Acceptance," 23 *Ob. Gyn. News* 1, 30-31 (March 1-14, 1988) 27

K. Luker, *Taking Chances: Abortion and the Decision Not to Contracept* (1975) 15

Kumar and Robson, "Previous Induced Abortion and Antenatal Depression in Primiparae," 8 *Psychological Medicine* 711-14 (1978) 23

Levin, Schoenbaum, Monson, Stubblefield, and Ryan, "Association of Induced Abortion with Subsequent Pregnancy Loss," 243 *Journal of the American Medical Association* 2495-99 (1980).... 20

Liebman and Zimmer, *The Psychological Sequelae Of Abortion: Fact And Fallacy,* The Psychological Aspects of Abortion 127-38 27

TABLE OF AUTHORITIES—Continued

Page

National Committee for Adoption, *Adoption Factbook: United States Data, Issues, Regulations and Resources* 18 (Nov. 1985) 23

New Perspectives on Human Abortion (Hilgers, Horan, Mall, eds. 1981) .....*passim*

Ney, *Infant Abortion and Child Abuse: Cause and Effects,* The Psychological Aspects Of Abortion 25-38 23

Pettiti and Cates, "Restricting Medicaid Funds for Abortions: projections of excess mortality for women of childbearing age," 67 *Am. J. of Public Health* 860-62 (1977) 17

Pohlman, "Unwanted Conceptions: Research on Undesirable Consequences," 14 *Eugenics Quarterly* 143 (1967) 22

R. Helfer, *Child Abuse and Neglect: The Diagnostic Process and Treatment Programs* 28 (1977) (DHEW Pub. No. 77-30069) 22

Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association, *Adolescent Abortion: Psychological and Legal Issues* 84 (1986) 27

Rue, "Abortion in Relationship Context," *International Review of Natural Family Planning* 95-121 (Summer 1985) 27

S. Jordan, *Decision Making for Incompetent Persons* (1985) 10, 11

Sim, *Abortion and Psychiatry,* New Perspectives On Human Abortion 151-63 25

Syska, Hilgers, O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy,* New Perspectives on Human Abortion 164-81 ..... 15, 16

The Psychological Aspects of Abortion (Mall and Watts eds. 1979) .....*passim*

Tietze and Henshaw, *Induced Abortion: A World Review 1986* 132 (Alan Guttmacher Institute 1986) 16, 17, 18

TABLE OF AUTHORITIES—Continued

	Page
Tietze, *Induced Abortion as a Method of Fertility Control,* Fertility And Family Planning: A World View 311 (S.J. Berman, *et al.* eds. 1969)	15
Torres and Forrest, "Why do Women Have Abortions?" 20 *Family Planning Perspectives* 169-76 (1988)	18, 19
Trussel, *et al.*, "The Impact of Restricting Medicaid Financing for Abortion," 12 *Family Planning Perspectives* 120-30 (May/June 1980)	18
U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* Nos. 87, 101, 276 (108th ed. 1987)	21
U.S. Centers for Disease Control, 35 *CDC Surveillance Summaries* 955 (1986)	17
U.S. Centers for Disease Control, 29 *Morbidity and Mortality Weekly Reports* 254 (June 6, 1980)	18
U.S. Centers for Disease Control, *Abortion Surveillance 1979-80* 6 (May 1983)	20
U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices* (U.S. GPO Serial No. OTA-BA-358) (1988)	24
V. Fontana, *Somewhere a Child is Crying: Maltreatment-Causes and Prevention* (3rd ed. 1983)	22
Williams Obstetrics (J. Pritchard & P. MacDonald, 16th ed. 1980)	19
World Health Organization, *Special Programme of Research, Development and Research Training in Human Reproduction: Seventh Annual Report* (Geneva, Nov. 1978)	20
MISCELLANEOUS:	
"Abortion in the U.S. 1978-79," 13 *Family Planning Perspectives,* 6-18 (Jan.-Feb. 1981)	20
Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 *Val. U. L. Rev.* 563 (1987)	19
Kolata, *Fetal Sex Test Used as Step to Abortion,* N.Y. Times, Dec. 25, 1988	27

TABLE OF AUTHORITIES—Continued

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Letter from C. Everett Koop, M.D., Sc.D., Surgeon General, U.S.P.H.S., to Ronald Reagan, The President of the United States (Jan. 9, 1989)	25, 26
National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* (Nov. 14, 1985)	28
"No Excess Deaths Follow Medicaid Cutoff of Abortion," *Ob. Gyn. News* (April 1, 1979) (statement of Dr. Willard Cates)	18
"Repeated Abortions Increase Risk of Miscarriage, Premature Births and Low-Birth-Weight Babies," 11 *Family Planning Perspectives* 39-40 (1979)	20
Ryan, "Humane Abortion Laws and the Health Needs of Society," 17 *Case W. Res. L. Rev.* 424-34 (1965)	18
"Social Support Programs Held Key to Reducing Infant Mortality," *Ob. Gyn. News* 1, 18 (Mar. 15-31, 1988)	19
Wardle, "Rethinking Roe v. Wade," 1985 *B.Y.U. L. Rev.* 231	14, 22
"Washington Focuses on its High Perinatal Mortality," *Ob. Gyn. News* 6 (Nov. 15-30, 1982)	20
Will, "Splitting Differences," *Newsweek* 86 (February 13, 1989)	14
Wilson and Hitchings, "Adoption: It's Not Impossible," 112 *Business Week* (July 8, 1985)	24

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---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS*

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a nonprofit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. Of the values that the Conference seeks to promote through its participation

in litigation, respect for human life is of the highest importance.

In this case the Court has accepted a unique challenge —whether to continue the wholesale invalidation of regulatory efforts directed at abortion, or to begin a process of reasoned reconsideration of its jurisprudence in this controversial area. Because the exercise of that "right" imperils vital and fundamental interests of many, not merely the concerns of women and their physicians, this Court should review its basic approach to abortion cases. The Conference is concerned that affirmance of the judgment below will further confuse the legal landscape and derogate other fundamental rights, most especially those of countless unborn children. Because the federal right created in *Roe v. Wade*, 410 U.S. 113 (1973), underlies jurisdiction in this case, this Court may begin the process of reconsideration without further delay.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In 1973, this Court held that its privacy jurisprudence "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. It did so, however, recognizing that this kind of decision involved more than the decisions given constitutional protection in its earlier privacy cases from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Roe v. Wade*, 410 U.S. at 159. In abortion there is involved the termination of a life and the infringement of other persons' and the state's interests. For this reason, the Court held open the possibility that these interests could not only be balanced against, but even subrogate, the now protected choice of abortion. In sixteen years of constitutional experience, that prospect has never meaningfully materialized.

In his concurring opinion in *Roe v. Wade* and *Doe v. Bolton*, Justice Douglas discussed the nature of "liberty" as including "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*" 410 U.S. at 211 (1973) (emphasis in original). This right, the Justice said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were denominated autonomous, and no other Justice spoke of autonomy in relation to personal liberty or privacy in those first abortion cases. 410 U.S. 113-223. Yet by the time the Court reached its decision in *Thornburgh v. American College of Obstetricians and Gynecologists*, this Court had come to employ the concept of autonomy in direct relation to a woman's decision to abort her child. 476 U.S. 747, 772 (1986). By so doing, the Court has truly caused the pregnant woman to be "isolated in her privacy" from all other legitimate interests of society, of her community, of her family, and of her unborn child—a result that *Roe v. Wade* disavowed. 410 U.S. at 159.

The problem lies not in *Thornburgh*, but in *Roe v. Wade*. To explain its extension of the constitutional right of privacy to abortion, the Court had to engage in speculation as to how certain perceived medical, social, or psychological "detriments" to a pregnant woman might be alleviated by abortion. *Id.* at 153. This nation's experience shows that those predictions were unfounded. Widespread abortion has not solved problems; illegal abortion, maternal and infant mortality, family instability, teenage pregnancy, and similar difficulties continue unabated. In addition, abortion has created its own list of unexpected and undesirable detriments to our society.

The only rational solution for this Court is not to entrench its decisional law further, but to reconsider its rationale for including abortion within the right of privacy. This the Court can and should do because sub-

ject matter jurisdiction over this case is dependent upon abortion remaining a constitutional right. In order for the Court to examine its own jurisdiction, as it is bound to do in this and every case,[1] *Roe v. Wade* must be reconsidered.

ARGUMENT

I. BEFORE ADDRESSING THE MERITS OF THIS CASE, THE COURT SHOULD RECONSIDER ITS DECISION IN *ROE v. WADE*.

Since January 9, 1989, when this Court noted probable jurisdiction in this case, there has been rampant speculation across this nation as to whether *Roe v. Wade* would, could or should be reconsidered. For the most part, however, the prognosticators have ignored the fundamental fact that subject matter jurisdiction is always open to review, and that jurisdiction over this case depends on the Court's decision in *Roe v. Wade*.

Without discussion, the district court below concluded that it had jurisdiction over this case "under 42 U.S.C. § 1983 (1982) and 28 U.S.C. § 1331 and § 1343(3) (1982)." *Reproductive Health Services v. Webster*, 655 F. Supp. 1300, 1303 (W.D. Mo. 1987). The court of appeals opinion, on review here, does not even mention jurisdiction. *Reproductive Health Services v. Webster*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989) (No. 88-605). Yet this Court has stated that:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (citation omitted)). Every federal court is therefore obliged to examine its subject matter jurisdiction, whether the issue is raised by a party, a witness, an intervenor, an *amicus curiae*, or by the court itself. The question of jurisdiction is so "fundamental" that "the Court is bound to ask and answer [it] for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

The abortion cases filed in federal courts since the Court's decision in *Roe v. Wade* have principally relied, as this case does, on 28 U.S.C. §§ 1331 and 1343 for federal jurisdiction. Those statutory provisions require, of course, a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1343(3) and 1331. Because of this Court's pivotal holding in *Roe v. Wade* that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," federal courts apparently assume that the jurisdictional requirement of a constitutional deprivation or claim is always extant where abortion is involved.[2] In fact, many parties do not even raise the issue, concentrating instead on other jurisdictional issues such as plaintiffs' standing, as the parties in this case did below. *Webster*, 851 F.2d at 1075; *see, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at 754-55.

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[1] *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986).

[2] This is not an unreasonable assumption since, under *Roe v. Wade*, plaintiffs can generally allege a substantial constitutional claim. *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). Nevertheless, the issue remains open to review at each level of the federal judiciary. *Bender*, 475 U.S. at 541.

Yet prior to *Roe v. Wade*'s elevation of abortion to a constitutional position, federal jurisdiction over abortion cases was not at all clear; lower courts cited one another for assurance that they ought even to entertain these complaints. *See, e.g., Doe v. Bolton*, 319 F. Supp. 1048, 1052 (N.D. Ga. 1970) and *Doe v. Scott*, 310 F. Supp. 688, 689 (N.D. Ill. 1970). This Court has itself assumed jurisdiction in several abortion cases, beginning with *Doe v Bolton*, 410 U.S. 179 (1973), without ever mentioning that subject matter jurisdiction is wholly dependent on the continued efficacy of *Roe v. Wade*'s central holding.[3] Such silence by this Court, however, is decidedly not a binding jurisdictional decision. As this Court noted in another action brought under 28 U.S.C. § 1343:

> Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. We therefore approach the question of the District Court's jurisdiction to entertain this suit as an open one calling for a canvass of the relevant jurisdictional considerations.

Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) (citations omitted). Similarly, this Court is now faced with a consideration of federal jurisdiction under 28 U.S.C. §§ 1331 and 1343; indeed, the obligation to address the issue "is inflexible and without exception," applying "in all cases" and "[o]n every writ of error or appeal." *Bender*, 475 U.S. at 547 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. at 382). In proceeding then to "canvass all relevant jurisdictional considerations," the Court must begin with studied consideration of its decision in *Roe v. Wade*. For it is that decision upon which federal jurisdiction rests.

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[3] In both *Thornburgh v. American College*, 476 U.S. at 759 and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983), this Court reaffirmed *Roe v. Wade* without commenting upon the jurisdictional ramification of that holding.

II. THE COURT'S APPLICATION OF PRIVACY PRINCIPLES TO ABORTION IN *ROE v. WADE* WAS FUNDAMENTALLY FLAWED.

One of the more enduring and intractable debates throughout the constitutional history of the United States has been how best to protect individual personal liberties against the arbitrary exercise of governmental power. Certainly for the last century or more in constitutional adjudication, deeply personal actions, interests, and choices, some not particularly threatening to public order, have been subjects of state regulation. This Court has struggled to demarcate those personal actions deserving of constitutional protection, on the one hand, from the interest of the government, the competing interests of other persons, and the common good, on the other. Some interests have had to be subrogated to other values, or the common good, in order for our basic institutions to thrive or even survive. Others have been protected under a body of case law developed on a theme of personal liberty and privacy. It has been a continuing search for fundamental constitutional values.

Historically, it was always understood that liberty to engage in certain personal actions was not license. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), Justice Harlan explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Although the ability to make certain choices was often given constitutional foundation, such as in the due proc-

ess clause of the fourteenth amendment, the Court has always required that some balance be struck between legitimate competing interests, rationally related to the choice. *E.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).[4] In the early cases the Court struggled without a script, but still decided that protection of basic constitutional values must be the dominant adjudicative principle.[5]

The early debate on what became the privacy doctrine in this century occurred during the process of incorporation of "federal" rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court articulated the necessary standard to sort those rights "incorporated" from those "unincorporated." The "incorporated" rights were not necessarily enumerated in the Constitution but were those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 326.[6] Only those liberties

[4] In *Allgeyer*, the Court found that there was certainly a basic right to engage in business contracts as an element of personal liberty that deserved to be protected. But for purposes of this discussion, it should be noted that the Court did "not intend to hold that in no such case can the State exercise its police power." Indeed the Court found that this fundamental right "may be regulated, and sometimes prohibited, when the contract for business conflicts with the policy of the State as contained in its statutes . . . ." *Allgeyer*, 165 U.S. at 582.

[5] Throughout its cases the Court has engaged in an effort to apply faithfully those values. Justice Harlan in *Jacobson v. Massachusetts*, 197 U.S. at 22, cites approvingly Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) for the idea that the spirit of the Constitution "is to be collected chiefly from its words."

[6] The *Palko* Court employed "freedom of thought" as its primary example: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." 302 U.S. at 327. In his concurring opinion in *Roe v. Wade*, Justice Douglas states that such internal matters as thought or belief are integral to one's autonomy and not subject to *any* infringe-

"found to be implicit in the concept of ordered liberty" were incorporated. *Id.* at 325. In his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), Justice Harlan recited that the search for these fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges." Thus, he found that personal liberty was somewhat of a "continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Id.* at 543. In that language, endorsed by the Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 501-502 (1977) (plurality opinion), Justice Harlan acknowledged that protection of personal liberty often required a balance of different interests. By preserving liberty against only "substantial arbitrary" and "purposeless" restrictions, the Court invited consideration of countervailing interests.

When an individual exercises a private choice, which is personal as to him or her and does not affect the interests of others, the equation is only the individual versus the State. In many instances, individuals have made such choices, opposed to those of the State, whether they were over religious preferences,[7] the education of children,[8] the person to marry,[9] or similar interests. It makes sense that the State should have a strict standard of proof to engage in restriction of such choices where there are no third-party interests at stake. This is especially true when the exercise of individual choice falls within the context of a protected relationship, like a

ment by the State. 410 U.S. at 211. Other interests, like an interest in one's life, health, or well-being, are subject to appropriate regulation. *Id.* at 211-14.

[7] *West Virginia State Board v. Barnette*, 319 U.S. 624 (1943).

[8] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[9] *Loving v. Virginia*, 388 U.S. 1 (1967).

marriage or family.[10] Yet even in these relationships the State has regulatory authority, severely circumscribed, but sufficient to insure individual choices be worked out in a balance respectful of all members of the protected relationship.[11]

When one considers abortion decisions, however, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

In perhaps its most candid observation about the nature of the "right" being established in *Roe v. Wade*, the majority specifically recognized that the decision-making process they were about to protect was, in its basic character, different from the character of the decisions protected in the line of cases from *Meyer* to *Griswold* (*see* notes 8-10). *Roe v. Wade*, 410 U.S. at 159. However, even while stating that a woman could not be "isolated in her privacy," the Court nonetheless framed the discussion in language that would enable subsequent majorities to link *Roe v. Wade* to the same line of cases

[10] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[11] *Prince*, 321 U.S. at 166-67.

which it admittedly distinguished in that original opinion. *E.g., Thornburgh v. American College*, 476 U.S. at 722. By describing abortion as a confrontation only between a State and a woman, the Court has precluded full and fair consideration of the true nature and other impacts of the decision. S. Jordan, *Decision Making, supra*, at 20. Rather than carefully balance the way in which the various and plainly fundamental interests in life, procreation, marriage, family, or indeed the common good, might be affected by the abortion decision, the majority has treated these admittedly different interests as somehow subrogated to a state's interest, which it has already arbitrarily diminished beyond recognition. J. Noonan, *A Private Choice, supra*, at 90-95.

Over the last sixteen years, a majority of this Court has characterized itself as protecting a "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772 (citing without discussion the string of decisions noted above). The Court originally offered a number of rationales, legal, medical and social, for so doing. Although these rationales when first offered in 1973 were debatable, on further consideration and through actual experience, they have been largely unrealized. In actuality, although it claims to the contrary, the Court *has* isolated the pregnant woman in her privacy from all other interests. To be true to its constitutional roots and history, this Court should courageously label excess for what it is and promise to begin a thoughtful reconsideration of abortion jurisprudence.

In this kind of critical self-evaluation, it must be remembered that the privacy doctrine was intended to protect only certain kinds of choices, those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. at 325. Its fidelity was to be measured by the "tradi-

tion of the country, not judges." *Poe v. Ullman*, 367 U.S. at 542. Limitations on choice were to be invalid only when they were "purposeless" or "substantial[ly] arbitrary." *Id.* As the majorities in the abortion case have erected a series of "substantial arbitrary impositions and purposeless restraints" on virtually every competing interest, the Court has separated legitimate privacy doctrine from its roots.[12] In stretching the privacy doctrine until it was broad enough to cover abortion, the Court introduced a flaw into its jurisprudence that has become a threat to the very constitutional values and legitimate societal interests the doctrine was meant to protect.

This Court should now rationally evaluate the abortion decision within its true decisional matrix.[13] If the Court seriously seeks support for abortion decisions in the historical line of privacy cases, it must reflect accurately that one person's "liberty" is not "license" to control even one's own body where another's interest could suffer or the common good be diminished. *Jacobson*

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[12] For example, it is widely recognized that parents have a general right to protect their children from potential adverse consequences of medical decisions. *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Yet, in the abortion area, parents do not have the ability to exercise the same fundamental freedom. Thus has Justice O'Connor observed that, in the area of abortion, different rules come into play and nothing is safe from "ad hoc nullification" at the hands of a majority. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). Even traditional principles of informed consent have been abrogated in the abortion context. *See id.* at 798-804 (White, J., dissenting).

[13] This *amicus* would note Justice O'Connor's efforts to rectify the standard by which these various concerns are reviewed. *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting). A rational balancing of legitimate interests throughout pregnancy is precisely the kind of calculus originally intended in privacy doctrine. *See id.* at 828.

v. Massachusetts, 197 U.S. at 26-27. And it must reexamine the rationales first proffered for bringing abortion under the Constitution.

III. A REASONED RECONSIDERATION OF *ROE v. WADE* IN LIGHT OF CURRENT KNOWLEDGE IS NECESSARY.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Roe v. Wade, 410 U.S. at 153. These "detriments" are the precise underpinnings for the announced holding that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* When this Court thus speculated on the potential problems caused by denying women the discretion to abort their unborn children, however, it necessarily did so without any knowledge of how abortion might or might not alleviate the enumerated problems.

Today our country has sixteen years' experience with the effects of abortion's ever-increasing availability. The experience has been a painful one, but the knowledge gained must now be considered. This Court should do what it suggested in *Doe v. Bolton*: "readjust its views and emphases in light of the advanced knowledge and

techniques of the day." [14] 410 U.S. at 191. When considered, two things become increasingly apparent—abortion has not eliminated the problems it was supposed to solve and it has created additional problems unanticipated by the Court in *Roe v. Wade*.

A. The Problems Associated with Illegal Abortion Are Not Solved by Constitutional Abortion.

Abortion advocates argue strenuously that reconsideration of *Roe v. Wade* might lead to a narrowing of the choice of abortion that would cause "misery and deaths of thousands of women from illegal operations and reverse startling improvements which the legalization of abortion has made in both maternal and infant mortality and morbidity." [15] The assertion proceeds from a false premise. Even before *Roe v. Wade*, abortion was legal under certain circumstances throughout the United States. 410 U.S. at 118, 182. In fact, prior to 1973, the circumstances permitting abortion were expanding.[16] Therefore, even if this Court were to remove abortion from constitutional protection, it would not result in instantaneous illegality. The only abortion policy dependent upon constitutional protection for its survival is abortion-on-demand—something few states are likely to

[14] There are other holdings, findings, and statements in the opinion that also should be reconsidered, including the discussion of Roman Catholic tradition and the decision that an unborn child is not a person. 410 U.S. at 134, 158, 162; J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977); J. Noonan, *The Experience of Pain by the Unborn*, in New Perspectives on Human Abortion 205-16 (Hilgers, Horan, Mall, eds. 1981) (hereinafter "New Perspectives"); *see* Wardle, "Rethinking Roe v. Wade," 1985 *B.Y.U.L. Rev.* 231.

[15] *See* Appellees' Motion to Affirm at 17.

[16] Compare the Texas statute struck down in *Roe v. Wade* with the more "modern" Georgia statute in *Doe v. Bolton*. 410 U.S. at 117, 183. *See also* Will, "Splitting Differences," *Newsweek* 86 (February 13, 1989). To observe this trend is not to endorse it.

enact, and this Court insists it has not endorsed. *Thornburgh*, 476 U.S. at 772 ("within the limits specified in *Roe*"); *but see* 476 U.S. at 383-84 ("We have apparently already passed the point at which abortion is available merely on demand.") (Burger, C.J., dissenting).

However close to abortion-on-demand this country is, abortion has not reduced maternal deaths, or eliminated illegal abortions. The "problems" that *Roe v. Wade* was intended to solve continue; they are related to abortion itself, whether "legal" or not. In addition, new problems have been created, while reasonable legislative efforts, such as the Missouri statute on review here, are themselves deemed "illegal."

1. *Illegal Abortion.*

Prior to *Roe v. Wade*, abortion advocates inflated the estimates of illegal abortions and maternal deaths in order to influence judges and legislators.[17] Researchers have more recently determined that legal abortion does not replace illegal abortion; rather, total abortions have increased six- to eleven-fold.[18] Even the small effect that legal abortion does have on the incidence of illegal abortion decreases as the total number of abortions rises. Syska, Hilgers, O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public*

[17] Estimates of illegal abortions prior to *Roe v. Wade* are notoriously unreliable. *Abortion in the United States* 180 (D. Calderone ed. 1958); Tietze, *Induced Abortion as a Method of Fertility Control*, in Fertility And Family Planning: A World View 311 (S.J. Berman, *et al.* eds. 1969). Widely used figures on maternal deaths were later admitted to be "totally false." B. Nathanson, *Aborting America* 193 (1979).

[18] Earlier estimates that legal abortions simply replace illegal ones assumed that unintended pregnancies remain constant despite easier access to abortions—an assumption now proven false. *See* K. Luker, *Taking Chances: Abortion and the Decision not to Contracept* (1975).

Policy, in New Perspectives, *supra* note 14, at 164-81. These findings not only undercut the argument that to restrict the availability or scope of legal abortion would increase illegal abortion, but also the argument that even more abortions are the solution to continued illegal abortions. The researchers conclude: "What was previously thought to be a single solution to criminal abortion [legalization], is *clearly a nonsolution.*" *Id.* at 180 (emphasis supplied).

2. *Maternal Deaths.*

Not only do deaths from illegal abortions continue to occur,[19] but constitutional abortion has added its own casualties to the maternal mortality statistics—in some cases simply bringing "back-alley" practitioners to the clinics. Indeed exhaustive study has shown that maternal deaths resulting from legal abortions are replacing those due to illegal abortions. Hilgers and O'Hare, *Abortion Related Maternal Mortality*, *supra* note 19, at 90. The trend toward a decrease in maternal deaths due to abortion began before *Roe v. Wade* and is attributable to improvements in health care and obstetrical medicine, not constitutional litigation. J. Legge, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* 154-55 (1985).[20] Recent evidence suggests "in

[19] Hilgers and O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in New Perspectives 69-91. Supporters of abortion now admit that "a substantial proportion of illegal abortions in the 1960s were performed by physicians, including some highly experienced practitioners, while in the late 1970s, most illegal abortions were self-induced or performed by medically unqualified practioners. It is entirely possible that the death-to-case ratio following illegal abortion in the United States is now higher, not lower than it was 15-20 years ago." Tietze and Henshaw, *Induced Abortion: A World Review 1986* 132 (Alan Guttmacher Institute 1986).

[20] Maternal mortality from all causes has declined sharply since the 1940s due to antibiotics and other medical advances. In 1965,

competition with other factors, [*Roe v. Wade*] and its implementation did not have a strong impact on health indicators." *Id.* at 150. After 1973 the decline in abortion-related deaths stopped and reversed itself in 1977, 1979, and 1982. U.S. Centers for Disease Control, 35 *CDC Surveillance Summaries* 955 (1986).

This country's experience after the adoption of the "Hyde Amendment" by Congress in 1976 is particularly instructive on this point.[21] Before the Hyde amendment became effective, abortion advocates predicted increases in illegal abortions and maternal deaths.[22] When the federal funding cut occurred, there was no discernible evidence of resort to illegal abortions or of increased abortion-

abortion-related deaths decreased faster than other maternal deaths, in part because "illegal abortions may have shifted from the non-medical to the medical sector and become safer." Cates, U.S. Centers for Disease Control, Statement submitted to the U.S. Senate Judiciary Subcommittee on the Constitution, in 2 *Constitutional Amendments Relating to Abortion* 439 (U.S. GPO Serial No. J-97-62) (1983). An international comparison by abortion supporters recently concluded that "reported rates of abortion mortality are more closely associated with the availability of modern methods of contraception (including surgical sterilization), with the general level of health services and with the adequacy of the registration system than with the legal status of abortion or the presumed incidence of illegal abortions performed by untrained operators." Tietze and Henshaw, *Induced Abortion: A World Review 1986*, *supra* note 19, at 127.

[21] The Hyde Amendment, named for its principal sponsor, prohibits the use of any federal Medicaid funds to pay for abortion except under certain specified circumstances. *See Harris v. McRae*, 448 U.S. 297, 302 (1980).

[22] *E.g., Berger*, "Abortion in America: The Effects of Restrictive Funding," 298 *New England Journal of Medicine* 1474-77, 1475 (June 29, 1978); *see Pettiti* and Cates, "Restricting Medicaid funds for abortions: projections of excess mortality for women of childbearing age," 67 *Am. J. of Public Health* 860-62 (1977).

related mortality.[23] More intensive investigation did not find the predicted maternal deaths and complications. Over an eighteen-month period, only one death of a Medicaid-eligible woman in Texas occurred due to an illegal abortion; two others were not directly related to the funding cut. Even this "finding" was rebutted upon further investigation.[24]

Claims that childbirth is statistically more risky than abortion have also been exaggerated.[25] In a recent survey by abortion advocates, only 7% of the women obtaining an abortion reported any reason relating to a "health problem" as part of their motivation.[26] As each "indica-

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[23] "Original projections by the CDC that the cutoff of Medicaid funding for abortions would result in 5-90 excess abortion-related deaths annually have not proved true." "No Excess Deaths Follow Medicaid Cutoff of Abortion," *Ob. Gyn. News* (statement of Dr. Willard Cates) (April 1, 1979); *see also* U.S. Centers for Disease Control, 29 *Morbidity and Mortality Weekly Reports* 254 (June 6, 1980); Trussel, *et al.*, "The Impact of Restricting Medicaid Financing for Abortion," 12 *Family Planning Perspectives* 120-30, 127, 128 (May/June 1980).

[24] Gold and Cates, "Restriction of Federal Funds for Abortion: 18 Months Later," 69 *Am. J. of Public Health* 929 (Sept. 1979). Reporters discovered that the Texas woman "portrayed as a martyr to the Hyde Amendment" had died for reasons not related to the funding cutoff. Grand and Murray, "Facts Don't Back Link of Abortion Death in Texas to Fund Cutoff," *Ob. Gyn. News* 1, 26 (Dec. 1, 1977).

[25] Hilgers and O'Hare, *Abortion-Related Maternal Mortality*, *supra* note 19, at 84-90. Even advocates of constitutional abortion now admit that U.S. Centers for Disease Control figures suggest an abortion at 16-20 weeks is more dangerous than carrying to term. Tietze and Henshaw, *Induced Abortion*, *supra* note 19, at 110. As Dr. Kenneth Ryan stated as early as 1965, "with the advances in medical technology, there are now almost no absolute contraindications to pregnancy." Ryan, "Humane Abortion Laws and the Health Needs of Society," 17 *Case W. Res. L. Rev.* 424-34, 430 (1965).

[26] *See* Torres and Forrest, "Why Do Women Have Abortions?" 20 *Family Planning Perspectives* 169-76, 170 (1988). Among the seven percent who cited a health problem, only half said a doctor informed them that their condition might be made worse by remaining pregnant. *Id.* at 172.

tion" for abortion—*e.g.*, diabetes, hypertension—finds its own appropriate treatment in modern medicine, it disappears from the proposed lists of "indications" for abortion. This progress in preventing maternal mortality has refocused attention on medicine's ability to treat both mother and unborn child as separate patients. *Williams Obstetrics* vii (J. Pritchard & P. MacDonald, 16th ed. 1980).[27]

3. *Infant Mortality.*

Abortion advocates argue that increased abortions have produced "startling improvements" in infant mortality. They even point approvingly to the increasing numbers of women, especially teenagers, whose babies are aborted each year.[28] Of course babies that are aborted never appear in infant mortality statistics, they appear in the abortion statistics. The distinction is without a legitimate difference.[29] The millions of children aborted during the last sixteen years are very real infant mortality statistics. Infant mortality improves in relation to better prenatal and postnatal care, not to abortion.[30] In cities where abortion rates far exceed national averages, infant

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[27] *See* Callahan, "How Technology is Reframing the Abortion Debate," 16 *Hastings Center Report* 33-42, 37-38 (1986); Harrison, *et al.* "Fetal Treatment 1983," 307 *New England Journal of Medicine* 1651-52 (1982).

[28] *See* Appellees' Motion to Affirm, at 18.

[29] *See, e.g.*, Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 *Val. U. L. Rev.* 563, 607-11 (1987).

[30] "Social Support Programs Held Key to Reducing Infant Mortality," *Ob. Gyn. News* 1, 18 (Mar. 15-31, 1988).

mortality rates are a scandal.[31] At the same time, other forms of infant mortality increase in proportion to abortion.

Among the most tragic features of widespread abortion is the fact that a prior abortion may endanger subsequent children who otherwise could have been wanted and loved by their own mothers. This endangerment sometimes occurs in the form of a physical inability to carry a subsequent pregnancy to term. Although some studies suggest this as a possible effect of even one abortion, a woman who has had two or more abortions is at significantly increased risk of being unable to carry later children to term.[32] This is a substantial public health problem in light of the fact that over 35% of all abortions in the United States are performed on women who have had previous abortions, and that the figure is even higher in major cities. U.S. Centers for Disease Control, *Abortion Surveillance 1979-80* 6 (May 1983).

B. Personal, Social and Family Problems are Aggravated, Not Alleviated, by Abortion.

One of the most disturbing aspects of the majority opinion in *Roe v. Wade* was its failure to balance the predicted (but now unrealized) "benefits" of abortion

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[31] *Compare* "Abortion in the U.S. 1978-79," 13 *Family Planning Perspectives*, 6-10, 10-11 (Jan.-Feb. 1981) *with* "Washington Focuses on its High Perinatal Mortality," *Ob. Gyn. News* 6 (Nov. 15-30, 1982).

[32] Levin, Schoenbaum, Monson, Stubblefield, and Ryan, "Association of Induced Abortion with Subsequent Pregnancy Loss," 243 *Journal of the American Medical Association* 2495-99 (1980); "Repeated Abortions Increase Risk of Miscarriage, Premature Births and Low-Birth-Weight Babies," 11 *Family Planning Perspectives* 39-40 (1979) (reporting on World Health Organization, *Special Programme of Research, Development and Research Training in Human Reproduction: Seventh Annual Report* (Geneva, Nov. 1978)); *see also* Harlap, Shiono, Ramcharan, Berendes, and Pellegrin, "A Prospective Study of Spontaneous Fetal Losses After Induced Abortion," 301 *New England Journal of Medicine* 677 (1979).

against the probable (and now manifest) harm expanding abortion would cause. A growing body of evidence demonstrates that abortions, especially multiple abortions, have damaging effects on maternal and infant health, future pregnancies, mental well-being, adoption alternatives and other aspects of "marriage," "procreation," "contraception," "family relationships," and "child rearing." *Roe v. Wade*, 410 U.S. at 152-53. These effects are dramatically illustrated by the mounting evidence that abortion does not reduce child abuse and neglect, makes adoption increasingly difficult, and creates serious psychological ramifications.

1. *The "Unwanted" Child.*

Among the concerns cited in *Roe v. Wade* as justification for finding an abortion right in the Constitution was "the distress, for all concerned, associated with the unwanted child, and . . . the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." 410 U.S. at 153. Implicit here was an assumption that the existence of "unwanted" children was due in part to lack of access to abortion, and that recognition of an abortion right would alleviate this problem. That this projected "benefit" has not materialized is clear from current statistics on child abuse and out-of-wedlock childbearing.[33] The correlation between the

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[33] Between 1970 and 1985, births to unmarried women rose from 399 thousand to 828 thousand annually. Between 1973 and 1982 estimated "unwanted births" to never-married women remained roughly the same: in 1973, 86% of the births were "wanted at conception," 26% were "mistimed," and 14% were "unwanted at conception"; in 1982, 90% were "unwanted at conception," 28% were "mistimed," and 10% were "unwanted at conception." Between 1978 (when reasonably accurate national reporting of child abuse is said to have begun) and 1985, reported cases of child abuse and neglect rose from 607 thousand to 1.3 million annually. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* Nos. 87, 101, 276 (108th ed. 1987).

increasing numbers of abortions and the increasing incidence of child abuse and neglect is such that one may well wonder whether the former is somehow contributing to the latter.[34]

Even at the time of the Court's 1973 decision, there was much literature indicating that children who were intensely desired during pregnancy may be at higher, not lower, risk of being abused and neglected after birth. Dr. Vincent Fontana, a professor of clinical pediatrics and a Chairman of the Mayor's Task Force on Child Abuse and Neglect of the City of New York, stated that abortion is a "sweeping and simplistic" solution that fails because "the assumption that every battered child is an unwanted child, or that most or even a large proportion of abused children are unwanted children is totally false."[35] Another professor of pediatrics, Dr. Edward Lenoski, discovered in 1975 that 91% of the abused children in his survey had been wanted by their parents: "Significantly high among these parents," Lenoski observes, "was the desire for the pregnancy."[36]

Considered together these studies demonstrate that abortion has not eliminated or reduced child abuse or other manifestations of dysfunctional families, and it never will. Other researchers go further, finding that abortion hinders normal maternal-infant bonding with later children and may increase the likelihood of later

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[34] Wardle, "Rethinking Roe v. Wade," *supra* note 14, at 232-43 (describing and collecting research).

[35] V. Fontana, *Somewhere a Child is Crying: Maltreatment-Causes and Prevention* 215-17 (3rd ed. 1983).

[36] E. Lenoski, *The Plight of the Children* (1981). *See also* R. Helfer, *Child Abuse and Neglect: The Diagnostic Process and Treatment Programs* 28 (1977) (DHEW Pub. No. 77-30069); Pohlman, "Unwanted Conceptions: Research On Undesirable Consequences," 14 *Eugenics Quarterly* 143 (1967).

child abuse.[37] Unless this nation becomes an Orwellian society where psychological tests are mandated to determine eligibility for parenthood, the solutions to child abuse must address the causes, not the victims, of the problem. Using abortions to eliminate "unwanted" children is not relieving distress or other psychological problems, it is simply eliminating children.

2. *Effect on Adoption.*

Prior to *Roe v. Wade*, two options were recommended to prospective unwed mothers: single motherhood and adoption. Rather than being a third alternative, abortion has disproportionately tended to replace adoption, eliminating children who would have been wanted and raised by adoptive parents. The National Committee for Adoption cites "the legalization of abortion" as a factor that "reduces the potential number of adoptive children," recounting data such as the following: In 1972, there were 403,200 out-of-wedlock births and 65,335 unrelated adoptions; but in 1982 there were 715,227 out-of-wedlock births but only 50,720 unrelated adoptions.[38] In 1981 Congress noted that "at present, only 4 per centum of unmarried pregnant adolescents who carry their babies to term enter into an adoption plan or arrange for their babies to be cared for by relatives or friends." 42 U.S.C. § 300z (a) (6) (B). In practice the prospective unwed mother's three choices have been reduced to two. If she is unalterably attached to her child she is assisted in

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[37] Ney, *Infant Abortion and Child Abuse: Cause and Effect* in The Psychological Aspects Of Abortion 25-38 (Mall and Watts eds. 1979); Kumar and Robson, "Previous Induced Abortion and Antenatal Depression in Primiparae," 8 *Psychological Medicine* 711-14 (1978); Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortions," 1 *International Journal of Psychoanalytic Psychotherapy* 79-66 (1972).

[38] National Committee for Adoption, *Adoption Factbook: United States Data, Issues, Regulations and Resources* 18 (Nov. 1985).

preparing for single parenthood, but otherwise abortion is proposed as her best alternative.

Meanwhile the pool of prospective adoptive parents has grown, due in part to delayed childbearing and unwanted infertility.[39] In 1984 alone, over two million couples were seeking to adopt children, while only some 58,000 children were available.[40] So while demand for adoptable children rises, supply declines. Bachrach, "Adoption As A Means of Family Formation: Data From the National Survey of Family Growth," 45 *J. Marr. & Fam.* 859 (1983). Infertile couples, frustrated at the short supply of adoptable children, have increasingly resorted to unusual and even experimental reproductive technologies, which themselves create new tensions for the institutions of marriage and family.[41] In short, the adverse effects of constitutional abortion are spreading to such unexpected areas as adoption, creating problems never anticipated when *Roe v. Wade* was first decided.

3. *Psychological Ramifications.*

Several of the concerns that prompted this Court to conclude that abortion ought to become a constitutionally protected privacy right dealt with the psychological stress

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[39] Based on 1982 figures, infertility affects an estimated 2.4 million couples in the United States. The decreased supply of children available for adoption has increased demands for infertility treatment from these couples. U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices* 3, 14 (1988) (U.S. GPO Serial No. OTA-BA-358).

[40] Wilson and Hitchings, "Adoption: It's Not Impossible," 112 *Business Week* (July 8, 1985); *see also* Congressional Quarterly, *Independent Adoptions*, 2 Editorial Research Reports 647 (Dec. 11, 1987).

[41] They have also presented the judiciary with unique and challenging legal battles. *E.g., In re Baby M.*, 109 N.J. 396, 439, 537 A.2d 1227, 1249 (1988).

that pregnancy and child care may place upon the mother and her family.[42] 410 U.S. at 153. The underlying assumption was that abortion would relieve the psychological burden and, presumably, not replace it with something worse. Experience proves otherwise.

Only five years after *Roe v. Wade*, the psychological evidence against abortion had accumulated to the point that experts could conclude that "[a]bortion puts women at greater risk mentally" than does childbirth. *The Psychological Aspects of Abortion* x (Mall and Watts eds. 1979). "Out of the sea of conjecture surrounding the psychological aspects of abortion emerges the somewhat heretical idea that social policy may have moved in the wrong direction." *Id.* at xi. It is now even more clear that abortion policy did take a wrong turn and that women and their families are suffering psychologically as a result. "Not only is the woman who has a genuine psychiatric handicap more likely to suffer than benefit from an abortion, but across the board the prognosis of a post-abortive psychosis is worse than that of a post-partum one." Sim, *Abortion and Psychiatry*, in New Perspectives 151-63, 162.

Coincident with this Court's noting probable jurisdiction in this case, the Surgeon General of the Public Health Service recommended a new controlled study on the mental health effects of abortion.[43] His reason for the

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[42] It is not easy to understand how concern about the family translates into a policy treating abortion as an autonomous decision affecting only the mother and her physician. *E.g., Thornburgh*, 476 U.S. at 772.

[43] Letter from C. Everett Koop, M.D., Sc.D., Surgeon General, U.S.P.H.S., to Ronald Reagan, The President of the United States (Jan. 9, 1989). The Surgeon General stated that there was no "conclusive data about the health effects of abortion on women." In so stating, his letter offers no explanation into either the "data" or the degree to which they must be "conclusive" for him to accept them. He most certainly does not state his disagreement with

recommendation was his conclusion "that, at this time, the available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those pro-choice." While noting the conflicting scientific evidence in the field, the Surgeon General does confirm two critical points that undermine the very assumptions upon which constitutional abortion relies. First, he confirms that even after sixteen years and twenty million abortions, there is still no confirmation that the possible benefits projected for *Roe v. Wade* exist. Second, he states that "when pregnancy, whether wanted or unwanted comes to full term and delivery, there is a well documented, low incidence of adverse mental health effects." [44] In other words, when a child, whether initially wanted or not, is born instead of aborted, adverse psychological consequences are rare.[45]

It is beyond question, however, that post-abortion trauma *does exist*, and can be lethal, especially for the woman most frequently cited as a beneficiary of legalized

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points made below that post-abortion trauma and other effects exist. The fact that studies may conflict does not mean they should or may be discarded wholesale.

[44] *Id.* at 2.

[45] "A review of published reports on women who had been denied abortion and were followed up shows that 70.6% of the 6298 women completed their pregnancies and only 13.2% had an abortion elsewhere." These women, denied abortion by review committees in various European countries, could reasonably be expected to have the most negative emotional attitudes toward giving birth. Yet "the literature shows a generally comparable outcome of pregnancy, delivery and puerperium between women who were denied abortion and controls," "no evidence that a continued unwanted pregnancy will endanger the mother's mental health," and "good acceptance of the infant by the mother, especially if she has the father's support." Del Campo, "Abortion Denied—Outcome of Mothers and Babies," 130 *Journal of the Canadian Medical Association* 361, 362 (1984).

abortion—the pregnant teenager. The American Psychological Association states:

> Although they are rare, cases have been reported of women's experiencing psychotic breaks following abortion despite the absence of preexisting psychological problems (Spaulding & Cavenar, 1978). In light of statistics showing that suicide is the third leading cause of death among adolescents, one needs to be alert to this risk . . .. Compared with adults, adolescents appear to have somewhat more negative responses on average following abortion.

Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association, *Adolescent Abortion: Psychological and Legal Issues* 84 (1986).

The increasing use of amniocentesis and other prenatal diagnostic techniques for detecting fetal abnormalities has also exacerbated the psychological problems of abortion by eroding the willingness of parents to accept the children they have voluntarily conceived. This practice at least delays, and may disrupt, the vital development of maternal-infant bonding. B.K. Rothman, *The Tentative Pregnancy* 100-102 (1986). The problem is likely to increase as more women resort to prenatal diagnosis and abortion for reasons of convenience, such as to select a child of the desired sex.[46]

The damaging psychic impact of abortion is not limited to the mother. Liebman and Zimmer, *The Psychological Sequelae Of Abortion: Fact And Fallacy* in The Psychological Aspects of Abortion 127-38 (1979). In particular, abortion is contributing to dysfunctional families and causing adverse psychological harm to the father as well. Rue, "Abortion in Relationship Context," *Interna-*

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[46] Since amniocentesis can now be used to determine an unborn's gender with certainty, abortions of children not of the desired sex are increasing. Jancin, "Prenatal Gender Selection Appears to be Gaining Acceptance," 23 *Ob. Gyn. News* 1, 30-31 (March 1-14, 1988). *See* Kolata, *Fetal Sex Test Used as Step to Abortion*, N.Y. Times, Dec. 25, 1988, at 1 and 38.

tional Review of Natural Family Planning 95-121 (Summer 1985).

C. There Is No Basis For *Roe v. Wade*'s Inclusion Of Abortion Within The Right Of Privacy.

This Court placed a freedom to choose abortion within its privacy doctrine because it thought that by constitutionalizing abortion, the health and welfare of both women and society would improve. *Roe v. Wade*, 410 U.S. at 153. As indicated by the above discussion, abortion has failed to solve the medical, familial and societal problems it was supposed to cure. To the contrary, it has inflicted its own evils upon women, the family, our communities and the nation. Solutions to the list of problems that existed before *Roe v. Wade*, or to the additional problems added since that decision, are not easy.[47] We now know there is no one simple answer like the one abortion was to provide. In protecting unlimited abortion against every other consideration, the Court has fortified itself against the critiques of physicians, lawyers, scholars, and basic community values.

This Court set us on our present path, and this Court can initiate a process to correct the course of its jurisprudence. The first step is to reconsider federal jurisdiction over abortion by reviewing the decision that first brought abortion within the constitution—*Roe v. Wade*. In undertaking that reconsideration, this Court should look to that line of privacy cases predating this country's turn toward abortion. In those precedents are found the proper balancing of individual and societal interests—a

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[47] "Respect for human life leads individuals and groups to reach out to those with special needs. With the support of the Catholic community, Catholic organizations and agencies will continue to provide services and care to pregnant women, especially to those who would otherwise find it difficult or impossible to obtain high-quality care." National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Reaffirmation* 10 (Nov. 14, 1985).

balancing that allows for personal liberty within a framework that respects familial relationships, preserves and promotes the common good, and protects our free society.

CONCLUSION

The judgment of the court of appeals should be reversed after this Court has reconsidered its essential constitutional and jurisdictional holdings in the area of abortion jurisprudence.

Respectfully submitted,

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February, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals
For the Eighth Circuit

BRIEF FOR 127 MEMBERS OF THE MISSOURI GENERAL ASSEMBLY AS AMICI CURIAE SUPPORTING APPELLANTS

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Moore v. City of East Cleveland, 431 U.S 494 (1977) ... 24,25

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) ... 22

O'Grady v. Brown, 654 S.W.2d 904 (Mo.banc 1983) ... 3,8

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Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 2,6,24

Regan v. Time, Inc., 468 U.S. 641 (1984) 17

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

San Antonio School District v. Rodriquez, 411 U.S. 1 (1973) 21

State v. Emerich, 13 Mo.App. 492 (1883), aff'd, 87 Mo. 110 (1885) 7

Stegall v. Morris, 258 S.W.2d 577 (Mo.banc 1953) 3,9

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Truax v. Corrigan, 257 U.S. 312 (1921) 22

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United States v. Richardson, 418 U.S. 166 (1974) 15,18

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Whalen v. Roe, 429 U.S. 589 (1977) 22,23

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Mo. Rev. Stat. (Supp. 1988)

§ 135.327 9

§ 188.036 9

§ 208.151 9

§ 208.152 9

Treatises and Other Authorities:

A. Bickel, The Morality of Consent (1975) 16

Blasi, *The Ruthless Activism of the Burger Court,* The Burger Court: The Counter-revolution that Wasn't 198 (V. Blasi ed. 1983) 16

Bok, *Ethical Problems of Abortion,* 2 Hastings Center Stud. 33 (1974) 11

Caldeira, *Judges Judge the Supreme Court,* 61 Judicature 208 (1977) 16

IV The Collected Works of Abraham Lincoln 262 (R. Basler ed. 1953) 13

A. Cox, The Role of the Supreme Court in American Government (1976) 3,10,16,25,26

Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973) 14,16

J. Ely, Democracy and Distrust (1980) 11

Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases,* 1973 Sup. Ct. Rev. 159 (1974) 16

1 M. Farrand, The Records of the Federal Convention of 1787 (1911) 17

The Federalist

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No. 78 (A. Hamilton) 12,13

Fletcher, *Abortion, Euthanasia, and the Case of the Defective Newborn,* 292 N. Eng. J. Med. 75 (1975) 11

F. Frankfurter, The Public and its Government (1930) 22,23

Freund, *Storms Over the Supreme Court,* 69 A.B.A. J. 1474 (1983) 16

Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1983) 18

L. Hand, The Bill of Rights (1958) 17

Heyman & Holtz, *The Severely Defective Newborn,* 23 Pub. Policy 381 (1975) 11,12

R. Jackson, The Struggle for Judicial Supremacy (1941) 12

Koop, *Infanticide American Style,* 125 Cong. Rec. S19389-91 (July 18, 1979) 11

Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine,* 25 Ariz. L. Rev. 805 (1983) 16

Noonan, *An Almost Absolute Value in History,* The Morality of Abortion: Legal and Historical Perspectives 1 (J. Noonan ed. 1970) 10

Sandalow, *Federalism and Social Change,* 43 L. and Contemp. Probs., Summer 1980 at 29 21

A. Schweitzer, Reverence for Life (1965) 10

R. Sherlock, Preserving Life: Public Policy and the Life Not Worth Living (1987) 11

J.B. Thayer, John Marshall (1901) 15

L. Wardle & M. Wood, A Lawyer Looks at Abortion (1982) 21

Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231 15,16,18,19,20

Miscellaneous:

Amicus Brief of the United States of America filed in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S 747 (1986) 16

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From the World Beyond Washington, in Planned Parenthood — World Population (Alan Guttmacher Institute), Washington Memo, Jan. 14, 1986, Jan. 15, 1987, Jan. 21, 1988, Jan. 12, 1989 .. 19

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April 24, 1975, pp. 1033-34 6

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Journal of the Senate

April 30, 1974, p. 1021 6

April 2, 1975, p. 543 6

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April 16, 1986, p. 1159 5

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BRIEF FOR 127 MEMBERS OF THE MISSOURI GENERAL ASSEMBLY AS AMICI CURIAE SUPPORTING APPELLANTS

INTEREST OF THE AMICI

Amici are 127 members of the Missouri General Assembly.[1] They therefore have a substantial interest in the outcome of this

[1] The amici include Senators Harold L. Caskey, Phil B. Curls, Pat Danner, David Doctorian, Fred Dyer, Francis E. Flotron, Mike Lybyer, James L. Mathewson, Thomas W. McCarthy, Emory Melton, Norman L. Merrell, Jay Nixon, John T. Russell, Jeff W. Schaeperkoetter, John D. Schneider, John E. Scott, Dennis Smith, Irene Treppler and Harry Wiggins; and Representatives Todd Akin, Bill Alter, Ollie Amick, Ron Auer, Stephen C. Banton, Francis M. Barnes, James A. Barnes, Philip M. Barry, Joe Bock, Francis R. Brady, Russell G. Brockfeld, Everett W. Brown, Galen B. Browning, Gary L. Burton, Flavel J. Butts, Elmer J. Cantrell, Steven R. Carroll, Mervin R. Case, Gail L. Chatfield, Doyle Childers, Bonnie Sue Cooper, Norwood A. Creason, Dewey G. Crump, Wayne F. Crump, George P. Dames, Michael P. David, William T. Dawson, Ronnie DePasco, Jeanette T. Dixon, Laurie B. Donovan, Joseph L. Driskill, Robert L. Dunning, Sr., Steven E. Ehlmann, T. Mark Elliott, Herbert C. Fallert, Ken F. Fiebelman, James V. Froelker, Donald L. Gann, Jess Garnett, Jack Goldman, Russell Goward, Christopher Graham, Timothy P. Green, David C. Hale, John Hancock, Raymond W. Hand, Patrick J. Hickey, Ted House, W.O. (Bob) Howard, Mary C. Kasten, John Kauffman, Pat Kelley, Timothy M. Kelley, Craig Kilby, Sam D. Leake, Ken Legan, William C. Linton, T.M. Macdonnell, W.A. (Bill) Markland, William Marshall, Jean H. Mathews, Joe McCracken, William P. McKenna, Wesley A. Miller, Jim Mitchell, Neil Molloy, Walt Mueller, Jim Murphy, Al Nilges, Judith G. O'Connor, Matt O'Neill, Joseph R. Ortwerth, Edward E. Ottinger, Paul (Pete) Page, Carole Roper Park, Opal Parks, Robert J. Quinn, William A. Raisch, David L. Rauch, Anthony D. Ribaudo, James N. Riley, Henry C. Rizzo, Larry M. Rohrbach, Carson Ross, James (Jay) Russell, Edward Schellhorn, David Schwab, Delbert Lee Scott, Vernon E. Scoville, III, Robert F. Sego, Jonathan Selsor, Norman E. Sheldon, Todd P. Smith, Earle F. Staponski, Kaye H. Steinmetz, Thomas P. Stoff, Chuck Surface, James M. Talent, Merrill M. Townley, Joseph L. Treadway, Robert D. Ward, Stephen R. Waters, Harold G. Weil, Dale Whiteside, Clarence Wohlwend, J. Dan Woodall, Chuck Wooten and Dennis Ziegenhorn. *Total members:* 197.

case. They assert not just the state interest in upholding the Missouri statute, but their interest as the individuals elected by the people of Missouri to strike the balance of competing interests and resolve the public policy issues involved in this case. Thus, the amici have a direct interest in preserving the integrity of the federal system and the legislative role in the democratic process. The views of the amici, moreover, may aid the Court in its continuing efforts to define the proper sphere of legislative action in an area of continuing public debate. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The abortion controversy, involving complex questions of public policy and oftentimes competing notions of public morality, continues unabated. The Missouri legislature, as in the past (*Planned Parenthood Assoc. of Kansas City, Mo. v. Ashcroft,* 462 U.S. 476 (1983); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976)), has once again attempted to balance the competing interests of all parties (including unborn children) affected by the abortion decision. The federal courts have once again invalidated, in large measure, that legislative effort. This unseemly struggle between the state legislature and the federal judiciary should not continue. While the Court has an obligation to protect express constitutional rights, the Court "should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " *Maher v. Roe,* 432 U.S. 464, 479-489 (1977) (*quoting Missouri K. & T. Ry. v. May,* 194 U.S. 267, 279 (1904) (Holmes, J.)).

For over 150 years, the State of Missouri has consistently expressed its opposition to abortion on demand. The legislature and courts of Missouri, moreover, have extended the protection of state law to "all humans, born and unborn" (Mo. Rev. Stat. § 188.010 (1986)), in contexts ranging from abortion regulation (*id.*) to criminal law (Mo. Rev. Stat., "Crimes and

Punishments," art. II, § 9 (1835)), tort law (Mo. Rev. Stat. § 537.080; *O'Grady v. Brown,* 654 S.W.2d 904 (Mo.banc 1983)), and property law (*see Stegall v. Morris,* 258 S.W.2d 577 (Mo.banc 1953)). These regulatory efforts all permissibly express the state's compelling interest in the protection of unborn life. Such regard for human life does not transgress constitutional norms. Rather, it represents "respect for the paramount sanctity of human life which has always been at the centre of western civilization." A. Cox, The Role of the Supreme Court in American Government 53 (1976).

By invalidating the regulations at issue here, the lower courts improperly intruded upon the legislative arena. Basic prudential and constitutional concerns — including the principle of popular sovereignty, the inherent limitations of the judicial process, and the need to preserve public confidence in the judiciary — counsel substantial deference to legislative resolutions of controversial issues of public policy. And despite stifling supervision by federal courts, the legislatures of all of the states (and Congress) have, like the Missouri legislature, enacted modern statutes regulating and restricting abortion practices in more than a dozen substantive areas. *See* Appendices A-1 to A-15, and B.

Moreover, the decisions below entrench upon policy-making authority properly reserved to the states. The federal judiciary has erred by attempting to impose upon the states a non-existent consensus regarding abortion policy. The states should be freed from the substantive due process fetters of abortion-privacy doctrine so that "the law might come to reflect a tolerable accommodation of competing views." Sandalow, *Federalism and Social Change,* 43 L. and Contemp. Probs., Summer 1980 at 36.

Finally, the Court should clarify the proper standard of judicial review in this troublesome area. State regulations having a harmless, collateral or insubstantial impact upon a protected interest should not trigger any level of exacting judicial

review. Regulations that are found to have a substantial impact, furthermore, do not reflexively merit "strict scrutiny." A "test so severe that legislation can rarely meet it should be imposed by the courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments." *Carey v. Population Services International,* 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment). The Court would do much to clarify and rationalize the task of federal and state courts by holding that the "rational basis" test applies to the review of popularly-enacted abortion regulations.

ARGUMENT

I. Missouri Has Always Been Committed To The Protection Of Life And To The Regulation Of Abortion

The citizens of Missouri and their elected officials are emphatically committed to the protection of human life in all of its stages and to the regulation of abortion. As the legislature has said:

> It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

Mo. Rev. Stat. § 188.010 (1986).

This commitment, this *conviction,* is bipartisan and overwhelming. The Act which is the subject of this suit was passed 119-36 in the Democrat-controlled House of Representatives[2] and 23-5 in the Democrat-controlled Senate[3] before being signed into law by Governor Ashcroft,[4] a Republican. In 1979, the House voted 139-18[5] and the Senate 28-4[6] to pass an abor-

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[2] Journal of the House, April 23, 1986, pp. 1512-13.

[3] Journal of the Senate, April 16, 1986, p. 1159.

[4] Governor Ashcroft's "Proclamation" of January 22, 1989 as a day in memoriam for the "23 million unborn children" who "have been denied their 'right to life, liberty and the pursuit of happiness' " since 1973 is attached hereto as Appendix C. He has issued a similar proclamation every January since 1985.

[5] Journal of the House, April 11, 1979, pp. 1288-89.

[6] Journal of the Senate, June 15, 1979, p. 1544.

tion statute which was approved by Democrat Governor Teasdale.[7] This Court reviewed that statute in *Planned Parenthood Assoc. of Kansas City, Mo. v. Ashcroft,* 462 U.S. 476 (1983). In 1974, the Senate voted 27-5[8] and the House 148-3[9] to approve an abortion statute, later signed into law by Republican Governor Bond, which was the subject of *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976). And in 1975, pursuant to Article V of the U.S. Constitution, the Senate voted 24-8[10] and the House 112-36[11] to apply to the U.S. Congress to call a convention for the purpose of proposing a human life amendment[12] to the U.S. Constitution.

This profound opposition to abortion on demand is as old and enduring as the State of Missouri itself. Missouri began to codify its abortion policy in 1825,[13] shortly after it became a state, and by 1835[14] the law extended protection to *all* unborn

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[7] Governor Teasdale's "Proclamation" of January 22, 1980, is similar to Governor Ashcroft's (n. 4, *supra*) and is attached hereto as Appendix D. Governor Teasdale issued similar proclamations each January in 1977, 1978 and 1979.

[8] Journal of the Senate, April 30, 1974, p. 1021.

[9] Journal of the House, April 30, 1974, pp. 1631-32.

[10] Journal of the Senate, April 2, 1975, p. 543.

[11] Journal of the House, April 24, 1975, pp. 1033-34.

[12] *See* Appendix E.

[13] Mo. Rev. Stat., "Crimes and Misdemeanors," ch. I, § 12 (1825). *See* Appendix F.

[14] Mo. Rev. Stat., "Crimes and Punishments," art. II, §§ 10 and 36 (1835). *See* Appendix F.

children by forbidding all kinds of abortion procedures, throughout pregnancy, "unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose. . . ." This qualified prohibition of abortion remained intact from 1835 until 1973.[15]

There is no doubt, historically, about the status ascribed to unborn children by Missouri lawmakers. Since the beginning of abortion regulation in Missouri, the General Assembly has uniformly used the terms "child" or "unborn child" to refer to fetuses and embryos from the moment of conception onward.[16] Distinctions with respect to penalties for performing abortions were made on the basis of "quickening."[17] From 1835 through the end of the century, abortions of unborn children prior to

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[15] Mo. Rev. Stat., § 7336 (1919). There were minor amendments between 1835 and 1919, but the statutes were substantially unchanged from 1919 through 1973. *See* Appendix F.

[16] *See* Appendix F.

[17] An 1883 opinion of the Missouri Court of Appeals described the meaning of the term "quick":

> The framers of our statutory provisions in regard to abortion, undoubtedly used the words "quick with child" in the old common-law meaning of the phrase, when they speak of the woman being "pregnant of a quick child." The statute recognizes a period of pregnancy previous to quickening. As the child is, in truth, alive from the moment of conception, this quickening must be taken to mean that period of pregnancy at which the womb, having become too large to be contained in the pelvis, rises into the abdomen, when the woman feels, or imagines that she feels, the movement of the foetus.

State v. Emerich, 13 Mo.App. 492, 495 (1883), *aff'd,* 87 Mo. 110 (1885).

quickening were generally misdemeanors,[18] but beginning in 1907[19] and continuing through 1973, even those early abortions led to "felony abortion" convictions, while abortion of unborn "quick" children led to the more serious felony conviction of manslaughter.[20]

Missouri has pursued its policy to protect the unborn in contexts other than abortion. In 1835, for instance, the legislature declared that "[t]he wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." Mo. Rev. Stat., "Crimes and Punishments," art. II, § 9 (1835). This statute remained substantially unchanged until it was repealed by the 1986 Act, which made Missouri's homicide laws applicable to the killing of all unborn children in non-abortion contexts by declaring that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons. . . ." Mo. Rev. Stat. § 1.205.2 (1986). Even before passage of this Act, however, Missouri's wrongful death statute (Mo. Rev. Stat. § 537.080) was construed to apply to the unborn by a unanimous Missouri Supreme Court, which concluded "that the term 'person' as used in 537.080 includes the human fetus *en ventre sa mere.*" *O'Grady v. Brown,* 654 S.W.2d 904, 910 (Mo.banc 1983). And Missouri courts have

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[18] The Missouri abortion statutes, from the beginning until *Roe,* were directed at the provider or procurer of an illegal abortion, but never at the woman upon whom the abortion was performed, and the reported cases do not reveal any instance in which such a woman had been prosecuted for having an abortion, even as an accessory.

[19] 1907 Mo. Laws, pp. 230-31. *See* Appendix F.

[20] Thus, the more serious manslaughter conviction required an additional quantum of proof of actual pregnancy — that the mother *feel* the movement of the child.

long recognized the property rights of persons from the time of conception onward (*see Stegall v. Morris,* 258 S.W.2d 577 (Mo.banc 1953)).

The Missouri General Assembly has also pursued its policy to protect the unborn by providing practical alternatives to abortion. A few of these, for example, are special medical assistance to women who are pregnant (Mo. Rev. Stat. § 208.151); special subsidies to facilitate certain adoptions (§ 453.070); and tax credits of up to $5,000.00 for expenses related to the adoption of a "special needs child" (§ 135.327).

In addition to the major legislation leading to the *Danforth* and *Ashcroft* cases and this case, the Missouri General Assembly has passed numerous other bills occasioned directly by *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. For example, suits for wrongful life (brought by the child) and for wrongful birth (brought by the parents) have been abolished (Mo. Rev. Stat. § 188.130); Medicaid funding is forbidden for abortions except where the life of the mother is endangered (§ 208.152); persons and institutions refusing to participate in abortions cannot be discriminated against (§ 197.032); state-sponsored genetic diagnostic and counseling centers cannot refer for abortions unless the mother's life is endangered (§ 191.320); medical insurance coverage for elective abortions must be by optional rider requiring an additional premium (§ 376.805); and abortions done with the intent to use fetal organs or tissues for transplants, and trafficking in fetal organs and tissues, are prohibited (§ 188.036).

In sum, Missouri is, and always has been, committed to the protection of innocent human life and to the regulation of abortion to the full extent permitted by the Constitution of the United States and the decisions of the United States Supreme Court. Until *Roe v. Wade*, pursuit of these policies was not complicated. Since *Roe v. Wade*, pursuit of these policies has been continually frustrated.

II. The Missouri Regulations Permissibly Express The State's Fundamental Interest In The Protection Of The Unborn

In the 1986 Act, the Missouri General Assembly expressed its continuing concern with the protection of human life by finding that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. 1.205.1(1) and (2) (1986). Far from transgressing constitutional norms, § 1.205 and its accompanying regulations embody compelling values inherent in our democratic system of government. The lower courts' contrary conclusion should be reversed.

Official respect for the life of the unborn has been "an almost absolute value in history."[21] Behind the many centuries of legal restriction of abortion lies what former Solicitor General Archibald Cox has called "the most compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death."[22]

The equal worth under law of *all* lives — not just the able-bodied, full-facultied, socially-accepted, racially-and-culturally homogenized, and mature-but-not-decrepit — is one of the cornerstones of our constitutional democracy. The Declaration of Independence proclaims that it is "self-evident" that "all men

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[21] Noonan, *An Almost Absolute Value in History* in the Morality of Abortion; Legal and Historical Perspectives 1, 6 (J. Noonan ed. 1970).

[22] A. Cox, The Role of the Supreme Court in American Government 53 (1976) (Professor Cox criticizes the Court's opinion in *Roe* because it "fails even to consider" this interest). *See also* A. Schweitzer, Reverence for Life 5 (1965).

. . . are endowed . . . [with the unalienable rights of] Life, Liberty and the pursuit of Happiness" and that "to secure these rights Governments are instituted. . . ." Accordingly, the Missouri legislature — like the legislatures of most states[23] — has consistently sought to secure these rights for all people, including the unborn. *See supra* Part I.[24] In our legal tradition, the taking of human life has never been deemed a purely private matter.

The categorical exclusion of any human life from the protection of the law based upon some immutable biological characteristic, such as race, sex, physical and mental development, or bodily condition, is inconsistent with the idea of democracy. R. Sherlock, Preserving Life: Public Policy and the Life Not Worth Living 15-74 (1987). The value and worth of life itself is tenuous indeed if the interests of those outside the mainstream — whether they be unborn children, the elderly, the handicapped, the dying, or just the socially excluded — are ignored. Section 1.205 and its accompanying regulations are expressions of these fundamental values; values going to the very heart and soul of America's — and Missouri's — democratic system. They are not unconstitutional.[25]

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[23] *See* Appendix A.

[24] *See also* J. Ely, Democracy and Distrust 43-73 (1980); *Graham v. Richardson,* 403 U.S. 365 (1971); *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

[25] *See* Bok, *Ethical Problems of Abortion,* 2 Hastings Center Stud. 33, 42-44 (1974). If there were any question about the reality of the need for concern regarding the risk abortion poses to other persons on the "fringes" of life in 1973, that reality is now undeniable. There has been a profound and appalling increase in the incidence of acts manifesting disregard and apathy for the destruction of other classes of unwanted, vulnerable human lives. Correlation between abortion and euthanasia, infanticide, child abuse, and other invidious practices is no longer a matter of idle speculation. *See, e.g.,* Koop *Infanticide American Style,* 125 Cong. Rec. S19,389-91 (July 18, 1979); *Editorial* J. Pediatrics 904 (1973); Fletcher, *Abortion, Euthanasia, and the Case of the Defective Newborn,* 292 N. Eng. J. Med. 75-77 (1975); Heymann & Holtz, *The Severely Defective Newborn,* 23 Pub. Policy 381, 410, 413 (1975); Bok, *supra* at 42.

The Missouri legislation at issue here presents the case for bright lines. "A sense of security and acceptance, which underlies the very concepts of rights and self-respect which is a precondition of human happiness, depends upon knowing when one . . . is a fully protected member of the community." Heymann & Holtz, *The Severely Defective Newborn* 23 Pub. Policy 381, 411 (1975). The Missouri legislature has defined personhood to include all human beings — and not to exclude any. Nothing in the text or history of the United States Constitution, except its darkest and most shameful hours pertaining to the treatment of racial minorities and slaves,[26] suggests that the duly authorized branches and units of our republican government may not be so inclusive.

III. Invalidation Of The Missouri Regulations Is An Unwarranted Intrusion Into The Legislative Arena

Federal courts, like the other branches of the federal government, are bound by discernible prudential and constitutional limits. As Solicitor General, later Justice, Robert H. Jackson wrote, "the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy."[27] The Founders were not unaware of the risk noted by Jackson. Hamilton wrote: "[T]he general liberty of the people can never be endangered from [the judiciary] . . . so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that 'there is no liberty if the power of

[26] *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

[27] R. Jackson, The Struggle for Judicial Supremacy 322 (1941).

judging be not separated from the legislative and executive powers.' "[28]

Three basic prudential and constitutional concerns require substantial judicial deference to legislative resolutions of controversial issues of public policy: the principle of popular sovereignty, the inherent limitations of the judicial process, and the need to preserve public confidence in the judiciary. These factors counsel this Court to uphold, rather than invalidate, the Missouri abortion regulations.

"Just government," the Declaration of Independence states, "is founded on the consent of the governed." The things that matter most in life matter differently to different people, and the only morally supportable method of resolving deeply held differences of opinion regarding public policy is to let the people decide — through the democratic processes. The Court's prior abortion decisions, as evidenced by the decisions below, wrongfully ignore this fundamental precept. Virtually none of those affected by the abortion privacy doctrine were permitted to participate in its creation, nor — as the opinions below demonstrate — has the general populace had any opportunity

[28] The Federalist, No. 78 (A. Hamilton) (quoting Montesquieu, The Spirit of the Laws, vol. 1, p. 181) (emphasis added). *See also* The Federalist, No. 48 (J. Madison) ("It is equally evident that none of [the three branches of government] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers").

Abraham Lincoln also recognized the limits of the judicial role:

> [I]f the policy of the Government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of the eminent tribunal.

IV The Collected Works of Abraham Lincoln 262, 268 (R. Basler ed. 1953).

since to modify it. By constitutionalizing the controversy, the Court has removed the profound legal and moral issues surrounding the abortion decision from the realm of public debate and democratic decisionmaking. This course should be corrected.[29]

Recognition of the institutional limitations of the judicial branch also compels respect for legislative resolutions of controversial issues of public policy. Judicial deference to Missouri's abortion regulations is warranted here because of the superior fact-finding capability of the legislative branch,[30] the

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[29] On January 23, 1989, 67,000 demonstrators gathered in Washington, D.C., as they have during the previous fifteen years, to march to this Court to protest the abortion decision. Washington Post, Jan. 24, 1989, at A1, col. 1. If our constitutional system of government were functioning properly, those protestors would have been gathering at their statehouses to demonstrate, not at a courthouse.

The arrest of thousands of anti-abortion protestors (peacefully sitting on sidewalks and walkways to block access to abortion clinics) in 1988 alone is symptomatic of a widely-shared perception that the range of political solutions to what many believe to be a morally intolerable judicially-imposed rule is so limited that massive civil disobedience is the only viable alternative. *See, e.g.*, N.Y Times, Oct. 30, 1988, at A26, col. 1 (2,200 abortion protestors arrested in 27 cities in demonstrations on October 28 and 29); N.Y. Times, May 3, 1988, B1, col. 2 (503 anti-abortion protestors arrested in Manhattan); N.Y. Times, Oct. 5, 1988, A22, col. 1 (400 anti-abortion protestors arrested in Atlanta); N.Y. Times, Jul. 6, 1988, A7, col. 1 (600 protestors block the entrance to a clinic in Pennsylvania); N.Y. Times, Jul. 30, 1988, at A30, col. 3 (235 anti-abortion protestors arrested in Amherst, New York); N.Y. Times, Sept. 25, 1988, at A33, col. 6 (158 anti-abortion protestors arrested in Reston, Washington); N.Y. Times, Jul. 7, 1988, at A20, col. 6 (133 anti-abortion protestors arrested in Florida).

[30] *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 n.89 (1973) ("because the claims involved [in the abortion controversy] are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly not under the guise of enforcing the Constitution").

superior accountability of the legislative branch,[31] and the benefits to the public and to democracy in general which flow from the proper functioning of open legislative processes.[32] Judicial deference, furthermore, would ease the significant burden *Roe* and its progeny have imposed upon the federal court system.[33]

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[31] As Justice Powell warned in his concurring opinion in *United States v. Richardson,* 418 U.S. 166, 188 (1974): "We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch."

[32] Chief Justice John Marshall's biographer described this concern (J.B. Thayer, John Marshall 106-107 (1901)):

> [T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors * * *. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

See also Ball v. James, 451 U.S. 355, 373 (1981) (Powell, J., concurring).

[33] As the decisions of the courts below demonstrate, the abortion privacy doctrine has proven to be unmanageable. There is virtually no abortion regulation, direct or indirect, immediate or remote, substantial or insignificant, that has not been challenged and litigated in federal court. Accordingly, a major portion of federal judicial time and energy has been devoted to supervising state and local elected officials' attempts to regulate abortion. "During the entire decade before *Roe v. Wade* was decided, there was a total of only 18 opinions published in all federal courts in all cases dealing with abortion or abortion regulation." *Legal Ramifications of the Human Life Amendment: Hearings Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary on S.J. Res 3,* 98th Cong., 1st Sess. 47, 51, 66 (prepared statement of Professor Lynn D. Wardle). Since *Roe* there have been literally *hundreds* of reported federal court decisions considering challenges to (and virtually all invalidating) federal and state abortion regulations. Wardle, *Rethinking* Roe v. Wade,

(footnote continued on next page)

In addition, the imperative need to preserve public confidence in the federal judiciary mandates the greatest measure of judicial self-restraint in the abortion arena. When the judiciary creates as well as interprets and applies public policy, it may threaten that confidence. Indeed, a great part of the opposition to *Roe* comes from those who object to the creation and imposition of public policy on a profoundly controversial subject by judicial fiat.[34] It is "necessary that the Supreme Judiciary

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1985 B.Y.U. L. Rev. 231, 238 n.41. In fact, there have now been more major abortion decisions by this Court alone, in the 16 years beginning with *Roe,* than were decided in the same period of time before *Roe* by *all* federal courts combined. Wardle, 1985 B.Y.U. L. Rev. at 233 n.19.

[34] Strict judicial review of state abortion legislation has been one of the most controversial and highly criticized exercises of judicial power in the history of our nation. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases,* 1973 Sup. Ct. Rev. 159 (1974); Freund, *Storms Over the Supreme Court,* 69 A.B.A. J. 1474 (1983); Blasi, *The Ruthless Activism of the Burger Court,* The Burger Court: The Counter-revolution that Wasn't 198, 212 (V. Blasi ed. 1983); A. Bickel, The Morality of Consent 27-29 (1975); A. Cox, The Role of the Supreme Court in American Government 113 (1976). Numerous legal scholars, including many sympathetic to decriminalizing abortion, have criticized the abortion decisions for failing to articulate a persuasive principle that lifts the ruling "above the level of a political judgment." A. Cox, *supra* at 13-14. At least four recent Solicitors General have criticized the judicially-created abortion doctrine and/or *Roe v. Wade.* Charles Fried (*see* Amicus Brief of the United States of America filed in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986)), Rex E. Lee, (*see* Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine,* 25 Ariz. L. Rev. 805, 813 (1983)), Archibald Cox (*see* A. Cox, *supra* at 13-14, 54-56), Robert Bork (U.S. News & World Rep., Sept. 14, 1987, at 20). Even federal judges, charged with the duty of enforcing abortion privacy doctrine, have "labelled *Roe v. Wade* massive 'judicial legislation'." Caldeira, *Judges Judge the Supreme Court,* 61 Judicature 208, 212 (1977) ("For these judges, the justices' opinions on *Roe* lacked sufficient reasoning to justify this judicial excursion into the field of morals").

should have the confidence of the people." 1 M. Farrand, The Records of the Federal Convention of 1787, 76 (1911) (remarks of Nathaniel Gorham, Massachusetts). This confidence, however, can be "lost, if [judges] are employed in the task of remonstrating against popular measures of the Legislature." *Id.* at 77. The "legislatures are ultimate guardians of the liberties and welfare of the people in as great a degree as the courts."[35] Our constitutional Republic cannot survive long the notion that unelected judges must decide fundamental issues for the common people.[36]

It is, finally, of profound significance that the coequal branches of the federal government have refused to endorse *Roe.*

> [I]n every session since *Roe* was decided, Congress has been flooded with proposals directly or indirectly expressing dissatisfaction with the abortion privacy doctrine. In less than thirteen years [1973 to mid-1985], nearly six hundred separately-numbered resulutions pertaining to abortion [were] introduced in Congress, including 270 joint resolutions proposing anti-abortion amendments to the Constitution. Congress has enacted more than twenty 'prolife' bills in recent years, and several highly publicized

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[35] *Missouri K. & T. Ry. v. May,* 194 U.S. 267, 270 (1904) (Holmes, J.) (cited in *Maher v. Roe,* 432 U.S. 464, 479-480 (1977)), and *Regan v. Time, Inc.,* 468 U.S. 641, 700 (1984) (Stevens, J., concurring and dissenting in part).

[36] *See also* L. Hand, The Bill of Rights 70 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not").

> congressional hearings have featured prominent criticism of the abortion decisions.[37]

Such substantial congressional animosity toward a judicially-created rule is telling. The refusal of the coequal branches of the federal government (and the state legislatures) to endorse or support the abortion doctrine of the Court stands in stark contrast, for instance, to the success of the Court's gender discrimination decisions — a contrast that is especially noteworthy because the Court has dealt with both subjects during the same period of time.[38] This clash between the life-tenured judiciary and the elected representatives of the people should not continue. As Justice Powell noted in his concurring opinion in *United States v. Richardson,* 418 U.S. 166, 188 (1974):

> Repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and

[37] Wardle, 1985 B.Y.U. L. Rev. at 247-48. During the past six years, 299 separately-numbered bills or resolutions regarding abortion have been introduced in Congress. In the 98th Congress — 94 filings; 99th Congress — 93 filings; 100th Congress — 105 filings; 101st Congress (1 month) — 7 filings. U.S. Senate, Legislative Information Service, *Legis,* Feb. 10, 1989. As appendix B, attached, reveals, there are currently 22 separate provisons in federal statutory law dealing with abortion (most prohibiting any governmental support for non-therapeutic abortion in federal programs); all but four of these provisions have been enacted since 1973. Moreover, in little over a decade, congressional restrictions of public funding of abortion (enacted annually as budget restrictions) have provoked at least four major confrontations between Congress and the Court. *See Beal v. Doe,* 432 U.S. 438 (1977); *Maher v. Roe,* 432 U.S. 464 (1977); *Harris v. McRae,* 448 U.S. 297 (1980); *Williams v. Zbaraz,* 448 U.S. 358 (1980). *See also Bowen v. Kendrick,* 108 S.Ct. 2562 (1988).

[38] *See* Ginsburg, *Some thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375, 376 (1983).

> the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of other branches.

IV. The Decisions Below Entrench Upon Policy-Making Authority Properly Reserved To The States

From 1973 through the end of 1988 state legislatures have enacted *three hundred* (or more) different bills regulating abortion.[39] As Appendix A (A-1 through A-15) documents, abortion regulations, restrictions and prohibitions are contained in the current statutes or codes of *all* the states. These enactments, moreover, manifest remarkably consistent life-protective

[39] For the bills enacted from 1973 to 1984, *see* Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 247 n.83. For the period since then *see From the World Beyond Washington,* in Planned Parenthood — World Population (Alan Guttmacher Institute), Washington Memo, Jan. 14, 1986, at 5 (hereinafter "Washington Memo") (in 1985 eighteen separate abortion bills were enacted by state legislatures); Washington Memo, Jan. 15, 1987, at 6 (in 1986 at least six different pieces of abortion legislation were enacted by state legislatures); Washington Memo, Jan. 21, 1988, at 7 (in 1987 eight pieces of abortion legislation were enacted by state legislatures); Washington Memo, Jan. 12, 1989, at 4 (in 1988 nine separate pieces of abortion legislation were enacted by state legislatures). The fervency of the legislative debate is further demonstrated by the bills introduced, but not passed, by state legislatures. For example, in 1988, 200 bills regulating abortion were introduced in state legislatures, but only nine were enacted into law that year. Washington Memo, Jan. 12, 1989, at 4. Moreover, by 1983, 23 state legislatures had sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution and at least 19 state legislatures had passed petitions calling on Congress to convene a Constitutional Convention to propose a human life amendment to the Constitution. Wardle, *supra,* 1985 B.Y.U. L. Rev. at 274. *See also* Appendix E.

policies plainly in tension with the Court's abortion privacy doctrine. Thus, this case raises sensitive federalism issues.[40]

The shared-sovereignty scheme of cooperative federalism adopted in the Constitution guarantees that when there is no constitutional consensus (*i.e.*, a majority in a super-majority of the constituent states; *see* U.S. Const., art. V) on an issue of public policy, that issue may not be considered part of the fundamental, unquestionable law of the land. The drafters of the Constitution thus rejected the view that national consensus can always (or best) be achieved through the imposition of national policies formulated at the national level by officials of the national government. The genius of our Constitution is that it is "made for people of fundamentally differing views." *Lochner v. New York,* 198 U.S. 45, 76 (1905) (Harlan, J., dissenting). Many federal courts, including the courts below, have significantly erred by trying to impose upon the states a nonexistent consensus regarding abortion policy.

In *Roe,* the Court announced a complicated set of rules designed to regulate the abortion decision nationwide. "Sensitivity to the values of federalism," however, "would . . . have

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[40] Abortion privacy doctrine raises federalism issues beyond the apparent tension between state legislatures and the federal judiciary. Despite the constant, unanimous assertion by the states of their continuing interest in determining their own abortion policy, there is abundant evidence that government authority to regulate abortion has shifted away from the state and toward the national legislature since *Roe v. Wade*. For example, in the entire decade before *Roe* was decided only ten bills were introduced in Congress relating to abortion (and all of them were introduced *after* federal courts began to invalidate state abortion laws in 1969). By comparison, in the decade after *Roe* nearly 500 separately-numbered bills and resolutions dealing with abortion were introduced in Congress (an increase of about *5000 percent*), and in the six years since the end of the first post-*Roe* decade, another 299 have been introduced. *Legal Ramifications of the Human Life Amendment, supra* note 33, at 47-82 (listing proposed congressional legislation dealing with abortion); *see also* Wardle, 1985 B.Y.U. L. Rev. at 247-48.

counseled a decision [regarding abortion] permitting the states to shape their abortion laws at least in some measure, according to local preferences." Sandalow, *Federalism and Social Change,* 43 L. and Contemp. Probs., Summer 1980, at 29, 36. Why? Because at the time the Court decided *Roe,* and certainly since then, "a national consensus plainly had not evolved regarding abortion." *Id.* at 36.[41] But, if the States were now liberated from the stifling abortion privacy doctrine that treats them as if they are "subordinate governmental agencies subject to societal norms determined at the national level," "the law might come to reflect a tolerable accommodation of competing views, differing from state to state in accordance with the differences among their citizens." *Id.*[42]

The responsibility of this Court to preserve the federal system of government is surely as important as its responsibility to nurture the development of new constitutional liberties. Abortion is a deeply controversial issue on which the scholars and experts are divided. In determining what the abortion policy of the United States is — or should be — the Constitution compels substantial deference to decisions made at the state level. As this Court has previously noted (*San Antonio School District v. Rodriquez,* 411 U.S. 1, 42-43 (1973)):

> The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could cir-

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[41] If there is any clear national consensus regarding the abortion issue, however, it is reflected by the consistent and abiding policy of the states to protect unborn children. *See* Appendix A.

[42] The process of achieving general national consensus on the issue of abortion by means of state legislation was well underway when this Court disrupted the process in 1973. L. Wardle & M. Wood, A Lawyer Looks at Abortion 42, 43 (1982).

> cumscribe or handicap the continued research and experimentation so vital to keeping even partial solutions to [such] problems and to keep abreast of ever-changing conditions.

In *Whalen v. Roe*, 429 U.S. 589, 597 (1977), another privacy decision, the Court emphasized that individual states must "have broad latitude in experimenting with possible solutions to problems of vital local concern." The Court stated that "Mr. Justice Brandeis' classic statement of the proposition merits reiteration" (*id.* at n.20) (*quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.[43]

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[43] Over sixty years ago, during the heyday of another era of substantive due process, Justice Holmes wrote (*Truax v. Corrigan*, 257 U.S. 312, 342-44 (1921) (Holmes, J., dissenting)):

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by several States, even though the experiments may seem futile if even noxious to me and to those whose judgments I most respect.

Justice Frankfurter echoed that concern when he wrote (F. Frankfurter, The Public and its Government 50-51 (1930)):

(footnote continued on next page)

The constitutional allocation of law-making functions between state and federal governments is seriously undermined if federal courts disregard state legislation on matters as to which there is no express overriding federal legislative interest. *See generally Hanna v. Plummer*, 380 U.S. 460, 477-478 (1965) (Harlan, J., concurring). There is no better modern evidence of the inhibiting anti-federalist effects of substantive due process than the decisions of the courts below. If upheld, they will continue to stifle healthy and democratic debate about abortion.

V. Strict Scrutiny Of The Missouri Regulations Is Inappropriate

The lower courts prematurely applied an overly strict standard of review without giving due consideration to the profoundly important state interests supporting the Missouri legislation. The Court should take this opportunity to clarify the standards governing judicial review of state abortion regulations.

State regulations having a harmless, collateral, or insubstantial impact upon protected interests should not trigger *any* level of exacting judicial review.[44] Rather, there must be a significant intrusion upon protected interests before such scrutiny is in-

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> The veto power of the Supreme Court over the social-economic legislation of the states, thus exercised through the due process clause, is the most vulnerable aspect of undue centralization. It is . . . the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error. . . . The inclination of a single Justice or two, the tip of his mind or his fears, may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with the social evil.

[44] *Whalen v. Roe*, 429 U.S. 589, 597 (1977) ("State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part").

voked.[45] Thus, the earliest abortion precedents of this Court teach that legislation dealing with abortion or having some incidental effect upon the abortion decision is not, for that reason alone, subject to strict scrutiny. State regulation must substantially burden or restrict the abortion decision before any level of exacting scrutiny is triggered.[46]

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[45] *See, e.g., Zablocki v. Redhail,* 434 U.S. 374, 383 (1978) ("critical examination" is appropriate when government classification "significantly interferes with the exercise of" fundamental right to marry); *id.* at 387 (rigorous judicial scrutiny appropriate when legislation "interfere[s] directly and substantially with the right to marry" and citizens "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental"); *id.* at 397 (Powell, J., concurring in judgment) ("the Court has yet to hold that all regulation touching upon marriage implicates a 'fundamental right' triggering the most exacting scrutiny"); *id.* at 403 (Stevens, J., concurring in judgment) (state laws "may 'significantly interfere with decisions to enter into the marriage relationship.' . . . That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences . . . ."); *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977) (plurality opinion) ("the usual judicial deference" is unwarranted when the government "undertakes . . . intrusive regulation" of a protected right).

[46] While the Court's explanation and application of this standard has sometimes been obscure, "the right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion,' as the courts below seemed to think. Rather, the right protects the woman from unduly burdensome interference" with her right of privacy. *Maher v. Roe,* 432 U.S. at 473-74. *See Doe v. Bolton,* 410 U.S. 179, 192 (1973) ("unduly restrict the woman's right of privacy"); *id.* at 193 ("impermissibly restricts the physician's right"); *id.* at 198 ("unduly restrictive of the patient's rights" and "substantial and irrational roadblocks"); *id.* at 199 ("unduly infringes on the physician's right to practice"); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 66-67 (1976) ("unduly burdensome interference"); *Bellotti v. Baird,* 443 U.S. 622, 640 (1979) (opinion of Powell, J.) (the question the Court must answer is whether statute "does not unduly burden the right to seek an abortion"); *Harris v. McRae,* 448 U.S. 297, 314 (1980); *Beal v. Doe,* 432 U.S. 438, 446 (1976). *See generally City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 452-53, 462 n.8 (1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 828-833 (1986) (O'Connor, J., dissenting).

The Missouri regulations at issue here do not substantially burden, but only collaterally impact, the abortion-childbirth decision. The broad-based claims of appellees are neither "implicit in the concept of ordered liberty . . . such that neither liberty nor justice would exist if [they] were sacrificed," (*Palko v. Connecticut,* 302 U.S. 319, 325 (1937)), nor are they "deeply rooted in this Nation's history and tradition" (*Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion)). *Cf. Bowers v. Hardwick,* 478 U.S. 186, 191-195 (1986). Surely the "right" to be free of legislative declarations that life begins at conception; the "right" to indirect public funding, assistance of public employees, and use of public facilities to facilitate abortions; the "right" to official encouragement and promotion of abortion; and the "right" to the cheapest, quickest late-pregnancy abortions possible (regardless of the risk to potentially viable unborn children) cannot — by any stretch of the imagination — be said to be inherent in the text of the Constitution, the traditions of the American people, or to be a pillar upon which democracy rests. *See generally* A. Cox, *supra* at 54.

Even if the Court concludes that the Missouri regulations have a significant enough impact upon protected interests to warrant some level of judicial scrutiny, the standard of review applied below was overly strict. The abortion right recognized in *Roe* "cannot be said to be absolute." 410 U.S. at 154. "[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton,* 410 U.S. at 198. The almost-certainly-fatal strict scrutiny applied below, however, effectively creates such an absolute right. This result flies in the face of principled constitutional adjudication.

"A test so severe that legislation can rarely meet it should be imposed by the courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments." *Carey v. Population Services International,* 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment). *See also* Parts III and IV *supra.* Because

of these concerns, legislation need ordinarily possess only a "rational basis" to pass muster under the due process clause. Compare *Lochner v. New York,* 198 U.S. 45 (1905) with *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). This Court would do much to clarify and rationalize the task of federal (and state) courts by reversing the judgment of the court of appeals and indicating that the ordinary standard for due process review — *i.e.,* the rational basis test — applies to abortion cases.[47] At a minimum, the Court should, in such cases, defer to legislative judgments at least to the extent appropriate under a "critical examination" standard of review, instead of applying the traditionally fatal standard of "strict scrutiny." *Cf. Zablocki v. Redhail,* 434 U.S. 374, 383 (1978) (applying a "critical examination" standard in a marriage privacy case).[48]

Finally, the courts below erred in failing to give sufficient attention and respect to the profound interests and values asserted by Missouri in support of its legislation.[49] If the history of abor-

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[47] The standard of judicial review for abortion cases is a muddled morass. Apparently the constitutionality of abortion regulations might depend upon (1) the trimester of pregnancy regulated, *Roe,* 410 U.S. at 164-65, *but see City of Akron,* 462 U.S. at 434, (2) the current state of prevailing medical opinion, *City of Akron,* 462 U.S. at 431, 434, and (3) the legislative motive for enacting the legislation, *Thornburgh,* 476 U.S. at 759. These and other ambiguities in this Court's abortion decisions have led the lower courts into an impossible swamp.

[48] Under this standard, state regulation passes constitutional muster if it "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki,* 434 U.S. at 388.

[49] Indeed, the decisions below once again render the federal judiciary vulnerable to the most oft-repeated criticism of substantive due process: that the doctrine permits judges to exceed the judicial function "when a statute offends their policy preferences." A. Cox, *supra* at 54.

tion regulation in Missouri and the United States teaches anything, it is that the resolution of the complex and controversial issues surrounding the abortion debate is not allocated to the judicial branch alone. *Fullilove v. Klutznick,* 448 U.S. 448, 472 (1980). Missouri's legislation is neither hasty, nor novel; rather it reflects more than a century of consistent statutory respect for a fundamental principle of western civilization: the protection and fostering of human life.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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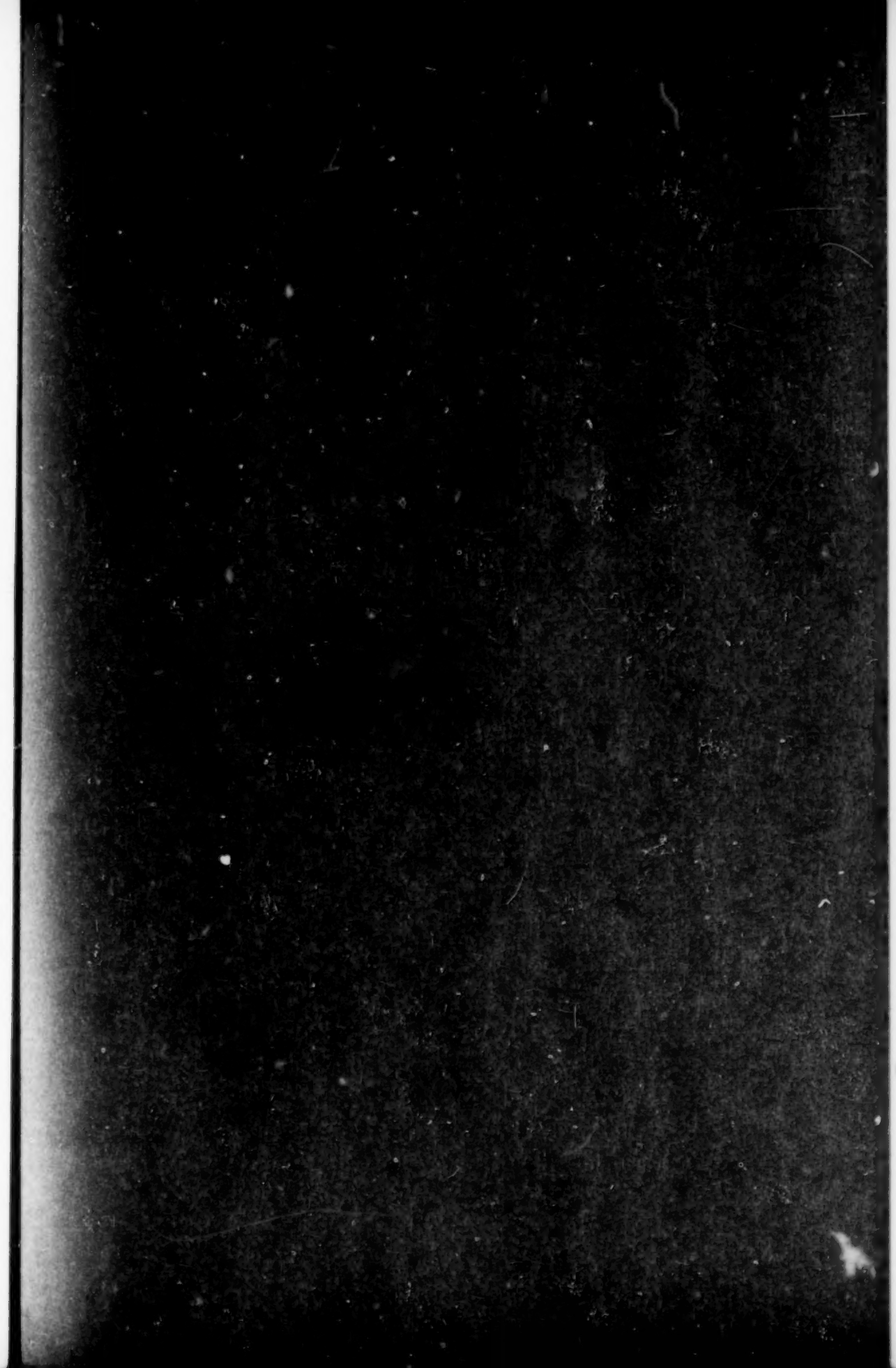
February 22, 1989



APPENDIX A

STATE STATUTES REGARDING ABORTION
(February 1989)

(Current Legislation Regulating, Restricting or Prohibiting Abortion in All 50 States)

A-1 Trimester/Health Regulations.

AK Alaska Stat. § 18.16.010(a)(1) (1986) (Lic. phys. or surg.); § 18.16.010(a)(2) (1986) (Hosp. or approv. fac.); § 08.64.105 (1987) (State Med. Board to reg).

AZ Ariz.Rev.Stat.Ann. § 96-2901 (1956) (Duty to promote life if born alive).

AR Ark.Stat.Ann. § 20-9-302 (1987) (Clinics, etc. registered with and regulated by State Board of Health); § 5-61-302 (1987) (Lic. med. pract.; viol.); § 5-61-102 (1987) (Unlawful/drugs after quickening for abortion, or any other method); § 20-18-603 (1987) (Registration of term. of pregnancy).

CA Cal.Health & S.Code § 25951 (West 1984) (Authority to perform; requirements); § 25952 (West 1984) (Preg. res. from rape or incest); § 25953 (West 1984) (Med. Staff Committee); § 25954 (West 1984) (Def. mental health); § 25955.5 (West 1984) (System for Reporting); § 25955.9 (West 1984) (Rights of infant born alive); § 27491 (West 1984) (Death requiring inquiry).

CO Colo.Rev. Stat. § 18-6-101 (1986) (Lic. phys., hosp.); § 18-6-101(1)(6) (1986) (Less than 16 wks of gestation); § 18-6-101(4) (1987) (req. of hosp. board); § 25-1-666 (1982) (Sale of drug only through prescription).

DE Del.Code Ann., tit. 24, § 1790(a) (1987) (Lic. phys., hosp); § 1790(b)(1) (1987) (No more than 20 wks. gestation); § 1790(c) (1987) (Written report from hosp. board); § 1795 (1987) (Protect live birth).

nant patients, report); ch. 38 § 6 (West 1983) (Duty to report death).

MI Mich.Comp.Laws Ann. § 52.202 (1967) (County medical examiner invest. death by abortion); § 52.203 (1967) (Notice to Cty. Med. Ex.); § 333.2835 (1980) (Reports; abortion defined).

MN Minn.Stat.Ann. § 145.413 (West 1989) (Recording, reporting); § 145.416 (West 1989) (Licensing and regulating); § 145.412(2) (West 1989) (Hosp. or abort. fac. after 1st trim.); § 145.412(1) (West 1989) (Phys.).

MS Miss.Code Ann. § 97-3-3(1) (1972) (Duly lic., pract. phys.).

MO Mo.Ann.Stat. § 188:020 (Vernon 1983) (Physicians req.); § 188.025 (Vernon Supp. 1988) (Subseq. 16 wks, hosp. req.); § 188.052 (Vernon 1983) (Physician's report); § 188.055 (Vernon 1983) (Forms to be supplied to facilities and physicians).

MT Mont.Code Ann. § 50-20-109(a) (1987) (Lic. physician); § 50-20-109(b) (1987) (After 3 mos., hosp.); § 50-20-110 (1987) (Reporting); § 50-20-109, 49-3-204 (1987) (Hosp. performing, licensing).

NE Neb.Rev.Stat. § 28-335 (1985) (Lic. phys.); § 28-336 (1985) (Accepted med. proc.); § 28-343 (1985) Bureau Vital Statis. reporting form); § 28-345 (1985) (Dept. Health file).

NV Nev.Rev.Stat. § 442.250(1)(a) (1987) (Lic. phys.); § 442-250(1)(b) (1987) (Within 24 wks); § 442.250(1)(c) (1987) (After 24th wk); § 442.250(2) (1987) (After 24th in hosp.); § 442.256 (1987) (Records); § 442.265 (1987) (Hosp. sub. vital stats); § 442.260 (1987) (Health div. adopt regulations).

NJ N.J.Stat.Ann. § 30:4D-6.1 (West 1980) (Performed in hosp., phys. submit report).

NM N.M.Stat.Ann. § 24-18-18 (1978) (Report of induced abortion).

NY N.Y. Penal Law § 125.05(3) (McKinney 1984) (Duly lic. phys., within 24 wks.).

NC N.C.Gen.Stat. § 14-45.1(a) (1986) (Phys. lic., first 20 wks in hosp. or facility); § 14-45.1(b) (1986) (After 20th wk.); § 14.45.1(c) (1986) (Statistical reports).

ND N.D.Cent.Code § 14-02.1-04(1) (1981) (Lic. phys.); § 14-02.1-04(2) (1981) (1st 12 wks, but before viability, lic. hosp.); § 14.02.1-07 (1981) (Records req.); 14.02.1-07.1 (1981) (Forms).

OH Ohio Rev.Code Ann. § 3701.341 (Anderson 1987) (Public health rules on abortion may be adopted by Public Health Council).

OK Okla.Stat.Ann. tit. 63 § 1-731(A) (West 1984) (Phys. lic.); § 1-731(B) (West 1984) (Subs. end of 1st trim., hosp.); § 1-733 (West 1984) (Self-induced abortion; advice of physician); § 1-737 (West 1984) (Hosp. which may perform); § 1-738 (West 1984) (Form to be completed); § 1-739 (West 1984) (Records).

OR Or.Rev.Stat. § 435-496 (1987) (Reports to Vital Stat. Unit).

PA Pa.Stat.Ann. tit. 18 §3207 (Purdon 1975) (Abortion facilities); § 3207 (Purdon 1975) (Reports); § 3209 (Purdon 1975) (Abortions after 1st trimester); § 3214 (Purdon 1975) (Reporting) (Held unconst.).

SC S.C.Code Ann. § 44-41-20 (Law. Co-op 1976) (Legal Abortions 1st, 2nd, 3rd trimesters); § 44-41-60 (Law. Co-op 1976) (Reported); § 44-41-70 (Law. Co-op 1976) (Promulgation of rules for hosp.); H&E R 61-12 §§ 101

to 609 (Law. Co-op 1976) (Rules and regs for abortion clinics, minimum licensing standards).

SD S.D.Codified Laws Ann. § 34-23A-3 (1986) (First 12 wks); § 34-23A-4 (1986) (2nd 12 wks-place of performance); § 34-23A-5 (1986) (After 24 wks); § 34-23A-6 (1986) (Blood supplies and testing facilities); § 34-23A-19 (1986) (Reports req.).

TN Tenn.Code Ann. § 39-4-201(c)(1) (1982) (1st 3 mos.); § 39-4-201(c)(2) (1982) (After 3 mos. before viability; hosp.); § 39-4-203 (1982) (Records and reports).

TX Tex.Rev.Civ.Stat.Ann. art. 4512.8 (Vernon Supp. 1989) (Texas Abortion Fac. Reporting/Licensing Act).

UT Utah Code Ann. § 76-7-302 (Supp. 1988) (Phys., 90 days after must be in hosp.); § 76-7-306 (1953) (Concurrence of attending physician); § 76-7-309 (1953) (Pathologist's report); § 76-7-313 (Supp. 1988) (Physician's report); § 26-2-23(3) (1953) (Records kept).

VA Va.Code Ann. § 18.2-72 (1988) (When lawful 1st trim.); § 18.2-73 (1988) (When lawful 2nd trim.); § 18.2-74 (When lawful after 2nd trim.); § 18.2-74.1 (1988) (When nec. to save life of woman); § 82.1-264 (1985) (Reports).

WA Wash.Rev.Code Ann. § 9.02.060 (1987) (Lawful termination); § 9.02.070 (1987) (Not quick, more than 4 mos.); § 9.02.070(c) (1987) (Accredited hospital); § 43.20A.625 (1982) (Records).

WV W.Va.Code § 16-2F-6 (1984) (Reporting reqs.).

WI Wis.Stat.Ann. § 69.186 (West Supp. 1988) (Induced abortion reporting).

WY Wyo.Stat. § 35-6-107 (1988) (Forms for reporting); § 35-6-108 (1988) (Complications).

A-2 Viability and Post-Viability Regulations.

AK Alaska Stat. § 18.16.010(d) (1962) (Abortion def. as termin. preg. nonviab. fetus).

AZ Ariz.Rev.Stat.Ann. § 36-2301.01 (1956) (Abortion of viab. fetus; reqs.; def.).

AK Ark.Stat.Ann. § 20-16-703 (1987) (Not pres. viab. until end of 25th wk.); § 20-16-705 (1987) (Prohib; exceptions); § 20-16-706 (1987) (Method or technique); § 20-16-707 (1987) (Attendance of addit. phys.).

FL Fla.Stat.Ann. § 390.001(5) (West 1986) (Standard during viab.).

GA Ga.Code Ann. § 16-12-141 (1988) (Viab. unborn right to life, annon. after).

HI Haw.Rev.Stat. tit. 25 § 453-16(b) (1985 repl.) (Abortion = termin. of unviab. fetus).

ID Idaho Code § 18-608(3) (1987) (3rd trim/viab; save fetus).

IL Ill.Ann.Stat. ch. 38 para. 81-25 (Smith-Hurd 1975) (Preserv. of life and health of mother; viab. of fetus); para. 81-26 (Smith-Hurd 1975, as amended) (Preserv. life and health of viab. fetus); para. 81-26(2)(a) (Smith-Hurd 1975) (Attending phys.) para. 81-32 (Smith-Hurd 1975) (Evid. of life); ch. 110 para. 11-107.1 (1983) (Supp. 1988) (Injunct. relief father after viab.).

IN Ind.Code Ann. § 35-1-58.5-2(3) (1986) (After viab.); § 35-1-58.5-7 (1986) (After viab.; 2nd phys; preserv. life; legal status).

IA Iowa Code Ann. § 707-10 (1978) (Preserv. life and health of viab. fetus).

KY Ky.Rev.Stat.Ann. § 311.780 (1983) (Prohib. after viab.-exceptions).

LA La.Rev.Stat.Ann. § 14:87.5 (1985) (intentional failure to sustain life of aborted viable infant); § 40:1299.35.4 (1989 supp.) (No abortion after viability; exceptions) (Additional phys. preserve life).

ME Me.Rev.Stat.Ann. tit. 22 § 1598(4) (1964) (Supp. 1988) (Abortions after viab. are crim.).

MN Minn.Stat.Ann. § 145.415 (West 1989) (Live fetus after abortion); § 145.412 subd. 3 (West 1989) (Unlawful when fetus potent. viab.; exceptions).

MO Mo.Ann.Stat. § 188.029 (Supp. 1989) (Phys. determine viab.); § 188.030 (1982) (Abort. viable permitted).

MT Mont.Code Ann. § 50-20-108 (1987) (Prot. of prem. infants born alive); § 50-20-109(c) (1987) (No abort. after viab.).

NE Neb.Rev.Stat. § 28-329 (1985) (No abort. after viab.); § 28-330 (1985) (Abort. procedure prot. viab. child).

NY N.Y.Pub Health Law § 4164 (McKinney 1984) (Induced viab. births).

ND N.D.Cent.Code § 14-02.1-04(3) (1981) (After viab, no abort. except in hosp.); § 14.021.03 (1981) (Preserving life of viab. child).

OK Okla.Stat.Ann. tit. 63 § 1-732 (West 1983) (Viable fetus-grounds to abort, procedure); § 1-734 (West 1983) (Preserve life, attending phys., live-born fetus).

PA Pa.Stat.Ann. tit. 18, § 3210 (Purdon 1975) (Abortion after viab.); § 3211 (Purdon 1975) (Viab.) (Held unconst.).

UT Utah Code Ann. § 76-7-302 (Supp. 1988) (After viab., when necessary for mother's health); § 76-7-307 (1953) (Med. proc. to save unborn child); § 76-7-308 (1953) (Med. skills).

WI Wis.Stat.Ann. § 940.15(2) (West Supp. 1988) (No abortion after viab.); § 940.15(3) (West 1981) (Unless necess to pres. life of woman); § 940-15(4) (West 1981) (Then, in hosp.); § 940.15(6) (West 1981) (Method).

WY Wyo.Stat. § 35-6-102 (1988) (No abortion after viab.); § 35-6-103 (1988) (Viab. no affected by abortion); § 35-6-104 (1988) (Means of treatment).

A-3 Informed Consent.

DE Del.Code Ann. tit. 24, § 1794 (1974 rev.) (Consent of woman).

FL Fla.Stat.Ann. § 390.001(4) (West 1986) (Informed consent); § 390.025(2) (West 1986) (Abortion referral and counseling agencies).

GA Ga.Code Ann. § 15-11-12(a)(2) (1985) (Minor signs consent).

ID Idaho Code § 18-609 (1987) (Informed consent); § 18-610 (1987) (Refusal to consent by pregnant woman).

IL Ill.Ann.Stat. Ch. 18 para. 81-26(b) (Smith-Hurd 1975) (Inform woman of pain reliever for fetus); para. 81-54(2) (Smith-Hurd 1975) (Informed consent of minor).

IN Ind.Code Ann. § 35-1-68.6-2(1)(B) (1986) (Woman's consent filed).

IA Iowa Code Ann. § 707.8 (1978) (Nonconsensual termination).

KY Ky.Rev.Stat.Ann. 12 § 311.726 (1983) (Vol, inf. consent); § 311.729 (1983) (Info on alternatives) (appear to be unconst).

LA La.Rev.Stat.Ann. § 40:1299.33(D) (1985) (Writ. consent); § 40:1299.35.6 (1985) (Informed consent).

ME Me.Rev.Stat.Ann. tit. 22, § 1599 (Supp. 1988) (Informed consent 48 hr. waiting).

MD Md HG Code Ann. § 20-211 (1987) (Inform. before abortion, signed).

MA Mass.Gen.Laws Ann. ch. 112, § 12S (West 1983) (Written informed consent).

MN Minn.Stat.Ann. § 145.412(4) (West 1989) (Informed consent).

MO Mo.Ann.Stat. § 188.027 (Vernon 1982) (Informed consent); § 188.039 (Vernon Supp. 1989) (Consent form).

MT Mont.Code Ann. § 50-20-106 (1987) (Informed consent); § 50-20-104 (1987) (Disclosure of alternatives); § 50-20-106 (1987) (No req., no coercion).

NE Neb.Rev.Stat. § 28-327 (1985) (Informed consent req.).

NV Nev.Rev.Stat. § 442.252 (1987) (Physician certify); § 442.253 (1987) (Requirements).

NY N.Y. Penal Law § 125.05(3) (McKinney 1984) (Consent).

ND N.D.Cent.Code § 14-02.1-03(1) (1981) (Full informed consent).

OH Ohio Rev.Code Ann. § 2919.12(a) (Anderson 1987) (Informed consent).

OK Okla.Stat.Ann. tit. 63, § 1-738 (West 1983) (Consent).

PA Pa.Stat.Ann. tit. 18, § 3205 (Purdon 1975) (Informed consent) (Held unconst.); § 3208 (Purdon 1975) (Printed info.) (Held unconst.).

RI R.I.Gen.Laws § 23-4.7-2 (1985) (informed writ. consent req.); § 23-4.7-3 (1985) (Req. disclosures); § 23-4.7-5 (1985) (Consent form).

SC S.C.Code Ann. § 44-41-20 (1976) (1st, 2nd, 3rd trim. woman's consent); § 44-41-30(a) (1976) (Persons from whom consent is req.).

SD S.D.Codified Laws Ann. § 34-23A-7 (1986) (Consent of patient); § 34-23A-10 (1986) (Info, counseling required); § 34-23A-10.1 (1986) (Statement of Informed Consent).

TN Tenn.Code Ann. § 39-4-201(c) (1982) (Woman's consent); § 39-4-202 (1982) (Consent req., info).

UT Utah Code Ann. § 76-7-305.5 (Supp. 1988) (Informed consent).

VA Va.Code Ann. § 18.2-76 (1988) (Informed consent req.).

WA Wash.Rev.Code Ann. § 9.02.070 (1987) (Prior consent).

WI Wis.Stat.Ann. § 146-78 (West Supp. 1988) (Informed consent).

A-4 Parental Participation Requirements.

AL Ala.Code § 26-21-1 (Supp. 1988) (Leg. Purp.); § 26.21-2 (Supp. 1988) (Def.); § 26-21-3 (Supp. 1988) (Writ./Unem. minor; notice to mother when preg. caused by father; writ. statement when eman. minor; waiver); § 26-21-4 (Supp. 1988) (Proc. for waiver); § 26-21-5 (Supp. 1988) (Not nec. in med. emerg.); § 26-21-7 (Supp. 1988) (Nonliab. of phys. for claims of nondisc. of info.); § 26-21-8 (Supp. 1988) (Confident.).

AK Alaska Stat. § 18.16.010(a)(3) (1962) (Parental consent).

AZ Ariz.Rev.Stat.Ann. § 36-2152(A) (1982) (Parental notice, unmarried or uneman. minor); § 36-2152(B)(2) (1982) (Notice req. if jud. ord.); § 36-2152(B)(3) (1982) (Emerg.); § 36-2153 (Supp. 1988) (Parental cons. waiver).

AK Ark.Stat.Ann. § 28-65-302 (1987) (Ct. approval before guardian can consent for incapacitated pers.).

CA Cal.Civ.Code 34.5 (West Supp. 1989) (Children and minors, consent); § Cal. Health & S Code § 25958 (West Supp. 1989) (Uneman. minor); Cal. cc Code § 2435 (West Supp. 1989) (Attorney in fact; auth. to consent).

CO Colo.Rev.Stat. § 18-6-101(1) (1986) (Justified med. term. incl. parental/spousal consent reqs.).

DE Del.Code Ann. tit. 24, § 1790(b)(3) (1974) (2 parents if minor resides in same household; otherwise 1 parent).

FL Fla.Stat.Ann. § 390.001(4)(a) (West 1986) (If under 18, parent or court (unmarried)); § 390.001(4)(b) (West 1986) (If married, husband gets notice).

GA Ga.Code Ann. § 15-11-112(a)(1)(A) (1985) (Notification required (parental)); § 15-11-112(b) (1985) (Waiver provision).

ID Idaho Code § 18-609(6) (1987) (Unmarried minor, 24 hr. notice to parents).

IL Ill.Ann.Stat. Ch. 38 para. 51-54(3) (Smith-Hurd 1975) (Parental consent for minor); para. 81-64 (Smith-Hurd 1975) (Notice req. uneman. minor); para. 81-65 (Smith-Hurd 1975) (Waiver of notice); para. 81-66 (Smith-Hurd 1975) (Med. emerg. excep.); para. 81-67 (Smith-Hurd 1975) (Other excep.); ch. 40 para. 1015 (Supp. 1988) (No spousal, parental liab. without consent).

IN Ind.Code Ann. § 35-1-58.5-2.5(a) (1986) (Uneman. minor, 1 parent); § 35-1-58.5-2.5(b) (1986) (Petition juv. cit.); § 35-1-58.5-2.5(c) (1986) (Waiver); § 35-1-58.5-2.5 (1986) (Notice req.).

KY Ky.Rev.Stat.Ann. 12 § 311.732 (1983) (Writ. consent of minor, both parents); § 311.732 (1983) (Exceptions); §

311.733 (1983) (Severability); § 311.735 (1983) (Notice to spouse) (Atty gen. opp. unconst.).

LA La.Rev.Stat.Ann. § 40:1299.33(D) (1985) (Uneman. minor, writ. par. consent); § 40:1299.33(d) (1985) (Minor emanc. by marriage, spousal consent); § 40:1299.35.5 (1985) (Parental consent); § 40:1299.35.5 (1985) (Court permission).

ME Ma.Rev.Stat.Ann. tit. 22, § 1597 (Supp. 1988) (Parental notif.) (Consent not req.).

MD Md. HG Code Ann. § 20-103(a) (1987) (Notice req. for unmarried minor); § 20-103(b) (1987) (Incomplete notice); § 20-103(c); (d) (1987) (Waiver; evidence of notice).

MA Mass.Gen.Laws Ann. ch 112, § 12S (West 1983) (Minor, unmarried, her consent & parents'); § 12S (West 1983) (Judge's order).

MN Minn.Stat.Ann. § 144.353 subd. 2 (West 1989) (Parental notice for uneman. minor-48 hours); § 144.343 subd. 6 (West 1989) (Substitute notif.).

MS Miss.Code Ann. § 41-41-53(1) (Supp. 1988) (Uneman. minor, writ. consent both parents); § 4-41-53(3) (Supp. 1988) (Petition for waiver).

MO Mo.Ann.Stat. § 188.028.1(1) (Vernon 1989) (Writ. consent minor & 1 parent); § 188.028.1(2) (1989) (Eman. minor); § 188.028 (Vernon 1989) (Court order).

MT Mont.Code Ann. § 50-20-107 (1987) (Writ. notice to spouse or parent req.) (Parent if under 18 and unmarried); § 41-1-105 (1987) (Self-consent of minors not applic. to abortion).

NE Neb.Rev.Stat. § 38-347 (1985) (Minor, notice req., excepts, waiver).

NV Nev.Rev.Stat. § 442.255 (1987) (Uneman. minor, notify parent); § 442.255 (1987) (Ct. order); § 442.2555 (1987) (Appeal ct. ruling).

ND N.D.Cent.Code § 14-02.1-03(1) (1981) (Notif. to parents of uneman. minor-before viab.); § 14.02.1-03(2)(a) (1981) (Subsequent to viab.); § 14-02.1-03(2)(b) (1981) (Uneman. minor consent of parents); § 14.02.1-03.1 (1981) (Parental consent or judicial author.-limited to rights under constit.).

OH Ohio Rev.Code Ann. § 2919.12(B)(1)(a) (Anderson 1987) (Uneman. minor-24 hrs. notice to 1 par.; juv. ct.); § 2919.12(B)(1)(a) (i)-(iv); (Anderson 1987) (Uneman. minor notice to others besides parents).

OK Okla.Stat.Ann. tit. 63, § 1-738 (West 1983) (Consent of parents); § 2602 (West 1983) (Right of self-consent (minor)).

PA Pa.Stat.Ann. tit. 18, § 3206 (Purdon 1975) (Parental consent).

RI R.I.Gen.Laws § 23-4.7-6 (1985) (Minors-parental consent); § 23-4.8-2 (1985) (Notify husband); § 23-4.8-3 (1985) (Exceptions).

SC S.C.Code Ann. § 44-41-20(c) (1976) (3rd trim., husband's consent); § 44-41-30(b)(c) (1976) (Unmar. minor, incompetent).

SD S.D.Codified Laws Ann. § 34-23A-7 (1987) (Unmarried minor-consent of parents); § 34-23A-7 (1987) (Married minor, consent of husband).

TN Tenn.Code Ann. § 37-10-303 (Supp. 1988) (Uneman. minor, writ. consent parents); § 37-10-303 [effec. July 1, 1989] (Waiver); § 37-10-304 [effec. July 1, 1989] (Applicability-pseudonym); § 39-4-202(f) (1982 repl.)

(Notice req. uneman.); § 39-4-202(f)(1)(2) (1982 repl.) (Notice not req. if eman.).

UT Utah Code Ann. § 76-7-304 (1953) (Notify parents, husband if married).

VA Va.Code Ann. § 18.2-76 (1988) (When consent of parent req.).

WA Wash.Rev.Code Ann. § 9.02.070(a) (1987) (Married, consent of husband); § 9.02.070(a) (1987) (Unmarried, consent of legal guardian).

WV W.Va.Code § 16-2F-3 (1984) (Parental notice req. uneman. minors; waiver); § 16-2F-4 (1984) (Waiver of notice; petition); § 16-2F-5 (1984) (Emergency except.).

WI Wis.Stat.Ann. § 146.78(5) (West Supp. 1988) (Parental notice for minor).

A-5 Spousal Participation Requirements.

CO Colo.Rev.Stat. § 18-6-101(1) (1986) (Justified med. termin. incl. parental/spousal consent reqs.)

FL Fla.Stat.Ann. § 390.001(4)(b) (West 1986) (If married, husband gets notice).

IL Ill.Ann.Stat. Ch 400 para. 1015 (Supp. 1988) (No spousal, parental liability without consent).

KY Ky.Rev.Stat.Ann 12 § 311.735 (1983) (Notice to spouse) (Atty gen. opp. unconst.).

LA La.Rev.Stat.Ann. § 40:1299.33(d) (1985) (Minor emanc. by marriage, spousal consent).

MT Mont.Code Ann. § 50-20-107 (1987) (Writ. notice to spouse or parent req.) (Parent if under 18 and unmarried).

RI R.I.Gen.Laws § 23-4.8-2 (1985) (Notify husband); § 23-4.8-3 (1985) (Exceptions).

SC S.C.Code Ann. § 44-41-20(c) (1976) (3rd trim., husband's consent).

SD S.D.Codified Laws Ann. § 34-23A-7 (1987) (Married minor, consent of husband).

UT Utah Code Ann. § 76-7-304 (1953) (Notify parents, husband if married).

WA Wash.Rev.Code Ann. § 9.02.070(a) (1987) (Married, consent of husband).

A-6 Conscience Protection Provisions.

AK Alaska Stat. § 18.16.010(b) (1962) (No req. for hosp. or phys. to partic.).

AZ Ariz.Rev.Stat.Ann. § 36-2151 (1973) (Right to refuse).

AR Ark.Stat.Ann. § 20-16-601 (1987) (Refusal to perform, partic., consent, or submit) (Immunity from civil liability).

CA Cal. Health & S Code § 25955 (West Supp. 1989) (Refusal to partic.).

CO Colo.Rev.Stat. § 18-6-104 (1986) (Failure to comply-no discipline).

DE Del.Code.Ann. tit. 24, § 1791 (1974) (Refusal to perform).

FL Fla.Stat.Ann. § 390.001(8) (West 1986) (Refusal to partic.).

GA Ga.Code Ann. § 16-12-142 (1988) (No requirement for phys. or hosp.).

HI Haw.Rev.Stat. 25 § 453-16(d) (1985) (No partic. required).

ID Idaho Code § 18-612 (1987) (Refusal to perform) (If *Roe* overruled).

IL Ill.Ann.Stat. ch. 38, para. 81-33 (Smith-Hurd 1975) (Conscientious objections); ch. 111 ½, para. 5201 (Smith-Hurd 1988) (Refusal to recommend or participate); para. 1503 et seq. (Smith-Hurd 1988) (Right of Conscience Act).

IN Ind.Code Ann. § 16-10-3-1 (1986) (No req. priv. denom. hosp.); § 16-10-3-2 (1986) (Performance not req. (phys.)); § 16-10-1.5-8 (1986) (Hosp. not req.).

IA Iowa Code Ann. § 146.1 (1978) (Liab. of persons); § 146.2 (1978) (Liab. of hosp.).

KS Kan.Stat.Ann. § 65-444 (1981) (Refusal to permit, hosp.); § 65-443 (1981) (Perf. not req.).

KY Ky.Rev.Stat.Ann. § 311.800(3) (1983) (No priv. hosp. req.); § 311.800 (4) (1983) (No phys., staff req.).

LA La.Rev.Stat.Ann. § 40:1299.31 (1985); § 40:1299.32 (1985) (Discrim. against hosp.)

ME Me.Rev.Stat.Ann. tit. 22, § 1591 (Supp. 1985) (Immunity and emp. protection); § 1592 (Supp. 1988) (Discrim. for refusal).

MD Md HG Code Ann. § 20-214 (1987) (Partic. not req. by doctors, hosp., patients).

MA Mass.Gen.Laws Ann. ch 112, § 121 (West 1983) (Refusal to partic.); ch 272, § 21B (West 1983) (Priv. hosp.).

MI Mich.Comp.Laws Ann. §§ 333.20181, 333.20182 (West 1967) (Hosp. not req., phys., staff, not req.); § 333.20183 (West 1967) (Refusal to give advice); § 333.20184 (West 1967) (Discrimination).

MN Minn.Stat.Ann. § 145.414 (West 1989) (Abortion not mandatory); § 145.42 (West 1989) (Nonliab. for refusal to perform.)

MO Mo.Ann.Stat. § 188.105 (Vernon Supp. 1989) (Discrim. by emp.); § 188.110 (Vernon Supp. 1989) (Discrim. by colleges); § 197.032 (1982) (Hosp. & med. person may refuse).

MT Mont.Code Ann. § 50-20-111 (1987) (Right to refuse to partic.).

NE Neb.Rev.Stat. § 28-337 (1985) (Not req. to admit in hosp., clinic); § 28-338 (1985) (Not req. to perform); §§ 28-339, 28-340, 28-341 (1985) (Discrimination against).

NJ N.J.Stat.Ann. § 2A:65A-1 (West 1980) (No person req.); § 2A:65A-2 (West 1980) (No hosp. req.); § 2A:65A-3 (West 1980) (Nonliability).

NM N.M.Stat.Ann. § 30-5-2 (1978) (Persons and instit. exempt).

NY N.Y. Civ. Rights Law § 79-i (McKinney 1984) (Discrimin. against person refusing to perform).

NC N.C.Gen.Stat. § 14-45.1(e) (1986) (No req. to partic.); § 14-45.1(f) (1986) (No req. hosp.).

ND N.D.Cent.Code § 23-16-14 (1978) (Partic. not mand.).

OK Okla.Stat.Ann. tit. 63, § 1-741 (West 1983) (Refusal to perform).

OR Or.Rev.Stat. § 435.475 (1987) (Refusal to admit); § 435.485 (1987) (Med. persons not req. to partic.).

PA Pa.Stat.Ann. tit. 18, § 3202(d) (Purdon 1975) (Right of conscience); tit. 43, § 955.2 (Purdon Supp. 1988) (Hosp. immun. from req. to perform).

RI R.I.Gen.Laws § 23-17-11 (1985) (Protection of non-partic.).

SC S.C.Code Ann. § 44-41-40 (1976) (Certain hosp. or clinics may refuse); § 44-41-50 (1976) (Med. empl. not req.).

SD S.D.Codified Laws Ann. § 34-23A-11 (1986) (Counselor not liab.); § 34-23A-12 (1986) (No liab. refusal to perform); § 34-23A-13 (1986) (Discrim.) § 34-23A-14 (1986) (Hosp. not req.).

TN Tenn.Code Ann. § 39-4-204 (1982) (Right to refuse to perform); § 39-4-205 (1982) (Rights of hosp. to refuse).

TX Tex.Rev.Civ.Stat.Ann. art. 4512.7 (Vernon Supp. 1989) (right not to perform).

UT Utah Code Ann. § 76-7-306 (1953) (Physician, hosp. emp., hosp. not req. to partic.).

VA Va.Code Ann. § 18.2-75 (1988) (Conscience clause).

WA Wash.Rev.Code Ann. § 9.02.080 (1987) (Objecting to partic.).

WV W.Va.Code § 16-2F-7 (1984) (Art. does not req. performance).

WI Wis.Stat.Ann. § 448.03(5) (West 1987) (Civil nonliability).

WY Wyo.Stat. § 35-6-105 (1988) (Priv. inst. not req., no liab. for refusal); § 35-6-106 (1988) (Persons not req.).

A-7 Public Funding, Participation Restrictions.

AZ Ariz.Rev.Stat.Ann. § 35-196.02 (1956) (Limit on public funds); § 15-1630 (1981) (Abortion at educ. fac. prohib.).

CA Cal. Health & S Code § 25955.3 (West 1984) (No loss of priv. or public benefits).

CO Colo.Rev.Stat. §§ 26-4-105.5, 26-15-104.5, Colo.Const., art. V, § 50, (1982 repl. vol.) (No public funds for abortion-exception).

ID Idaho Code §§ 41-2142, 41-2210A (Supp. 1988) (Insurance-limitation elective abortions); § 56-209c (Supp. 1988) (Denial of payments for abortions).

IL Ill.Ann.Stat. ch. 23, para. 5-5 (1988) (No med. payment for abortions from Dept. of Med. Assist.); para. 6-1 (1988) (No financial aid); para. 7-1 (1988) (No local aid).

IN Ind.Code Ann. § 35-1-58.5-2.5(c) (1986) (County pays for minor's atty. in abortion proceeding); § 16-10-3-3 (1986) (State funding of abort. prohib.).

KY Ky.Rev.Stat.Ann. 12 § 311.715 (1983 repl.) (Use public funds prohib.); § 311.810 (1983) (No denial of govt. assist. for accept or reject. of abortion).

LA La.Rev.Stat.Ann. § 40:1299.34 (Supp. 1989) (No state emp. may counsel abortion); § 40:1299.34.5 (Supp. 1989) (No use public funds).

MD Md.HG Code Ann. § 20-208 (comment) (1987) (State funding not req.).

MA Mass.Gen.Laws Ann. ch 29, § 208 (West 1983) (No payment for approp. for abortion); ch 258A, § 3 (West 1983) (No emergency rape funds for abortion or abortion counseling).

MN Minn.Stat.Ann. § 145.925 (West 1989) (Family planning grants, not for abortion); § 261.28 (West 1989) (Subsidy for abortions prohibited); § 393.07 subd. 11 (West 1989) (No funding (welfare)); § 2568.40 (West 1989) (Subsidy prohibited).

MO Mo.Ann.Stat. § 188.205 (Vernon Supp. 1989) (Use pub. funds prohibited); § 188.210 (Vernon Supp. 1989)

(Public emp. prohib.); § 188.215 (Vernon Supp. 1989) (Public fac. prohib.); § 208.152(14) (Vernon Supp. 1989) (Fam. planning services, no payment for abortions).

NJ N.J.Stat.Ann. § 30:4D-6.1 (West 1980) (Medicaid funds not used).

ND N.D.Cent.Code § 14-02.3-01 (1981) (Use public funds restricted); § 14.02.3-02 (1981) (Use for fam. planning prohibited); § 14.02.3-04 (1981) (Abortion in govt. hospitals).

OH Ohio Rev.Code Ann. § 5101.55(B) (Anderson 1987) (No loss public assist. benefits); § 5101.55(C) (Anderson 1987) (State or public funds not used).

PA Pa.Stat.Ann. tit. 18, § 3215 (Purdon 1975) (Publicly owned facilities, public officials, public funds); tit. 62, § 453 (Purdon Supp. 1988) (Exp. of public funds for abort. limited).

SD S.D.Codified Laws Ann. § 28-6-4.5 (1984) (Public funds not to be used).

UT Utah Code Ann. § 76-7-322 (Supp. 1988) (Public funds restric.) § 76-7-323 (Supp. 1988) (Public funds for support entities restricted); § 16-18-4 (Supp. 1988) (No Medicaid).

VA Va.Code Ann. § 32.1-92.2 (1988) (Funding when physical deformity or mental deficiency in fetus); § 32.1-92.1 (1985) (Funding when preg. resulted from rape, or incest).

WI Wis.Stat.Ann. § 46.24 (West 1987) (Assist. to minors concerning abortion notification); § 46.245 (West 1987) [from county] (Subsidy of abort. prohibited); § 59.07(136) (West 1988) (Municipal subsidy restricted); § 66.04(1)(m) (West Supp. 1988) (Municipal subsidy restricted).

WY Wyo.Stat. § 35-6-117 (1988) (Use of appropriated funds, exception).

A-8 Private Advertising, Promotion, Speech Restrictions.

AZ Ariz.Rev.Stat.Ann. § 13-3605 (1956) (Advert., pun.).

CA Cal.Bus&P Code § 601 (West 1974) (Advert. felony).

CO Colo.Rev.Stat. § 25-1-665 (1982) (Unlawful to sell or advert. abortion drugs, substances).

CT Conn.Gen.Stat.Ann. § 53-31 (1958 rev.) (Fine for encouraging abortion (i.e. publ. advert., lecture)).

FL Fla.Stat.Ann. § 797.02 (West Supp. 1988) (Advert. regs; penalty).

ID Idaho Code § 18-603 (1987) (Advert.); § 18-607 (1987) (Unauthorized sales).

LA La.Rev.Stat.Ann. § 14:87.4 (1985) (Abortion advert.).

MD Md. HG Code Ann. § 20-201 (1987) (No advert. abortion referral service).

MA Mass.Gen.Laws Ann. ch 272, § 20 (West 1983) (Advert.).

MI Mich.Comp.Laws Ann. § 750.15 (West 1968) (Advert., sell); § 750.40 (West 1968) (Publications); § 750.34 (West 1968) (Immoral advertis.).

MN Minn.Stat.Ann. § 617.25 (West 1986) (Indecent articles and information); § 617.26 (West 1986) (Mailing, carrying).

MS Miss.Code Ann. § 97-3-5 (1972) (Advert., sale or gift).

MT Mont.Code Ann. § 50-20-109(4) (1987) (No soliciting, advert.).

NV Nev.Rev.Stat. § 202.200 (1987) (Advert. goods and serv. to prod. miscarriage).

ND N.D.Cent.Code § 14-02.1-06 (1981) (Soliciting).

OK Okla.Stat.Ann. tit. 63, § 1-736 (West 1983) (Advert. counseling).

VT Vt.Stat.Ann. tit. 13, § 104 (Supp. 1988) (Advert.).

VA Va.Code Ann. § 18.2-76.1 (1988) (Encouraging, promoting prohibited).

WI Wis.Stat.Ann. § 943.145 (West Supp. 1988) (Crim. trespass to medical facility).

WY Wyo.Stat § 35-6-116 (1988) (Advert.).

A-9 Legislature/Public Policy, Purpose, Declaration.

AL Ala.Code § 26-21-1 (Supp. 1988) (Legis. purpose).

AZ Ariz.Rev.Stat.Ann. §§ 36-340, 36-341 (1956) (Authority to release records).

AK Ark.Stat.Ann § 20-16-701 (1987) (Legis. intent. reg. cons. w/Sup. Ct.).

CT Conn.Gen.Stat.Ann. § 53-31a (1958) (Abortion or miscarriage public policy); § 53-31b (1958) (Severability).

IL Ill.Ann.Stat. ch. 38, para. 81-21 (Smith-Hurd 1975) (Leg. intent); para. 81-51 (Smith-Hurd 1975) (Leg. intent, parental consent); para. 81-62 (Smith-Hurd 1975) (Leg. Purpose) (Notice).

IN Ind.Code Ann. § 16-10-3-4 (1986) (Childbirth preferred over abortion).

KY Ky.Rev.Stat.Ann. 12 § 311.710 (1983) (Legis. finding).

LA La.Rev.Stat.Ann. § 40:1299.35.0 (Supp. 1989) (Legis. intent).

ME Me.Rev.Stat.Ann. tit. 22, § 1598 (Supp. 1988) (Abortions).

MA Mass.Gen.Laws Ann. ch. 6 § 15FF (West 1983) (Pro-life month).

MI Mich.Comp.Laws Ann. § 333.9131 (West 1968) (Clinical abortions not family planning).

MN Minn.Stat.Ann. § 393.07 subd. 11 (West Supp. 1989) (Public policy: childbirth over abortion); § 256B.011 (West Supp. 1981) (Policy for childbirth and abortion funding).

MO Mo.Ann.Stat. § 188.010 (Vernon Supp. 1989) (Intent of gen. assem.); § 1.205 (Vernon Supp. 1989) (Life begins at concep.).

MT Mont.Code Ann. § 50-20-102 (1987) (Statement of purpose); § 50-20-103 (1987) (Legis. intent).

NE Neb.Rev.Stat. § 28-325 (1985) (Abortion; decl. of purpose).

ND N.D.Cent.Code § 14-02.1-01 (1981) (Purpose).

PA Pa.Stat.Ann. tit. 18, § 3202 (Purdon 1975) (Legis. intent).

RI R.I.Gen.Laws § 23-4.8-1 (1985) (Decl. of purpose for spousal notice); Const. R.I., Art. I, § 2 (No right granted).

TN Tenn.Code Ann. § 37-10-301 (Supp. 1988) (Legis. intent for parental consent).

UT Utah Code Ann. § 78-11-23 (Supp. 1988) (Right to life policy).

WV W.Va.Code § 16-2F-1 (1984) (Legis. findings and intent) (parental notice).

A-10 Disposition of Aborted Fetuses Regulations.

AZ Ariz.Rev.Stat.Ann. § 36-329 (1956) (Fetal death regis.); § 36-330 (1956) (Delayed regis.); § 36-331 (1956) (Disposal).

AK Ark.Stat.Ann. §§ 20-17-802(a), 20-17-801 (1987) (Dispose as other tissue).

CA Cal. Health & S Code § 25957 (West 1984) (Disposal, storage).

FL Fla.Stat.Ann. § 390.001(7) (West 1986) (Fetal remains).

GA Ga.Code Ann. § 16-12-141.1 (1988) (Disposal of fetus).

LA La.Rev.Stat.Ann. § 40:1299.35.14 (1985) (Disposal of remains) (Held unconst. in 1986).

MN Minn.Stat.Ann. § 145.1621 (West 1989) (Disposition of fetuses).

MS Miss.Code Ann. § 41-39-1 (1972) (Disposal of fetus).

MT Mont.Code Ann. § 50-20-105 (1987) (Disposition).

NY N.Y. Pub Health Law §§ 4164(4), 4162 (McKinney 1984) (Disposal of body).

ND N.D.Cent.Code § 14-02.1-09 (1981) (Humane disposal).

WY Wyo.Stat. § 35-6-109 (1988) (Disposal).

A-11 Fetal Experimentation and Transplantation Restrictions.

AZ Ariz.Rev.Stat.Ann. § 36-2302 (1956) (Exper. prohib.); § 36-2301(B) (1956) (Records must be released which under invest.).

AK Ark.Stat.Ann. § 20-17-802(b)(1) (1987) (No exper. if born alive); § 20-17-802(b)(2) (1987) (Or dead, without mother's permission); § 20-17-802(c), (d) (1987) (No sale, exchange, possession).

CA Cal. Health & S. Code § 25956 (West 1984) (Research restric., fetal remains); § 25957 (West 1984) (Fetal remains, exper.).

FL Fla.Stat.Ann. § 390.001(6) (West 1986) (Exper. prohib; exceptions).

IL Ill.Ann.Stat. ch. 38, para. 81-26(7) (Smith-Hurd 1975) (No sale or experi.); para. 81-31 (Smith-Hurd 1975) (Analysis of fetal tissue); para. 81-32.1 (Smith-Hurd 1975) (OK if fetal tissue not result of abortion).

IN Ind.Code Ann. § 35-1-58.5-6 (1986) (Exper., transport, prohibited; class A misdemeanor).

KY Ky.Rev.Stat.Ann. § 436.026 (Michie/Bobbs-Merrill 19____) (Sale, transport, of viab. aborted child for exper. prohib.).

LA La.Rev.Stat.Ann. § 14:87.2 (1985) (Human exper. live fetus); § 40:1299.35, 13 (1985) (Exper.).

ME Me.Rev.Stat.Ann. tit. 22, § 1593 (Supp. 1988) (Sale or use of fetuses).

MA Mass.Gen.Laws Ann. ch. 112, § 12J(a)I, II, III (West 1983) (Exper. prohibited); § 12J(a)IV (West 1983) (No sale or transfer of fetus).

MI Mich.Comp.Laws Ann. §§ 333.2685, 333.2686, 333.2687, 333.2685, 333.2619 (West 1968) (Human research); § 333.2690 (West 1968) (Sale, transfer).

MN Minn.Stat.Ann. § 145.422 (West 1989) (Exper. or sale).

MO Mo.Ann.Stat. §§ 188.036, 188.037 (Vernon Supp. 1989) (Prohibited abortions).

MT Mont.Code Ann. § 50-20-108(3) (1987) (No exper. of prem. infant born alive).

NE Neb. Rev. Stat. § 28-342 (1985) (Aborted Child); § 28-346 (1985) (Exper.).

NV Nev.Rev.Stat. § 451.015 (1987) (Commer. use prohib.).

NM N.M.Stat.Ann. §§ 24-9A-1 to 24-9A-7 (1978) (Maternal, Fetal, and Infant Exper. Act).

ND N.D.Cent.Code § 14.02.2-01 (1981) (Exper. live fetus); § 14.02.2-02 (1981) (Exper. dead fetus).

OH Ohio Rev.Code Ann. § 2919.14 (Anderson 1987) (Abortion trafficking).

OK Okla.Stat.Ann. tit. 63, § 1-735 (West 1983) (Sale, exper.).

PA Pa.Stat.Ann. tit. 18, § 3216 (Purdon 1975) (Fetal exper.).

RI R.I.Gen.Laws § 11-54-1 (1981) (Exper.).

SD S.D.Codified Laws Ann. § 34-23A-17 (1986) (Exper. consent req.).

TN Tenn.Code Ann. § 39-4-208 (1982) (Research, etc.).

UT Utah Code Ann. § 76-7-310 (1953) (Exper. prohib.); § 76-7-311 (1953) (Selling/buying prohib.).

WY Wyo.Stat. § 35-6-115 (1988) (Penalty for giving away live/viab. for exper.).

A-12 Feticide Restrictions.

IA Iowa Code Ann. § 707.7 (1978) (Feticide = class C felony; attempted = class D felony).

ME Me.Rev.Stat.Ann. tit. 22, § 1594 (Supp. 1988) (Failure to pres. life, subject to homicide laws).

MI Mich.Comp.Laws Ann. § 750.322 (West 1968) (Wilfull killing of unborn quick child); § 750.323 (West 1968) (Death of quick child, medicine).

MS Miss.Code Ann. § 97-3-37 (1972) (Homicide-killing of unborn quick child).

PA Pa.Stat.Ann. tit. 18, § 3212 (Purdon 1975) (Infanticide).

A-13 Wrongful Birth/Life/Death Regulation.

CA Cal. CC Code § 43.6 (West 1982) (Immunity from liab.).

ID Idaho Code § 5-334 (1977 as amended) (Act or omission prev. abort. not actionable).

IL Ill.Ann.Stat. ch. 70, para. 2.2 (1988) (No wrongful death action).

IN Ind.Code Ann. § 34-1-11 (1986) (Actions prohib.).

ME Me.Rev.Stat.Ann. tit. 22, § 1594 (Supp. 1988) (Failure to pres. life subject to wrongful death).

MN Minn.Stat.Ann. § 145.424 (West 1989) (Prohib. tort actions).

MO Mo.Ann.Stat. § 188.130 (1989) (No cause of action).

NV Nev.Rev.Stat. § 442.270 (1987) (Failure to exercise reasonable care to preserve life = wrongful death).

ND N.D.Cent.Code § 32-03-43 (Supp. 1987) (Prohib.).

SD S.D.Codified Law Ann. §§ 21-55-1, 21-55-2, 21-55-3, 21-55-4 (1987) (Prohib.).

UT Utah Code Ann. § 78-11-24 (Supp. 1988) (Act or omission preventing abortion not actionable).

A-14 General Criminal Prohibitions.

AL Ala.Code § 26-21-6 (Supp. 1988) (Penalties for violating consent reqs. Class A misd.); § 12A-13-7 (1975) (Inducing abortion; fine and prison).

AK Alaska Stat. § 18.16010(c) (1962) (Knowing violation-fine, impris. or both).

AZ Ariz.Rev.Stat.Ann. § 13-3603 (1956) (Def.; punish.); § 13-3604 (1956) (Woman solicits, punish.); § 36-2303 (1956) (Violations:Class B misd.); § 36-2152(C) (1982) (Class 1 misd. if viol. sec.).

AR Ark.Stat.Ann. § 20-16-704 (1987) (Class A misd.); § 5-61-101 (1987) (Class D Felony; violat.); § 5-61-102 (1987) (Fine and imprison; viol. of); § 20-17-802(f) (1987) (Class A misd. for viol. of).

CA Cal.Pen.Code § 274 (West 1988) (Supplying or admin. abortifacient; exception, punishment); § 275 (West 1988) (Solicit or submit to abortifacient; exception, punishment); § 276 (West 1988) (Soliciting use; except., punish; proof req.); § 1108 (West 1985) (Abortion-corroboration of testimony); § 187 (West 1988) (Murder defined; death of fetus); § 11413 (West Supp. 1989) (Terrorism, arson, pro-anti-abortion facilities); § 12022.9 (West Supp. 1989) (Termin. of preg. w/o consent).

CO Colo.Rev.Stat. § 18-6-105 (1986) (Distributing abortifacients class 1 misd.); § 18-6-102 (1986) (Elements of offense of crim. abortion); § 18-6-103 (1986) (Pretended crim. abort.); § 15-1-667 (1986) (Penalty for sale of drugs (fine)).

CT Conn.Gen.Stat.Ann. § 53-29 (1958) (Attempt to procure abortion, fine or imprisonment); § 53-31 (1958) (Encouraging abortion Class D felony); § 53-30 (1958) (Woman may be fined or imprisoned).

DE Del.Code Ann. tit. 11, § 651 (1974) (Abortion, class D felony); § 652 (1974) (Self-Abortion, class A misd.); § 653 (1974) (Issuing abortional articles, class B misd.); tit. 24, § 1795 (1974) (Class A misd. if violate); § 1766(b) (1974) (Guilty of felony if violate chapter 24).

FL Fla.Stat.Ann. § 390.001(10)(a) (West 1986) (Penalties for violations felony of 3rd degree); § 390.001(10)(b) (West 1986) (If result in death of woman, 2nd degree); § 390.025 (West 1986) (Penalty 1st degree misd. for viol.); § 797.03 (West Supp. 1988) (Misd. 2nd degree for wilfull viol.).

GA Ga.Code Ann. § 16-12-140 (1988) (Criminal abortion, penalty); § 16-12-143 (1988) (Failure to file reports a misd.); § 15-11-118 (1985) (Violations of parental notification, misd.).

HI Haw.Rev.Stat. 25 § 453-16(c) (1985) (Knowing violation fine, imprisonment).

ID Idaho Code § 18-605 (1987) (Unlawful-procurement-felony); § 18-606 (1987) (Unlawful-accomplice a felony); § 18-607 (1987) (Abortifacients-unlawful sale = misd.); § 18-614 (1987) (Abortion-procurement) (If *Roe* overruled); § 18-615 (Abortion-submission to) (If *Roe* overruled).

IL Ill.Ann.Stat. ch. 38, para. 81-23.1 (Smith-Hurd 1975) (Violation, class 2 felony); para. 81-25 (Smith-Hurd 1975) (Violation, class 2 felony); para. 81-26 (Smith-Hurd 1975) (Violation, class 3 felony); para. 81-31 (Smith-Hurd 1975) (Violation, class A misd.); para. 81-31.1 (Smith-Hurd 1975) (Abortion referral fee = class 4 felony); para. 81-31 (Smith-Hurd 1975) (Violations-unprof. cond.); para. 81-55 (Smith-Hurd 1975) (Violations); para. 81-68 (Smith-Hurd 1975) (Penalty).

IN Ind.Code Ann. § 35-1-58.5-4 (1986) (Class C felony; class A misd.).

IA Iowa Code Ann. § 707.7 (1978) (Not licensed = class C felony); § 707.8 (1978) (Nonconsensual term.); § 707.9 (1978) (Murder of fetus aborted alive).

KS Kan.Stat.Ann. § 21-3407 (1981) (Criminal Abortion-class D felony).

KY Ky.Rev.Stat.Ann. § 436.026 (Michie/Bobbs-Merrill 1985) (Imprisonment for viol. of); § 311.990 (1983) (misd. to viol. prov. of).

LA La.Rev.Stat.Ann. § 14:87 (1985) (Imprisonment for com. abortion); § 14:87.1 (1985) (Killing a child during del.); § 14:87.2 (1985) (Human exper.); § 14:87.4 (1985) (Advert.);§ 14:87.5 (1985) (Aborted viab. fetus); § 14.88 (1985) (Distrib. of abortifacients); § 40:1299.25.18 (1985) (Penalties); § 40:66 (1985) (failure to complete form, misd.); CC&P § 465 (Indictment form).

ME Me.Rev.Stat.Ann. tit. 22, § 1593 (Supp. 1988) (Punishment, sale or use fetuses); § 1593(4) (Supp. 1988) (Abortions after viab.)

MD Md. HG Code Ann. § 20-206 (1987) (Penalty for abortion referral services viol.); § 20-21 (1988 amendment) (Unlawful acts); § 20-211(e) (1987) (Penalty for not giving info).

MA Mass.Gen.Laws Ann. ch. 112, § 12J(a)V (West 1983) (Viol, imprisonment); § 12J(a)VI, VII (West 1983) (Defense); § 12N (West 1983) (Punishment for violation of 12L or 12M); § 12T (West 1983) (Viol. of 120 to 12R, punish.); ch. 272, § 20 (West 1983) (Penalty for advert.); § 21 (West 1983) (Instruments for abortion); § 19 (West 1983) (Procuring miscarriage); ch. 277, § 79 (West 1983) (Indictment, form).

MI Mich.Comp.Laws Ann. § 750.14 (West 1968) (Intent to procure); § 750.15 (West 1968) (Drugs, medicine); §

750.40 (West 1968) (Publications); § 750.34 (West 1968) (Immoral advert.); § 750.322 (West 1968) (Wilfull killing unborn, quick); § 750.323 (West 1968) (Death of quick child, medicine); §§ 750.14, 767.72 (West 1968) (Manslaughter); § 750.149 (West 1968) (Compounding offenses); § 333.2691 (West 1968) (Violations of §§ 333.2685 to 333.2690); § 333.20199(2) (West 1968) (Violations of §§ 333.20181 to 333.20184).

MN Minn.Stat.Ann. § 145.412 subd. 4 (West 1989) (Criminal Acts); § 144.343 subd. 5 (West 1989) (Penalty); § 617.20 (West 1986) (Drugs to produce miscarriage); § 617.26 (West 1986) (Mailing and carrying obscene matter); § 617.25 (West 1986) (Indecent articles and info.).

MS Miss.Code Ann. § 41-41-61 (Supp. 1988) (Penalties for viol. of confidence); § 97-3-3 (1972) (Abortion); § 97-3-5 (1972) (Advertisement, etc.).

MO Mo.Ann.Stat. § 188.035 (Vernon 1982) (Death of child aborted alive); § 188.070 (Vernon 1982) (Breach of confid.); § 188.075 (Vernon 1982) (Viol. of sections 188.010 to 188.085); § 188.080 (Supp. Vernon 1987) (Abortion other than phys.); § 188.200 et seq. (Supp. Vernon 1989) (Public crimes).

MT Mont.Code Ann. § 50-20-106 (1987) (Viol. of is misd.); § 50-20-108 (1987) (Protection of prem. infants born alive-felony); § 50-20-109 (1987) (Viol. of (1)(2)(3) felony, of (4) misd.); §§ 50-20-112, 50-20-110 (1987) (Penalties).

NE Neb.Rev.Stat. § 28-328 (1985) (Abortion w/o inform. consent-class II misd.); § 28-332 (1985) (Viol. penalty); § 28-335 (1985) (Lic. phys.); § 28-336 (1985) (Ac. med.); § 28-339 (1985) (Discrim.); §§ 28-342, 346 (1985) (Exper.); § 28-344 (1985) (Reporting form viol.); § 28-706 (1985) (Criminal nonsupport).

NV Nev.Rev.Stat. § 202.200 (1987) (Advert., misem.); § 201.120 (1987) (Abort., punishment); § 201.130 (1987) (Selling drugs/miscarriage); § 200.220 (1987) (Woman taking drugs to termin. preg.); § 442.260 (1987) (Criminal penalty).

NH N.H.Rev.Stat.Ann. § 585.12 (1986) (Attempt to procure miscarriage); § 585.13 (1986) (Intent to destroy quick child); § 585.14 (1986) (Causing death to woman); § 630.1(N) (1986) (Fetus not included under capital murder statute).

NM N.M.Stat.Ann. § 24-9A-6 (1978) (Penalty); § 30-5-3 (1978) (Criminal abortion).

NY N.Y. Penal Law § 125.00 (McKinney 1984) (Homicide defined); § 125.45 (McKinney 1984) (Abortion in 1st degree); § 125.50 (McKinney 1984) (Self-abortion in 2nd degree); § 125.55 (McKinney 1984) (Self-abortion in 1st degree); § 125.60 (McKinney 1984) (Issuing abortional articles); § 125.15(2) (McKinney 1984) (Manslaughter 2nd degree); § 125.20(3) (McKinney 1984) (Manslaughter 1st degree); § 125.40 (McKinney 1984) (Abortion in 2nd degree); § 265.00 (McKinney 1984) (''Serious offense''); N.Y. CPL Law § 700.05 (McKinney 1984) (''Designated offense'').

NC N.C.Gen.Stat. § 14-44 (1986) (Using drugs or instruments to destroy unborn child); § 14-45 (1986) (Using drugs or instr. to produce miscarriage, injure preg. woman); § 14-46 (1986) (Concealing birth of child).

ND N.D.Cent.Code § 14-02.1-04(4), (5) (1981) (Penalties) § 14-02.1-05 (1981) (Penalty); § 14-02.1-08 (1981) (Protect. viable fetus born alive); § 14-02.1-10 (1981) (Concealing-penalty); § 14-02.1-11 (1981) (General penalty); § 14-02.3-05 (1981) (Penalty); § 12.1017.1-02 (Supp. 1987) (Murder unborn child); § 12.1-17.1-03

(1987) (Manslaughter unborn); § 12.1-17.1-04 (1987) (Negl. homicide unborn); § 12.1-17.1-05 (1987) (Aggr. Assault unborn); § 12.1-17.1-06 (1987) (Assault unborn); § 12.1-17.1-07 (1987) (Exceptions).

OH Ohio Rev.Code Ann. § 2919.12(D) (Anderson 1987) (Unlawful abortion); § 2919.13 (Anderson 1987) (Abortion manslaughter).

OK Okla.Stat.Ann. tit. 21, § 861 (West 1983) (Procuring an abortion); § 862 (West 1983) (Submitting to, soliciting); § 863 (West 1983) (Concealing stillbirth, death); tit. 63, § 1-731(A) (West 1983) (Persons who perform-viol., penalties); § 1-732(F) (West 1983) (Homicide); tit. 21, § 713 (West 1983) (Killing unborn quick child-manslaughter); § 714 (West 1983) (Procuring destruction of unborn child).

OR Or.Rev.Stat. § 435.990 (1987) (Penalties).

PA Pa.Stat.Ann. tit. 18, § 3213 (Purdon 1975) (Prohibited acts); § 3218 (Purdon 1975) (Criminal penalties).

RI R.I.Gen.Laws § 23-4.8-4 (1985) (Penalties); § 11-54-2 (1981) (Penalties); § 11-9-18 (1981) (Manslaughter).

SC S.C.Code Ann. § 44-41-80 (1976) (Performing, soliciting unlawful abortion); § 16-1-10 (Supp. 1988) (Felony).

SD S.C.Codified Laws Ann. § 34-23A-10.2 (1986) (St. informed consent-misd.); § 22-17-5 (1988) (Unau. abort. felony); § 22-17-6 (1988) (Int. killing of fetus by injury to mother).

TN Tenn.Code Ann. §37-10-304 (Supp. 1988) (Violations) [Effec. 7-1-89]; § 39-4-201 (1982) (Criminal abortions); § 39-4-206 (1982) (Violation = felony); 39-4-208 (1982) (Violation = felony).

TX Tex.Rev.Civ.Stat.Ann. art. § 4512.5 (Vernon 1976) (Destroying unborn child).

UT Utah Code Ann. § 76-7-314 (1953) (Violations); § 76-7-324 (1953) (Violation of restriction of public funds).

VT Vt.Stat.Ann. tit. 13 § 101 (1974) (Definition and punishment); § 103 (1974) (Joining with murder indictment).

VA Va.Code Ann. § 18.2-71 (1988) (Penalty).

WA Wash.Rev.Code Ann. § 9.02.010 (1987) (Punishment); § 9.02.020 (1987) (Preg. women attempt abortion); § 9.02.030 (1987) (Selling drugs, etc.); § 9.02.050 (1987) (Concealing birth).

WV W.Va.Code § 61-2-8 (1988) (Abortion, penalty); § 16-2F-8 (1984) (Penalties); § 61-2-8 (1988) (Homicide, result of abortion); § 62-9-5 (1988) (Form of indictment).

WI Wis.Stat.Ann. § 940.04 (West 1981) (Abortion); § 940.13 (Supp. West 1988) (Abortion exception); § 940.15 (Supp. West 1988) (Abortion); § 943.145 (Supp. 1988) (Criminal trespass).

WY Wyo.Stat. § 35-6-110 (1988) (Penalty for viol.); § 35-6-111 (1988) (Penalty for person other than phys. who performs abortion); § 35-6-112 (1988) (Penalty for using other means); § 35-6-113 (1988) (Penalty)

A-15 Miscellaneous Regulations.

AK Alaska Stat. § 18.16.010(c)(4) (Supp. 1988) (Domicile-30 days).

AR Ark.Stat.Ann. § 20-16-702 (1987) (Definitions).

CA Cal.Food&A.Code § 13121-13130 (West 1986) (Birth Defect Prevention Act) (prev. pesticide induced abor-

tions); Chapter 11: Health&S, § 464 (West 1979) ("Therapeutic Abortion Act," lists of fam. plan. clinics); Cal.Welf&I.Code § 220,1773 (West 1984) (No restr. jud. fac. inmates); Cal.Bus&PCode § 2746.6 (West Supp. 1989) (Discip. to nurse-midwife for aiding); § 2761, 2878 (West Supp. 1989) (For nurses); § 2660 (West Supp. 1989) (For physical therapists); § 4521 (West Supp. 1989) (Psychiatric technicians); Cal.Health&S.Code § 429.50 (West 1979) (State Dept. of Health Services may compile data for study); Cal.Pen.Code § 3405, 4028 (West Supp. 1989) (No restr. prisoners).

CO Colo.Rev.Stat. § 12-36-117(b) (1985) (Unprof. conduct = aiding in crim. abortion).

DE Del.Code Ann. tit. 11, § 654 (1974) (Defined); § 222(22) (1974) (Therapeutic abortion defined); tit. 24, § 1792 (1974) (No person shall assist in unlawful abortion); § 1793 (1974) (Residency req.).

FL Fla.Stat.Ann. § 390.001(1) (West 1986) (Definitions); § 390.026 (West 1988 Supp.) (Internal risk management program); § 406.11(a)(a)(9) (West 1986) (Exam by med. examin. when crim. abortion); § 462.14(z) (West Supp. 1988) (Revocation of naturopathy license for unlawful term. of preg.).

GA Ga.Code Ann. § 43-34-37(8) (1988) (Discipl. phys. crim. abortion); § 15-11-111 (1985) (Def.); § 15-11-113 (1985) (Time and notice of waiver hearing); § 15-11-114 (1985) (Conduct of hearing, appeal); § 15-11-115 (1985) (Applicability to nonresident minors); § 15-11-117 (1985) (Immunity to healthcare provider in good faith); § 15-11-110 (1985) (Parental Notif. Act).

HI Haw.Rev.Stat. 25 § 453-8 (1985) (Revocation of license to proc. medicine); § 453-16(a)(3) (1985) (Domicile req.) (Atty gen. says unconst.).

ID Idaho Code § 18-604 (1987) (Definitions); § 18-611 (1987) (Physicians may accept representations); § 18-613 (1987) (Statutory changes in event *Roe* is overruled); [18-604 to 18-611 repealed; 18-612 to 18-615 effective]; § 19-2115 (1987) (Abort.-corrobor. testimony); § 54-1814 (1987) (Grounds for medical discipline); § 39-241(c) (1987) (Def. "fetal death"); § 32-102 (1987) (Unborn child as existing person).

IL Ill.Ann.Stat. ch. 38, para. 81-22 (Smith-Hurd 1975) (Definitions); para. 81-26(8) (Smith-Hurd 1975) (No abort. based on sex of fetus); para. 81-30.1 (Smith-Hurd 1975) (Viol., revocation of license); para. 81-34 (Smith-Hurd 1975) (Severability); para. 81-35 (Smith-Hurd 1975) (Short title); para. 81-52 (Smith-Hurd 1975) (Title of Act); para. 81-53 (Smith-Hurd 1975) (Abortion defined); para. 81-61 (Smith-Hurd 1975) (Short title-parental notice); para. 81-63 (Smith-Hurd 1975) (Definitions); para. 81-68.1 (Smith-Hurd 1975) (Invalidity, severability); ch. 111, para. 4400-22 (1978) (Supp. 1988) (Disciplinary grounds, elective abortion); ch. 111½, para. 87-9 (1988) (State insuranee benefits, no abortion); ch. 127, para. 526 (Supp. 1988) (State insurance benefits, no abortion); ch. 111, para. 4267 (Supp. 1988) (Physical therapy, disciplinary actions).

IN Ind.Code Ann. § 35-1-58.5-1 (1986) (Definitions).

IA Iowa Code Ann. § 707.10 (1978) (Duty to preserve live fetus); § 205.1 (1978) (Sale of abortifacients); § 205.2 (1978) (Exception).

KS Kan.Stat.Ann. § 65-2837(b)(5) (1981) (Professional incompetency).

KY Ky.Rev.Stat.Ann. 12 § 311.720 (1983) (Definitions) (sub. (5), (6), (8) unconst.); § 311.790 (1983) (Birth and Death cert. for live-born abortion); § 311.820 (1983) (No fee for couns. abortion); § 311.830 (1983) (Severability);

§ 211.027 (Michie/Bobbs-Merrill 19____) (Rules and regs. by Cab. for Hum. Res.); § 304.5-160 (1988).

LA La.Rev.Stat.Ann. § 14:87 (1985) (Def. of abortion); § 40:1299.35.1 (1989 supp.) (Definitions); § 40:63 (1985) (Abortion, purpose of sec.); § 40:64 (1985) (Forms for collection of data); § 40:65 (1985) (Completion of forms); § 37:1285 (1985) (Physicians, revocation).

ME Me.Rev.Stat.Ann. tit. 22, § 1595 (1964) (Supp. 1988) (Definition live born and live birth); § 1596 (1964) (Supp. 1988) (Abortion data).

MD Md. HG Code Ann. § 20-202. (1987) (No agreement with abortion referral service in another state); § 20-203 (1987) (Regis. Ab. Referral Serv.); § 20-204 (1987) (Fee-splitting prohib.); § 20-205 (1987) (Rules, regs, referral services); § 20-207 (1987) (Phys. defined).

MA Mass.Gen.Laws Ann. ch. 112, § 12J(b) (West 1983) (Legal procedures); § 12K (West 1983) (Definitions of 12L to 12U); § 12U (West 1983) (Enjoining abortion); ch. 32B, § 3A (West 1983) (Coverage for abortions under admin. contract); ch. 32A, § 12 (West 1983) (Insurance, retired teachers); 32A, §§ 4, 10C, 14 (West 1983) (Insurance, state employees); 32B, §§ 3, 16 (West 1983) (Insurance-pol. subdiv.); ch. 6, § 15FF (West 1983) (Pro-Life Month); ch. 176G, § 17 (West 1983) (Health maintenance org., rules and regs.).

MI Mich.Comp.Laws Ann. § 767.72 (West 1968) (Dying declarations); § 380.1507 (West 1968) (Schools and school districts, reprod. health educ. programs).

MN Minn.Stat.Ann. § 145.411 (West 1989) (Defintions); § 145.421 (West 1989) (Definitions); § 145.423 (West 1989) (Abortions, live births); § 148.75(d) (West 1989) (Physical therapist revocation); § 147.091(c) (West 1989) (Physician revocation); § 617.21 (West 1986) (Evidence);

§ 390.32 (West Supp. 1989) (Investigation of deaths arising from criminal abortion); § 62D.20 (West Supp. 1989) (Rules, health maint. org.-vol. abortions).

MS Miss.Code Ann. § 41-41-51 (West 1989) (Definitions); § 41-41-55 (West 1989) (Applicability; ct. proceedings, standard for waiver); § 41-41-57 (Supp. 1988) (Except. for emergencies); § 41-41-59 (Supp. 1988) (Viol. p.f. unprof. conduct); § 41-41-61 (Supp. 1988) (Confid. of records); § 41-41-63 (Supp. 1988) (Severability); § 41-61-59 (Supp. 1988) (Rep. death to med. ex.); § 73-25-29 (Supp. 1988) (Physician, revoc. of license, abort. not medically necessary).

MO Mo.Ann.Stat. § 376.805 (Vernon Supp. 1989) (1983 am.) (Elective abort., insurance); § 188.015 (Supp. 1989) (Definitions); § 188.047 (Vernon 1982) (Tissue sample); § 188.060 (Vernon 1982) (Records retained 7 yrs.); § 188.065 (Vernon 1982) (Revocation of license); § 188.085 (Vernon 1982) (Not exclusive); § 188.100 (Vernon Supp. 1989) (Definitions); § 188.115 (Vernon Supp. 1989) (Severability clause); § 188.120 (Vernon Supp. 1989) (Cause of action); § 188.200 Vernon (Supp. 1989) (Definitions); § 188.220 (Vernon Supp. 1989) (Taxpayer standing); § 58.455 (Vernon Supp. 1989) (Death certificate); § 58.451 (Vernon Supp. 1989) (Death by crim. action).

MT Mont.Code Ann. § 50-20-101 (1987) (Short title "Montana Abortion Control Act"); § 50-20-104 (1987) (Definitions); § 37-3-322 (1987) (Unprofessional conduct: perf. abort. against law); § 41-1-103 (1987) (Rights of unborn children).

NE Neb.Rev.Stat. § 28-326 (1985) (Terms defined); § 28-331 (1985) (Care and treatment of child aborted-born alive); § 71-148(8) (1956) (License revocation).

NV Nev.Rev.Stat. § 201.120 (1987) (Abortion; definition); § 201.140 (1987) (Evidence; witness must testify); §

634.018 (1987) (Chirop. unprof. cond. aid. crim. abortion); § 630A.370 (1987) (Homeopathic phys., unlawful abortion);§§ 632.220, 632.320 (1987) (Nurses, unprof. cond.); § 633.131 (1987) (Osteopathic phys. unprof. cond.); § 442.268 (1987) (Civil immunity, justly perf. abortion); § 442.240 (1987) (Defined); § 175.301 (1987) (Corrob. evidence essen.).

NJ N.J.Stat.Ann. § 45:9-16(c) (West 1980) (Med. lic. revocation); § 2A:65A-4 (West 1980) (Severability).

NM N.M.Stat.Ann. § 30-5-1 (1980) (Definitions); § 61-6-14(B)(1) (1980) (Lic. revoked-phys.); § 61-10A-5 (1980) (Osteop. phys. assis. revoked).

NY N.Y. Penal Law § 125.05 (McKinney 1984) (Definition of terms); § N.Y. Gen. Bus. Law § 394-C (McKinney 1984) (Report on request for abortion services); N.Y. Exec. Law § 291(3) (McKinney 1984) (Opportunity for med. treatment for aborted infant born alive); N.Y. Pub Health Law § 17 (McKinney Supp. 1989) (Release of med. records concerning abortion not to parents); N.Y. Judic. Law § 4 (McKinney 1984) (Ct. not public for abortion).

NC N.C.Gen.Stat. § 90-14 (Supp. 1988) (Revocation license).

ND N.D.Cent.Code § 14-02.1-02 (1981) (Definitions); § 14-02.3-03 (1981) (Payment by health insurance policies).

OH Ohio Code Ann. § 2919.11 (Anderson 1987) (Definitions); § 4734.09 (Anderson 1987) (Chiro. can't abort); § 2919.12(E) (Anderson 1987) (Civil liability); § 2701.15 (1987) (Ct. may not order abortion); § 4731.22(21) (Anderson 1987) (Discipline of phys.).

OK Okla.Stat.Ann. tit. 63, § 1-730 (West 1983) (Definitions); 63, § 938(a) (West 1983) (Deaths to be investigated); tit. 59, § 524 (West 1983) (Abortion-infant born alive-right to med. treatment); 59, § 509(1) (West 1983) (Unprofessional conduct).

OR Or.Rev.Stat. § 435.435 (1987) (Effect of refusal to consent to termination); § 465.110 (1987) (Place for unlawful abortion = nuisance); § 432.120 (1987) (Records, disclosure rule); § 659.029 (1987) (Employ. discrim.); § 685.110(4) (1987) (Revocation of naturopath license).

PA Pa.Stat.Ann. tit. 18, § 3203 (Purdon 1975) (Definitions); 18, § 3217 (Purdon 1975) (Civil penalties); 18, § 3219 (Purdon 1975) (State Board of Med. Ed. and Lic.); tit. 42, § 6144 (Purdon 1975) (Dying declarations in case of abortion).

RI R.I.Gen.Laws § 23-4.7-1 (1985) (Abortion defined); § 23-4.7-4 (1985) (Emergency); § 23-4.7-7 (1985) (Liability of phys.); § 23-4.7-8 (1985) (Severability); § 23-4.8-5 (1985) (Severability); § 27-18-28 (1979) (Health insurance); § 36-12-2.1 (1986) (Exclusion from hosp. care coverage); § 11-9-18 (1981) (Care of babies born alive during abortion).

SC S.C.Code Ann. § 44-41-10 (1976) (Definitions).

SD S.D.Codified Laws Ann. § 34-23A-1 (1976) (Definition of terms); § 34-23A-2 (1976) (Lawful only under certain conditions); § 34-23A-16 (1976) (Birth cert. live birth resulting from abort.); § 34-23A-16.1 (1976) (Right/life babies born alive); § 34-23A-18 (1976) (Abortion as evidence in termin. parental rights case); § 34-23A-20 (1976) (Severability; § 34-23A-21 (1976) (Repeal of chapter when states given exclusive authority); § 36-4-30(1) (1976) (Unprofess. conduct).

TN Tenn.Code Ann. § 37-10-302 (Supp. 1988) [effec. July 1, 1989] (Definitions); § 37-10-305 (Supp. 1988) [effec.

July 1, 1989] § 37-10-307 (Supp. 1988) [effec. July 1, 1989] (Civil actions); § 39-4-201(d) (1982) (Residency); § 39-4-206 (1982) (Rights to med. treatment-infant born alive during abortion); § 39-4-206 (1982) (No cause of wrongful death); § 39-4-207 (1982) (Custody of infant prem. born alive due to abortion); § 68-11-201 (Supp. 1988) (Defin. "Ambulatory Surgical Treatment Center"); § 63-1-120(14) (1986) (Revoc. of lic.); § 63-9-111(b) (1986) (Revocation of lic, osteopathic).

TX Tex.Fam.Code Ann. § 15.022 (Vernon 1986) (Definition) (Termination of parental rights of child born alive during abortion); § 17.011 (Vernon 1986) (Living child after abortion); § 12.05 (Vernon 1986) (Rights of living child after abortion); Tex.Rev.Civ.Stat.Ann. art. 44956 § 3.08(14) (Vernon Supp. 1989) (Revoc. of lic.).

UT Utah Code Ann. § 76-7-301 (Supp. 1988) (Definitions); § 76-7-312 (1953) (No intimidation, coercion); § 76-7-315 (1953) (Emergency exceptions); § 76-7-316 (1953) (Actions not precluded); § 76-7-321 (Supp. 1988) (Definitions); § 53A-13-101 (Supp. 1988) (Parental consent for school instruction on abortion); § 78-11-25 (Supp. 1988) (Failure, refusal to prevent birth not a defense).

VT Vt.Stat.Ann. tit. 13, § 102 (1974) (Dying declaration as evidence).

VA Va.Code Ann. § 19.2-8 (Supp. 1988) (Limitation of prosecution); § 54.1-2914(A)(1) (1988) (Unprofessional conduct).

WA Wash.Rev.Code.Ann. § 9.02.010 (1987) (Defined); § 9.02.040 (1987) (Evidence); § 9.02.070(b) (1987) (Residence requirement); § 9.02.090 (1987) (Act submitted to electorate); § 18.130.180(18) (1988) (Unprofessional conduct).

WV W.V.Code § 16-2F-2 (1984) (Definitions); § 16-2F-9 (1984) (Severability); § 16-2B-2 (1984) (Abortion not approved method of child spacing, family planning); § 16-2F-3 (1984) (Referral of minor for counselling).

WY Wyo.Stat. § 35-6-101 (1988) (Definitions).

APPENDIX B

CURRENT FEDERAL STATUTES REGARDING ABORTION

1. 42 U.S.C. § 300a-6 (1982) (Public Health Service prohibition against funding programs using abortion as family planning method).

2. 42 U.S.C. § 300a-7(b) (1982) (Public Health Service prohibition of public officials requiring recipients to perform, assist or provide facilities for abortion or discriminating in educational application because of belief about abortion).

3. 42 U.S.C. § 300a-8 (1982) (Public Health Service penalty for government officer or employee endeavoring to coerce abortion upon beneficiary of federal program).

4. 42 U.S.C. § 300z-5 (1982) (Adolescent Family Life Act demonstration projects, parental consent not required if parents compel abortion).

5. 42 U.S.C. § 300z-10 (1982) (Adolescent Family Life Act demonstration project grants available only to programs not providing abortion counseling).

6. 42 U.S.C. § 1975c (Supp. IV 1986) (Civil Rights Commission denied authority to study abortion).

7. 42 U.S.C.A. § 2000d-4a note (West Supp. July 1988) (University civil rights requirements in federally assisted programs—abortion neutral) (*See* 20 U.S.C.A. § 1688, *infra*).

8. 42 U.S.C. § 2000e (1982) (Equal Employment Opportunities provisions do not require health insurance to cover abortion).

9. 42 U.S.C. § 2996f(b)(8) (1982) (Legal Services Corporation prohibited from handling abortion litigation).

10. 42 U.S.C.A. § 6107 (West Supp. July 1988) (Age Discrimination provisions in federally assisted programs—abortion neutral) (*See* 20 U.S.C.A. § 1688 *infra*).

11. 10 U.S.C. § 1093 (Supp. II 1984) (Defense appropriations may not be used for abortions).

12. 18 U.S.C. § 552 (1982) (Crime for federal officer to violate abortion importation law).*

13. 18 U.S.C. § 1461 (1982) (Crime to mail information about abortion).*

14. 18 U.S.C. § 1462 (1982) (Crime to import abortifacient).*

15. 29 U.S.C.A. § 706 (West Supp. July 1988) (Rehabilitation Services antidiscrimination law—abortion neutral) (See 20 U.S.C.A. § 1688 *infra*).

16. 29 U.S.C.A. § 794 (1982) (nondiscrimination under Federal Rehabilitation grants—abortion neutral).

17. 22 U.S.C. § 2151b (1982) (International Development funds may not be used for abortion promotion).

18. 22 U.S.C.A. § 2151n (West Supp. 1988) (International Development report on international abortion coercion required).

19. 22 U.S.C.A. § 2304 note (West Supp. July 1988) (International Military Assistance human rights violation reports include coerced abortion).

20. 20 U.S.C.A. § 1687 (West Supp. July 1988) (Education, discrimination based on sex or blindness—abortion neutral).

21. 20 U.S.C.A. § 1688 (West Supp. July 1988) (Education, discrimination based on sex or blindness—abortion neutral).

22. 19 U.S.C. § 1305 (1982) (Tariff Act, importation of illegal abortion material prohibited).*

* Apparently pre-1973.

APPENDIX C

Office of the Governor
State of Missouri

PROCLAMATION

WHEREAS, January 22, 1989, is the 16th anniversary of the United States Supreme Court decision that legalized abortion on demand; and

WHEREAS, the protection of the Constitution of the United States ought to apply to all human beings, irrespective of age, health, function, or condition of dependency, including unborn children at every state of their biological development; and

WHEREAS, since 1973, over 23 million unborn children have been denied their "right to life, liberty and the pursuit of happiness"; and

WHEREAS, the people of Missouri and their elected and appointed officials treasure God's gift of life and have promoted life's protection through numerous programs, legislation, executive decrees, and judicial orders:

NOW, THEREFORE, I, JOHN ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI, do hereby proclaim January 22, 1989, as a day in memoriam for these unborn children and urge all Missourians to recognize this day and fully participate in its observance.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, this 17th day of January, 1989.

/s/ John Ashcroft
Governor

Attest:

/s/ Roy D. Blunt
Secretary of State

APPENDIX D

Office of the Governor
State of Missouri

PROCLAMATION:

WHEREAS, January 22, 1980, is the sixth anniversary of the United States Supreme Court decision which legalized abortion on demand; and

WHEREAS, the protection of the Constitution of the United States ought to apply to all human beings, irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development; and

WHEREAS, over seven and one-half million unborn children have been denied their "right to life, liberty and the pursuit of happiness"; and

WHEREAS, the people of Missouri and their elected officials respect God's gift of life:

NOW, THEREFORE, I, JOSEPH P. TEASDALE, GOVERNOR OF THE STATE OF MISSOURI, do hereby proclaim January 22, 1980, as a day in memoriam for these unborn children and urge all Missourians to recognize this day and fully participate in its observance.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, this 18th day of January, 1980.

/s/ Joseph P. Teasdale
Governor

Attest:

/s/ James C. Kirkpatrick
Secretary of State

APPENDIX E

SENATE CONCURRENT RESOLUTION NO. 7

BE IT RESOLVED by the Senate, the House of Representatives concurring, that this legislature, pursuant to the authority granted by Article V of the Constitution of the United States, respectfully applies to the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States:

ARTICLE —

Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person; provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The congress and the several states have power to enforce this article by appropriate legislation.

BE IT FURTHER RESOLVED that a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States, and to each member of the Congress from this state.

APPENDIX F

Mo. Rev. Stat., "Crimes and Misdemeanors," ch. I, § 12 (1825):

Be it further enacted, That every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison, or other noxious, poisonous or destructive substance or liquid, with an intention him or her thereby to murder, or thereby to cause or procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding three thousand dollars.

Mo. Rev. Stat., "Crimes and Punishments," art. II, § 10 (1835):

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

Mo. Rev. Stat., "Crimes and Punishments," art. II, § 36 (1835):

Every physician, or other person, who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatsoever, or shall use, or employ any instrument or means whatsoever, with intent thereby to procure abortion, or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

1907 Mo. Laws, pp. 230-31:

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine, or article or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter in the second degree, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three or more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding $1,000.00, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of health in its discretion.

Mo. Rev. Stat., § 7336 (1919):

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells, or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine, or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed

physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of health in its discretion.

Mo. Rev. Stat., § 559.100 (1969):

Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is

above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES AND CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF APPELLANTS

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On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES AND CERTAIN MEMBERS OF CONGRESS IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI CURIAE

The Center for Judicial Studies, Cumberland, VA 23040, is a tax-exempt, public policy institution founded in 1982 for the purpose of promoting judicial and legal reform. The Director of the Center is Dr. James McClellan. The Center is the only educational and public policy organization in the United States that focuses exclusively on the problem of judicial activism. The Center seeks to confine the power of the federal judiciary

to the bounds envisioned by the Framers of the Constitution and of the fourteenth amendment.

Individual Amici are members of the Congress of the United States. They are concerned about the fact that *Roe v. Wade* has expanded federal judicial powers into areas that are within the rightful legislative domain of Congress and the states. This expansion has adversely affected the constitutional allocation of powers between the judicial and legislative branches and between the states and the federal government. It has effectively prevented both the Congress and the states from implementing sound legislative solutions to abortion issues. And it has introduced into this important area an atmosphere of capriciousness that has arisen from the unpredictable character of state and federal court decisions that have vainly sought to apply the elusive criteria of *Roe v. Wade* in a coherent manner.

This case involves the efforts of a state legislature to regulate abortion. Congress, too, has enacted legislation affecting that area, *see* 42 U.S.C. § 300a-6 (1982), and may do so again. The lower court decisions in this case, holding unconstitutional various provisions of Missouri law affecting the use of state funds, raise issues similar to those involved in litigation now pending with respect to federal regulations of abortion funding. This Court's efforts to define the scope of permissible abortion regulation directly affects the ability of elected representatives —both state and federal—to deal with this important and controversial question. These are matters of immediate interest to the Center for Judicial Studies and to the Members of Congress who are Amici herein.

SUMMARY OF THE ARGUMENT

The abortion decisions of 1973, *Roe v. Wade* and *Doe v. Bolton*, sharply restricted the powers of the states to regulate abortion. Under the trimester scheme therein adopted, the states cannot prohibit abortion until the third trimester. Even in the third trimester, the states are prohibited from forbidding an abortion that is sought for the mother's "mental or physical health." The unlimited elasticity of that vague criterion, when combined with the requirement that state restrictions on abortion be justified by a compelling state interest, in effect makes *Roe v. Wade* a mandate for abortion on request at all stages of pregnancy.

Since 1973, this Court has reaffirmed *Roe v. Wade*'s mandate. State and lower federal courts have interpreted that mandate strictly against the states. One result is that the states are effectively forbidden not only to prohibit abortion but also to regulate it in any significant way. Even the power of the states and the Congress to withhold public funding of abortion, a power that this Court has explicitly sanctioned, has been eroded by state and lower federal courts that appear hostile to any restrictions on free access to abortion.

The case herein illustrates the confusion that has prevailed in the state and lower federal courts. That confusion is traceable to the internal incoherence of *Roe v. Wade* as constitutional doctrine, and to the lack of any principled foundation for the asserted constitutional right to abortion.

The inadequacies of *Roe v. Wade* are not susceptible of any merely cosmetic remedy. Rather, those inadequacies are so basic that they can be eliminated only by abandoning *Roe* and by restoring to the states and to the Congress their rightful powers to legislate on the subject of abortion.

ARGUMENT

I. THIS CASE ILLUSTRATES THE TENDENCY OF STATE AND LOWER FEDERAL COURTS TO NULLIFY THE RIGHTFUL POWER OF THE STATES TO ENACT REASONABLE LEGISLATION ON THE IMPORTANT SUBJECT OF ABORTION.

In *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179, (1973), this Court restricted the states' regulatory powers over abortion according to the trimesters of gestation. During the first trimester, the states may not prohibit abortion and their power to regulate it is minimal. From the end of the first trimester until viability, which *Roe* defined as "the capability of meaningful life outside the mother's womb," 410 U.S. at 163, the states may not prohibit abortion but may regulate it "in ways that are reasonably related to maternal health." *Id.* at 164. From viability until birth, the states may regulate and even prohibit abortion, except where it is necessary, "in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* The health of the mother includes "psychological as well as physical well-being" and "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being" of the mother. *Doe*, 410 U.S. at 191-92. At all stages of gestation, state regulations limiting abortion will be upheld only if they are justified by a "compelling state interest" and are "narrowly drawn to express only the legitimate state interest at stake." *Roe*, 410 U.S. at 155; *see also id.* at 156-64.

Since 1973, this Court has reaffirmed the mandate of *Roe v. Wade*, making it more restrictive in the process. In so doing, the Court has effectively left no room for state prohibitions of abortion and very little room for state regulations of the subject. *See, e.g., Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reprod.*

Health, Inc., 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

This Court has, to be sure, approved legislation denying public funding and the use of public facilities for abortion, thereby upholding the rightful prerogatives of Congress and the states in this one area. *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). But decisions of some lower courts have tended to undercut even these approved congressional and state prerogatives. *See, e.g., Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988). Other decisions have tended to be hostile to all state efforts to legislate in this area. *See, e.g., Planned Parenthood Ass'n of Cincinnati v. Cincinnati*, 822 F.2d 1390 (6th Cir. 1987); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted sub nom., Diamond v. Charles*, 471 U.S. 1115 (1985) *appeal dismissed*, 476 U.S. 54 (1986); *Haskell v. Washington Twp.*, 635 F. Supp. 550 (S.D. Ohio 1986). These decisions substantiate the claim of Appellants that "the lower federal courts do no apply normal principles of constitutional adjudication to abortion cases." Jurisdiction Statement (J.S.) at App. 11.

The decisions of the courts below in this case exemplify this tendency of judicial hostility. For example, the Court of Appeals for the Eighth Circuit dismissed Missouri's statutory definition of life[1] as "simply an im-

[1] Mo. Rev. Stat. § 1.205 (1986) provides:

1. The general assembly of this state finds that:

(1) The life of each human being begins at conception;

permissible adoption of a theory of when life begins to justify [the state's] abortion regulations." *Reproductive Health Serv. v. Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989). The court of appeals offered no justification for this conclusion. Missouri's declaration that the life of a human being begins "at conception" is supported by abundant scientific evidence. *See generally The Human Life Bill, 1981: Hearings on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. *passim* (1981). Moreover, this statutory definition is explicitly made subject to "the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court." Mo. Rev. Stat. § 1.205.2 (1986). The court of appeals dismissed this saving clause on the ground that, "A recitation that state laws must be compatible with the United States Constitution is simply a restatement of the postulate contained in article VI of the Constitution." *Webster*, 851 F.2d at 1077. The statute, however, makes itself subject not only to the Constitution but also to "decisional interpretations thereof" by this Court. Mo. Rev. Stat. § 1.205.2. If, as the court of appeals concluded, this Court's decisions mean that such a definition of life can have no effect on the abortion area, then the clear meaning of the saving clause is that the definition has no effect in that area because, as Appellants contend, the definition "simply defines the point at which unborn children are entitled to the protection of Missouri law in circumstances other than those involved in abortion." J.S. at App. 16. If the court of appeals interpretation of this Court's decisions is correct, then the Missouri statutory definition of life simply does not do anything at all with respect to abortion and therefore should have been upheld. The court of appeals did not explain how such a definition, which has nothing to do with abortion, infringes the right of privacy with respect to abortion.

A similar disposition to undercut legitimate state authority can be seen in the treatment of Missouri's viability-testing requirement.[2] As the courts below recognized, the states have a compelling interest in preserving the life of a fetus once the point of viability is reached. Yet those courts deprived Missouri of a reasonable and

(2) Unborn children have protectable interests in life, health and well-being.

(3) The natural parents of unborn children have protectable interests in the life, health and well-being of their unborn child.

2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every state of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

[2] Mo. Rev. Stat. § 188.029 (1986) provides:

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

indeed necessary means of advancing that interest through the statutory requirement that a determination as to viability be made in an appropriate case before the abortion is performed. The statute does not make any particular test mandatory or determinative. It simply requires, when the physician has "reason to believe" that the child is twenty or more weeks' gestational age—i.e., may be viable, that "such medical examination and tests" shall be performed "as are necessary to make a finding of gestational age, weight, and lung maturity," all of which are indicia of viability. Mo. Rev. Stat. § 188.029 (1986). Contrary to the apparent view of the courts below, this statute does not improperly intrude upon medical judgment. It allows the physician to make the required findings through whatever examinations or tests are necessary. The statute leaves the decision as to the necessity of any particular test to the judgment of the physician. The statute does not require the physician to perform any particular tests. He may rely upon whatever examinations are necessary to make the required findings, findings that are relevant to the determination of viability.

The diminished prerogatives of the states in the abortion area can be seen with special clarity in the lower courts' invalidation of the Missouri statutes that forbid the use of public funds for "encouraging or counselling" abortion, Mo. Rev. Stat. § 188.205 (1986), and that forbid the performance or assistance of abortion by public employees or through public facilities.[3] The first thing

[3] Mo. Rev. Stat. § 188.200 (1986) provides:

> As used in sections 188.200 to 188.220, the following terms mean:
>
> (1) "Public employee", any person employed by this state or any agency political subdivision thereof;
>
> (2) "Public facility", any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof;
>
> (3) "Public funds", any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Mo. Rev. Stat. § 188.205 (1986) provides:

> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Mo. Rev. Stat. § 188.210 (1986) provides:

> It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Mo. Rev. Stat. § 188.215 (1986) provides:

> It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

to remember here is that this Court has extensively and firmly upheld the right of the Congress and the states to deny public funding of abortion and the use of public medical facilities for abortion. *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 646 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

The court of appeals subjected the "encouraging or counselling" provision, Mo. Rev. Stat. § 188.205, to "a proportionately greater increase in scrutiny" because it

threatens to "inhibit the exercise of constitutional rights . . . of both physicians and their patients: the right to disseminate and receive information about abortion, and the right to knowingly and intelligently choose an abortion after consulting a physician." *Webster*, 851 F.2d at 1078. The court of appeals went on to hold the provision unconstitutionally vague. But as Appellant argues, this is not a prohibition of such constitutional rights but merely a prohibition of public funding of abortion that is in full accord with this Court's decisions that permit the states to deny such funding. The restriction, in the words of Appellant, prohibits only "the expenditure of public funds for the sole purpose of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life. The statute does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." J.S. App. 25. Further, the provision is not unconstitutionally vague. Rather, "it provides a reasonable person fair notice of the conduct which will not be subsidized by the state." *Id.*

The hypercritical judicial attitude toward the acknowledged state power to restrict abortion funding is manifested also in the court of appeals' treatment of the Missouri statutes restricting the performance or assistance of abortion by public employees or public facilities. Mo. Rev. Stat. §§ 188.210, 188.215 (1986). These statutes are well within the authority recognized by the abortion funding decisions of this Court and especially by *Poelker v. Doe*, 432 U.S. 519 (1977). In *Poelker*, this Court upheld a prohibition of "the performance of abortions" in city hospitals even where no net expenditure of public funds was involved. The court of appeals, however, said *Poelker* involved "an indigent who sought a free abortion at the expense of the city." *Webster*, 851

F.2d at 1081. And the court of appeals held that the Missouri prohibition of the use of public employees is unconstitutional because it applies even where the women pay for the abortions at no cost to the public, so that "even women who can afford abortions cannot obtain them through the assistance of public employees." *Id.* at 1083. The court of appeals' analysis involves a radical misreading of *Poelker*, in which this Court upheld a prohibition not only of funding but of "the performance of abortion in the city hospitals," *Poelker*, 432 U.S. at 520, even though the prohibition made no exceptions for paying patients or even for small communities where no other facility is available. *See id.* at 523-24 (Brennan, J., dissenting).

The court of appeals bypassed the *Poelker* precedent of this Court and instead placed its reliance on *Nyberg v. City of Virginia*, 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983). This misplaced reliance on *Nyberg* instead of on *Poelker* is particularly objectionable because *Poelker* upheld the prohibition as applied while this case presents a facial challenge to the Missouri statutes. A facial challenge "must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 107 S.Ct. 2095, 2100 (1987).

The decisions below in this case illustrate a process of erosion of legitimate state powers that is especially indefensible because it relates to such an important area of law and policy.

II. THE CONFUSION IN STATE AND LOWER FEDERAL COURTS AND THE EROSION OF STATE POWER IN THE ABORTION AREA ARE ATTRIBUTABLE TO THE INTERNAL INCOHERENCE OF *ROE v. WADE* AND TO THE LACK OF ANY PRINCIPLED FOUNDATION FOR THE ASSERTED CONSTITUTIONAL RIGHT TO ABORTION.

Roe v. Wade assumed or declared at various points that the Constitution guarantees a right to abortion, without ever identifying the basis of that right in a way that would guide its subsequent application. Although *Roe v. Wade* acknowledged that "[t]he Constitution does not explicitly mention any right of privacy," 410 U.S. at 152, it did not provide any specific reasons why the right to privacy included a right to abortion. Indeed, when one person demands access, free of governmental regulation, to a surgical procedure that is to be performed by another person—whether an abortion, a vasectomy, or a sex change operation—interference with the former's "privacy" is not an idea that comes readily to mind. Typically a failure to declare the constitutional basis of a holding would simply impede efforts by lower courts and public officials to gauge the scope, meaning, and future course of decisions. As to *Roe v. Wade*, however, the fact that the constitutional right declared was therefore utterly unknown, and that the abortion laws of approximately two thirds of the states were at odds with it, *see id.* at 139-40, made its principled application impossible from the outset.

Although this Court traditionally decides whether a constitutional challenge has any legal basis before it imposes on the states the burden of justifying their laws, *Roe v. Wade* took a different route. Rather than determining first the merit of Appellant Roe's attempt "to discover [an abortion] right in the concept of personal 'liberty' embodied in the Fourteenth Amendment," the privacy rights "said to be protected by the Bill of Rights

or its penumbras . . .," and the "rights reserved to the people by the Ninth Amendment," *see id.* at 129, *Roe* instead gathered various medical and moral justifications for abortion laws, *id.* at 129-47, and held them inadequate.

Canvassing their long history, *Roe* found "[t]hree reasons [that] have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence." *Id.* at 147. The first justification was "that these laws were the product of a Victorian social concern to discourage illicit sexual conduct," a justification not advanced by Texas in *Roe*, never "taken seriously" by any court or commentator, and attacked by "appellants and *amici*" as "not a proper state purpose at all." *Id.* at 148. Second, "[w]hen most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman," *id.*, a situation which "[m]odern medical techniques have altered." *Id.* at 149. Finally, "the third reason [was] the States' interest—some phrase it in terms of duty—in protecting prenatal life," *id.* at 150, although there is an "absence of legislative history to support the contention" that an original purpose of abortion laws "was to protect prenatal life," *id.* at 151, and there is "some scholarly" and state court support for the view that "most state laws were designed solely to protect the woman." *Id.* Thus, without explaining whether the Appellant's claim had any constitutional basis, *Roe* announced that "[it] is with these interests, and the weight to be attached to them, that the case is concerned." *Id.* at 152.

The rest of the *Roe* opinion described a balancing mechanism that weighs the states' regulatory interests against the abortion right, but did not explain with any specificity either the source, content, and scope of that right, or the reasons why it outweighed certain state interests. It offered no foundation for its newly announced abortion right beyond citing "a line of decisions

. . . going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), [in which] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.*

But those cases are not a "line of decisions" that might be logically extended to reach new circumstances. They are rather widely disparate and unrelated precedents. They concern rules of evidence,[4] freedom of speech,[5] criminal procedure and punishment,[6] contraception,[7], education,[8] and interracial marriage,[9] and child labor.[10] None of those decisions explained why, or suggested how, the Constitution guarantees a right to abortion. Except for *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), they do not purport to rest on a constitutional right of privacy as such, and they do not cite each other in support of such a right. Indeed, *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the case cited as the origin of the constitutional right of privacy, concerned a common law right which was not constitutional, which merely protected tort plaintiffs from court-ordered examinations of their alleged

[4] *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

[5] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[6] *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886).

[7] *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965); *id.* at 486 (Goldberg, J., concurring).

[8] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[9] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[10] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

physical injuries, and which in any event permitted English courts to order examinations of pregnant women to ascertain "whether a woman convicted of a capital crime was quick with child . . . in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253.

The flow of *Roe v. Wade*'s reasoning from the right of privacy to the abortion right is as cryptic as is its definition of privacy. *Roe v. Wade* simply announced the abortion right and confessed a degree of ambivalence about its constitutional basis: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153.

The internal incoherence of *Roe* becomes especially obvious at this point. The majority opinion cited *Buck v. Bell*, 274 U.S. 200 (1927), with approval. 410 U.S. at 154. *Buck v. Bell* uphold the constitutionality of a statute that provided for compulsory sterilzation by surgery. One would have supposed that a compelled and unconsented surgical intrusion into a person's body would have been the classical illustration of a government's unconstitutional invasion of that person's privacy. But after *Roe*, state and federal legislatures and courts were confronted with the task of trying to comprehend the astounding conclusion that restricting access to a desired surgical procedure is somehow an invasion of privacy whereas compelling an unwilling person to undergo a surgical procedure is not.

Once it concluded that a constitutional right to abortion existed, *Roe* took only modest steps to define that right. It expressed skepticism of "the claim asserted by some *amici* that one has an unlimited right to do with one's

body as one pleases." *id.* at 154, and doubted whether such a claim "bears a close relationship to the right to privacy previously articulated in the Court's decisions." *Id.* It also cautioned that "this right is not unqualified and must be considered against important state interests in regulation." *Id. Roe* thus concluded that the "right to privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155. And, it suggested that the limitations on the right to abortion would result from balancing the new "fundamental right" against "compelling state interests." *Id.* at 155-56.

In attempting to strike that balance, *Roe* again chose not to clarify the nature of the "fundamental right" involved. Instead, it devised a balancing mechanism that hinges on the weights accorded to the regulatory interests of the state. The first regulatory interest *Roe* identified, the "Victorian social concern to discourage illicit sexual conduct," *id.* at 148, was accorded little weight, while the state's interests in the protection of life, whether maternal or fetal, were deemed more weighty: "As we intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." *Id.* at 159. *Roe* did not explain the criteria whereby it determined that certain regulatory interests are "reasonable and appropriate" while others are not, nor whether those criteria emanated from the privacy right.

Being "reasonable and appropriate" nevertheless does not suffice, according to *Roe*, for a regulatory interest to tilt the balance in favor of the state. A "compelling" interest is required. *Id.* at 162-63. "With respect to the State's important and legitimate interest in the health

of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester . . . because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* at 163. The decision does not explain the conditions under which those medical data were gathered; why the state could not seek to protect the health of individual women who run a greater risk of complications from abortion than the "average" woman; or what would happen to constitutional law as medical understanding evolved.[11]

To protect "potential life," however, medical considerations inexplicably are not controlling. As a matter of medical fact, the embryo or fetus is obviously alive throughout pregnancy, but "the 'compelling' point is at viability . . . because the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Id.* The significance and origin of the term "meaningful life" are to this day unknown. Further, *Roe*'s explanation of the significance of viability suggests a view of the abortion right expressly contradicted elsewhere in its opinion. The abortion right here seems to consist of the mother's right to sever any bodily tie she may have to the fetus, but not to destroy it if doing so is unnecessary to sever that connection. But elsewhere in the opinion *Roe* cautioned that "the right of privacy previously articulated in the Court's decisions" does not "bear[] a close relationship" to any "unlimited right to do with one's body as one pleases." *Id.* at 152. Indeed, in defining the right of privacy, *Roe* vacillated between

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[11] Indeed, evolving medical knowledge now opens to question whether any medical basis ever existed for dividing pregnancy into trimesters, in spite of the fact that medical journals in the decade preceding *Roe v. Wade* stressed that division. *See* Cates & Grimes, The Trimester Threshold for Pregnancy Terminations: Myth or Truth?, in *Second Trimester Pregnancy Termination* 50 (M. Keirse & B. Gravenhorst ed. 1982).

calling it "a right of personal privacy," *id.*, which suggests a right of personal autonomy, and describing it as "a guarantee of certain areas or zones of privacy," *id.*, which implies a limited area of protections from state intrusion.

Roe v. Wade, moreover, left unanswered the question whether "the State has a compelling interest in protecting that life from and after conception" rather than merely in the third trimester. *Id.* at 159. That question, of course, is crucial if not dispositive. But *Roe* considered the question "of when life begins" a "difficult question" that "[w]e need not resolve" because "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* That statement is perhaps the most difficult of all to understand. *Roe* had resorted to a lengthy discussion of medicine, philosophy, and theology to identify other regulatory interests that, unlike the interest of protecting life from conception, it considered reasonable and appropriate. *Id.* at 129-52. But when the issue became whether the victim of abortion is a living human being, *Roe* abstained. The decision, in effect, that the fetus may be killed whether or not a human being is the same in principle as a decision that an acknowledged human being may be killed. And it is fair to ask why, if *Roe* were in doubt, it did not give the benefit of that doubt to innocent life.

In light of the internal incoherence of *Roe v. Wade* itself, it is not surprising that the decision has fostered arbitrary judicial decisions in which practically the only prediction that can safely be made is that the ruling will be hostile to whatever state regulation of abortion happens to be at issue. *See* Uddo, *A Wink from the Bench: The Federal Courts and Abortion*, 53 Tul. L. Rev. 398 (1979). Indeed, even at the Supreme Court level, it is

"painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). With good reason it was said that *Thornburgh* "finds no justification in the Court's previous holdings, departs from sound principles of constitutional and statutory interpretation, and unduly limits the state's power to implement the legitimate (and in some circumstances compelling) policy of encouraging normal childbirth in preference to abortion." *Id.* at 798 (White, J., dissenting).

III. THE SOLUTION TO THE PROBLEMS CREATED BY *ROE v. WADE* IS TO ABANDON THE RESTRICTIONS IMPOSED BY THAT CASE AND TO RESTORE TO THE STATES AND CONGRESS THEIR RIGHTFUL POWERS TO LEGISLATE ON THE SUBJECT OF ABORTION.

The confusion and instability manifested in abortion decisions since 1973 by state and lower federal courts as well as by this Court are attributable to *Roe v. Wade* itself. By proclaiming as fundamental a privacy right to abortion that is devoid of any linkage to the text or history of the Constitution, as well as any linkage to the common meaning of the word "privacy," *Roe* virtually guaranteed that the implementation of that right would be as arbitrary as was its creation.

From its inception, *Roe v. Wade* could not have been based on anything other than uniquely controversial moral judgments that the Constitution does not make. Making them calls for a competence and democratic legitimacy that federal courts lack by design. As a result, it is not surprising that *Roe v. Wade*'s sixteen-year journey through our system of justice has left a trail of unprincipled decisions and legislative confusion, which, un-

less ended, bode more of the same for the future. It is a journey that will place this Court ever more sharply at odds with firmly established limits on the role of courts in our society; with the idea of law itself as a set of binding principles that rise above the personal opinions of the men and women who enforce it; and with the democratice power of the states and their local subdivisions to order private and public life according to the different moral visions of their respective communities. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

In the interest of the orderly adjudication of constitutional cases, the solution should go to the source of the problem. Fortunately, this case presents an opportunity to resolve this problem by applying the principles this Court recently announced in *Bowers*. In holding that the right of privacy does not include a constitutional right to engage in sodomy, the Court identified "the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 . . . (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if (they) were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 . . . . (1977) (opinion of Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Id.* at 191-92.

Measured by these criteria the asserted right to abortion ought to fail the test for inclusion in the list of fundamental liberties. As the Court said of sodomy in *Bowers*, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition'

or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 186.

It is past time to abandon the regime of heightened judicial scrutiny mandated by *Roe v. Wade* and to return to the tested formulation urged by Justice Rehnquist in his dissent in that case: "The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." *Roe*, 410 U.S. at 173. A return to this principled standard will restore to the states and to the Congress their rightful powers to deal with this vital subject of abortion.

CONCLUSION

For the foregoing reasons, Amici Curiae submit that the judgment of the court of appeals from which this appeal is taken should be reversed, that the Missouri statutes involved should be upheld as constitutional, and the rule of *Roe v. Wade* should be abandoned.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In The

Supreme Court of the United States

October Term, 1988

WILLIAM L. WEBSTER; STATE OF MISSOURI,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF GREATER KANSAS CITY; HOWARD I. SCHWARTZ, M.D.; ROBERT L. BLAKE, M.D.; CARL C. PEARMAN, M.D.; CARROLL METZGER, R.N.C.; MARY L. PEMBERTON, B.S.W.,

Appellees.

On Appeal From The United States Court of Appeals For the Eighth Circuit

BRIEF AMICUS CURIAE OF THE HOLY ORTHODOX CHURCH

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BRIEF AMICUS CURIAE OF THE HOLY ORTHODOX CHURCH

The Holy Orthodox Church respectfully submits this brief amicus curiae on behalf of itself and its members.[1]

[1] Counsel for Amicus has obtained the oral consent of both parties to this case. Written consent shall be filed with the Clerk of the Court immediately upon its receipt.

INTEREST OF AMICUS CURIAE

The Holy Orthodox Church was founded by Jesus Christ and the Apostles, and bears witness to that continuous and unbroken faith.[2] The precepts of the Orthodox Christian faith mandate the protection of innocent human life, especially that of unborn children. The Church regards abortion as murder, and as such, takes a very active role in opposing legalized abortion. That the issue of abortion has both a moral and a legal dimension to it, is indisputable. However, this cannot in any way be equated to an assertion that the two aspects are disparate, or unrelated. Rather, the two have historically been intertwined; it must be recognized that laws have traditionally been positive expressions of moral norms.

The Framers of the Constitution discerned a divine presence not only in daily living, but as reflected in the Constitution itself. "It is impossible for any man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution."[3] That

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[2] The Holy Orthodox Church includes all major Orthodox Christian groups in the United States: Albanian, American, Antiochian, Bulgarian, Carpatho-Russian, Greek, Romanian, Russian, Serbian, and Ukrainian. Regardless of the jurisdiction, all Orthodox Christians share a unity of faith and tradition extending back almost two thousand years to the time of Jesus Christ and the Apostles.

[3] *The Federalist, No. 37* (J. Madison). George Washington echoed this sentiment. " . . . it would be peculiarly improper to omit, in this first official act, my fervant supplications to that Almighty Being, who rules over the universe, who presides in

(Continued on following page)

is, a law must of its very nature have a moral component to it, which cannot be divorced from the law itself.

Legal precepts, particularly those of constitutional proportions, simply cannot be judged in a vacuum. This notion not only predates the Constitution;[4] it is at the very heart of our civilization. The foundations of our morality can be found in the dawn and early morning light of the Judeo-Christian tradition, of which the Orthodox Church is a unique custodian. From its inception nearly two thousand years ago, it has never deviated from its condemnation of abortion, based on numerous scriptural references and the teaching of the Holy Fathers of the Church. The Church regards the *Roe v. Wade* decision as a gruesome turn on the road of judicial activism, having resulted in a holocaust which has claimed at least twenty million innocent lives.[5]

(Continued from previous page)

the council of nations, and whose providential aids can supply every human defect. . . . In tendering this homage to the great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own. . . . No people can be bound to acknowledge and adore the invisible hand, which conducts the affairs of men, more than the people of the United States." Washington, *First Inaugural Address, quoted in,* Eliot, *American Historical Documents, 1000-1904,* at 226 (New York: P.F. Collier & Son Corp., 1938).

[4] *See, e.g.,* John Locke, *Second Treatise on Civil Government,* ch. IV, secs. 22 and 23 (New York: Liberal Arts Press, 1952).

[5] This brief is filed with the blessings of: *The American Carpatho-Russian Orthodox Greek Catholic Diocese:* His Grace,

(Continued on following page)

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus curiae adopts the statement of the case and the statement of the facts as set out in the Appellants' Brief.

(Continued from previous page)

Bishop Nicholas; V. Rev. Frank P. Miloro, Dean of Christ the Savior Orthodox Theological Seminary; *The Anthiochian Orthodox Christian Archdiocese of North America:* His Eminence, Most Rev. Metropolitan Philip; Rt. Rev. Antun, Auxiliary Bishop; V. Rev. Peter E. Gillquist, Chairman of the Council of Coordinators, Antiochian Evangelical Orthodox Mission, and member, Worship and Evangelization Committee, National Council of Churches; V. Rev. Jack N. Sparks, Dean of St. Athanasius College; *The Greek Orthodox Archdiocese of North and South America:* Rt. Rev. Maximos, Bishop of Pittsburgh; Rev. Dr. Stanley S. Harakas, Archbishop Iakovos Professor of Orthodox Theology and Christian Ethics, Holy Cross Greek Orthodox School of Theology; Rev. Dr. Theodore Stylianopoulos, Professor of New Testament and Orthodox Spirituality, Holy Cross Greek Orthodox School of Theology, and member of the Central Committee of the World Council of Churches; Rev. Fr. George A. Alexson, Secretary-Treasurer of the Greater Washington Orthodox Clergy Council, and Pastor, St. Katherine's Greek Orthodox Church of Northern Virginia; *The Orthodox Church in America:* His Beatitude Theodosius, Archbishop of Washington, Metropolitan of All America and Canada; Rt. Rev. Peter, Bishop of New York and New Jersey; Rt. Rev. Dimitri, Bishop of Dallas and the South; Rt. Rev. Herman, Bishop of Philadelphia and Eastern Pennsylvania; Rt. Rev. Gregory, Bishop of Sitka and Alaska; Rt. Rev. Nathaniel, Bishop of Detroit and the Romanian Episcopate; Rt. Rev. Job, Bishop of Hartford and New England; Rt. Rev. Tikhon, Bishop of San Francisco; Rt. Rev. Mark, Acting Bishop of Chicago and the

(Continued on following page)

SUMMARY OF ARGUMENT

In this case, the Holy Orthodox Church seeks to restore to our nation's law the highest principle which a civilized society can espouse – the recognition that all

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Midwest; V. Rev. Leonid Kishkovsky, Secretary of External and Ecumenical Affairs, and President-Elect of the National Council of Churches; V. Rev. John Meyendorff, Dean of St. Vladimir's Orthodox Theological Seminary, and Professor of Church History and Patristics; V. Rev. Daniel K. Donlick, Dean of St. Tikhon's Orthodox Theological Seminary; V. Rev. Joseph P. Kreta, Dean of St. Herman's Orthodox Theological Seminary; V. Rev. Thomas Hopko, Associate Professor of Dogmatic Theology, St. Vladimir's Orthodox Theological Seminary, and member, Faith and Order Commission of the World Council of Churches; V. Rev. John Kowalczyk, Adjunct Professor of Religious Education and the Christian Family, St. Tikhon's Orthodox Theological Seminary, and Pro-Life Coordinator of the Diocese of Eastern Pennsylvania; V. Rev. Vladimir Borichevsky, Professor of Moral and Pastoral Theology, St. Tikhon's Orthodox Theological Seminary; Rev. Fr. Alexander F.C. Webster, Senior Research Associate, Ethics and Public Policy Center, Washington, D.C. (for identification only); Holy Transfiguration Orthodox Monastery, Elwood City, Pennsylvania; Holy Dormition Orthodox Monastery, Rives Eaton, Michigan; *The Russian Orthodox Church in Exile:* His Eminence, Most Rev. Vitaly, Metropolitan of New York and Eastern America, First Heirarch of the Russian Orthodox Church in Exile; Most Rev. Anthony, Archbishop of Los Angeles and Southern California; Most Rev. Antony, Archbishop of San Francisco and Western America; Most Rev. Laurus, Archbishop of Syracuse and Holy Trinity Monastery, Rector of Holy Trinity Orthodox Seminary, and Abbot of Holy Trinity Orthodox Monastery, Jordanville, New York; Rt. Rev. Alypy, Bishop of Chicago, Detroit, and Midwest America; Rt. Rev. Hilarion, Bishop of Manhattan; Rt. Rev. Daniel, Bishop of Erie and Protector of the Old Rite; Rev. Fr. Alexey

(Continued on following page)

human life is sacred. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court relied heavily upon its presentation of historic Christianity's teaching and practices. The assertions made in *Roe* were erroneous, and have no foundation in the church's traditions. Rather than being ambivalent, or even condoning abortion, as suggested by the *Roe* Court's opinion, historic Christianity has always condemned abortion as murder, without regard for any distinctions as to fetal development or viability.

The *Roe* Court also blurred the factual question of when life begins with the distinct legal question of what constitutional value attends to that life. The resulting

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Young, Editor of 'Orthodox America'; Rev. Fr. Gregory Williams, Editor of 'Living Orthodoxy'; *The Serbian Orthodox Church in the United States and Canada:* His Grace, Bishop Christopher; *The Ukrainian Orthodox Church of America and Canada:* His Grace, Bishop Vsevolod.

In addition, this brief is endorsed by: Orthodox Christians for Life – John Protopapas, Co-Founder and Chairman; Rev. Fr. Edward Pehanich, Co-Founder and Spiritual Advisor, and Diocesean Representative for the Carpatho-Russian Orthodox Greek Catholic Diocese; Valerie Protopapas, Educational Director, and Sanctity of Life Director for the Diocese of New York and New Jersey (OCA); and V. Rev. Gordon T. Walker, liaison to the Antiochian Evangelical Orthodox Mission. This brief is also endorsed by: Dr. Lewis J. Patsavos, Professor of Canon Law, and Dr. John Chirban, Professor of Psychology and Counseling, Holy Cross Greek Orthodox School of Theology; Dr. John Erikson, Professor of Canon law and Church History, St. Vladimir's Orthodox Theological Seminary; the Orthodox Christian Association of Medicine, Psychology, and Religion; the Orthodox Brotherhood of the United States; the National Association of Romanian Orthodox Women in America; and American Romanian Orthodox Youth.

confusion has tied the hands of legislators, and elevated abortion to the status of a near-absolute right. Unless this Court takes judicial notice, the factual question of when life begins is properly a subject for legislative findings. The strictly legal question of a life's constitutional value is the clear issue before this Court, as the State of Missouri has made an appropriate factual determination.

Science and history both mandate a conclusion that human life and constitutional personhood are coextensive, and any other result is without foundation in American jurisprudence. Consequently, the Holy Orthodox Church urges this Court to overrule *Roe v. Wade*, and accord full constitutional protection to all human life, beginning at conception.

ARGUMENT

I. THIS IS AN APPROPRIATE CASE IN WHICH TO RECONSIDER *ROE v. WADE*

In *Roe v. Wade*, 410 U.S. 113 (1973), and in subsequent cases, this Court has never reached the critical legal and public policy issue, that of when life begins. *Id.* at 159. However, for constitutional purposes, it is entirely appropriate for this Court to undertake to construe the term "life" as it appears in both the Fifth and Fourteenth Amendments.[6] In the absence of a judicial determination,

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[6] "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, sec. 1.

such matters have traditionally been committed to the political processes. Unfortunately, the Court has nonetheless proceeded to preclude any legislative determination of the question. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444 (1983).

This has created the confusing and circular assertion that life and personhood are unrelated, but nonetheless it is impermissible for legislatures to make findings as to when life begins. Unlike any other factual question, the political processes are now forbidden from employing the fruits of scientific research. If elected officials are to be prohibited, as a matter of law, from making necessary and proper factual findings, then this Court must determine for purposes of the Constitution, whether or not life is present in an unborn fetus. The State of Missouri has undertaken to make such a determination, and to address the merits of this case, this Court must make a ruling upon the validity of that assertion. Even though the question of when life begins may be difficult,[7] that does not remove the necessity of a just and proper judicial disposition of this case.

The Court has elevated abortion above all other constitutional rights; in practice, it may not be restricted, even if a life is indeed present. Unlike other constitutional rights, abortion need not be balanced against competing governmental interests. The implication is that the right to an abortion is more central to the tradition of individual liberty in America than the cherished rights of free speech and religion.

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[7] *Roe v. Wade*, 410 U.S. 113, 159 (1973).

The Missouri statute at issue here presents an important opportunity for this Court to resolve the ambiguities created by previous decisions, and clarify the precise relationship between human life and constitutional personhood. The Court need not make a ruling on the factual question of when life begins; indeed, this is properly left to legislatures and trial courts. However, it is imperative that there be a clear statement of the constitutional value of human life, *whatever* point science indicates it begins. If personhood does not attach until birth, then it is crucial to have guidance as to the legal status of pre-natal human life. The instant case frames the issue as clearly as is possible.

II. *ROE v. WADE* WAS WRONGLY DECIDED AND OUGHT TO BE OVERRULED

Amicus does not suggest to this Court that the theology or canons of the Orthodox Church, or of any other religious body, should form the basis of American constitutional law. However, in its lengthy historical exegesis, the *Roe* Court sought to show that abortion was philosophically and morally grounded in the Judeo-Christian tradition. To the extent such a perception is the foundation of *Roe*, the Orthodox Church bears an undivided witness to the fact that it is a perception which is utterly inconsistent with the experience of historic Christianity.

In the early centuries of the Church, its moral traditions and teachings were universally embraced, holding sway over almost the whole of Europe, the Middle East, and northern Africa, from Hadrian's Wall to the frontiers of the Persian Empire. Though this unanimity was later lost, the divergent moral strands of western thought,

including Anglo-American jurisprudence, ultimately trace their lineage to this rich heritage.

A. The Court's Finding in *Roe v. Wade*, That Abortion is Consistent With Historic Moral Practices, is Erroneous

The *Roe* Court relied heavily upon the contention that "Christian theology and canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century," and that "there was otherwise little agreement about the precise time of formation or animation." 410 U.S. at 134. The Court apparently found that Aristotle's three stage theory of life formed the basis of Christianity's beliefs, and "came to be accepted by early Christian thinkers." *Id.* at 133, n.22. The implicit conclusion is that the ancient Christian Church did not consider abortion in early pregnancy to be the taking of a human life. With all due respect to this Honorable Court, such was simply not the case.

Early Christian thought was not in any sense comparable or equivalent to prior Jewish or Greco-Roman traditions. The Church's teaching represented a significant departure from Aristotelian thought, and from the beginning regarded abortion as abhorrent and an abomination before God. The biologically erroneous Aristotelian view was rarely alluded to, and even in such cases where mention was made of the attempted distinction between "formed" and "unformed" fetuses, it was for the purposes of reiterating its moral irrelevance. To the extent that some western Christian writers espoused certain elements of Aristotelian philosophy, they must be regarded

as rather exceptional scholastic forays, whose basic premises and ultimate results have now been conclusively demonstrated to be false. The Christian Church, from its inception, expressed a distinct and fundamental horror of abortion, at whatever stage of pregnancy, and considered it to be the killing of a human being.

1. Early Christian Writings, and the Fathers of the Church, All Condemned Abortion as Murder

Among the most highly regarded of ancient Christian writings is the *Didache*, which dates from the late first century.[8] Its teaching is unambiguous: "Do not murder a child by abortion or kill a newborn infant." *Id.* at II, 2. This is echoed in another didactic writing universally esteemed in the ancient Church, the *Epistle of Barnabas*, from the early second century: "Never do away with an unborn child or destroy it after its birth." *Id.* at XIX, 5.

The writings of the Fathers of the Church and other authorities further attest to the unanimity with which abortion was condemned. Among the earliest was the philosopher and apologist Athenagoras of Athens, who wrote to the Emperor Marcus Aurelius (c.177) to defend Christians against false charges of murder: "What reason would we have to commit murder when we say that women who induce abortions are murderers, and will

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[8] Also known as *The Teaching of the Twelve Apostles*, it is a codification of the oral tradition handed down by the Apostles to their successors. Cf. II *Thessalonians* 2:15. It was called "scripture" by Clement of Alexandria (+c.215), and was recommended for catechists by St. Athanasius (c.297-373).

have to give account of it to God?"[9] St. Basil the Great (c.330-379) was unequivocable: "A woman who deliberately destroys a fetus is answerable for murder."[10] St. John Chrysostom (c.345-407) who in his famous homilies railed against men who secured the abortions of their illegitimate offspring, called their actions "even worse than murder." Of such men who impelled women to have abortions, he said, "You do not let a prostitute remain a prostitute, but make her a murderer as well."[11]

Finally, Canon 91 of the Quinisext Ecumenical Council (691 A.D.), decreed that people "who furnish drugs for the purpose of procuring abortion, and those who take fetus-killing poisons, they are made subject to the penalty prescribed for murderers." The same canonical position along with the opinions of individual Church Fathers, were compiled in the *Photian Collection*, which was adopted as the official ecclesiastical law book of the Orthodox Church in 883 A.D.

2. The Early Church Recognized That Life Begins at Conception, and Rejected Distinctions Based Upon Fetal Development or Viability

The *Roe* Court observed that there was "little agreement about the precise time of formation or animation.

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[9] Athenagoras, *Legation for Christians*, 6 Patrologia Graeca 969 (Paris: J.P. Migne ed., 1844-1865).

[10] St. Basil the Great, *Letters* CLXXXVIII, Canon 2.

[11] St. John Crysostom, *Homilies in Romans*, XXIV. *See also* the authoritative treatise by Fr. John Kowalczyk, *An Orthodox View of Abortion*, (Minneapolis: Light & Life Publishing Co., 2d ed. 1979).

There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide." 410 U.S. at 134. This assertion has no basis in the practices or theology of historic Christianity.

Among the earliest testimonies that fetal development was irrelevant is that of St. Basil the Great, who wrote that "any hairsplitting distinction as to its being formed or unformed is inadmissible with us."[12] He also condemned suppliers of abortifacients, regardless of the stage of pregnancy: "Those who give potions for the destruction of a child *conceived* in the womb are murderers, as are those who take potions which kill the child."[13]

St. Basil's brother, St. Gregory of Nyssa (c.335-394), saw the fetus as a complete human being from the time of conception, and specifically rejected theories based upon formation or quickening: "There is no question about that which is bred in the uterus, both growing, and moving from place to place. It remains, therefore, that we must think that the point of commencement of existence is one and the same for body and soul."[14] Even Tertullian of Carthage (c.160-c.230), a prominent Latin ecclesiastical writer who seemed to accept the formed/unformed distinction as a biological matter, dismissed its moral importance: "Abortion is a precipitation of murder, nor does it matter whether or not one takes a life when formed, or

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[12] St. Basil the Great, *supra* note 10.

[13] *Id.*, Canon 8 (emphasis supplied.)

[14] St. Gregory of Nyssa, *On the Soul and the Resurrection.*

drives it away when forming, for he is also a man who is about to be one."[15]

Though less specific, Holy Scripture also recognizes that an unborn child's life is sacred, and begins no later than conception: "Before I formed you in the womb, I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations." *Jeremiah* 1:5, 6.[16] Also noteworthy is St. Luke's use of the same Greek word, *brephos* (baby), for both the unborn St. John the Baptist (*Luke* 1:44) and the newly-born Christ child (*Luke* 2:12). Even more indicative are those examples, in both Old and New Testaments, where God enters into a direct personal relationship with a specific individual before birth, by "consecrating," "appointing," "calling," and "setting apart" the unborn child through His grace.[17] This testifies to the Bible's view that the fetus is not only a human being but a person. That this understanding of an unborn person's receptivity to divine grace extends back to conception is further evidenced by the ancient practice, as formalized in the Church calendar, of celebrating not only the conception of Christ (Annunciation, March 25), but that of His mother (December 9), and St. John the Baptist (September 23).

The canon law of the ancient Church, still in effect in the Orthodox Church today, is entirely consistent with the foregoing exposition of theological, patristic, and

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[15] Tertullian of Carthage, *Apology IX*.

[16] *See also, Job* 10:8, 9, 11; *Psalms* 139:13-16; *Ecclesiastes* 11:5; *Luke* 1:41-44.

[17] *See, e.g., Psalms* 139:13-16; *Isaiah* 44:2; *Isaiah* 49:1, 5; *Jeremiah* 1:5; and *Galatians* 1:15-16.

scriptural evidence. The first canonical pronouncement specifically on abortion was that of the regional Council of Elvira, Spain (c.303 A.D.), imposing life-long excommunication. In 314-315 A.D., the regional Council of Ancyra adopted Canon 21:

> Regarding women who become prostitutes and kill their babies, and who make it their business to concoct abortives, the former rule barred them for life from communion, and they are left without recourse. But, having found a more philanthropic alternative, we have fixed the penalty at ten years, in accordance with the fixed degrees.

The reference to prostitutes attests to the Fathers' recognition that abortion was only resorted to by women in the most desperate social circumstances. Three centuries into the Christian era, abortion was unthinkable to the broad mass of Christian people; canon law was adopted which lightened the penalty imposed upon those most in need of mercy. More importantly, the "former rule," imposing life-long excommunication, is Apostolic Canon 66, which pertains to homicide.[18] The fact that for centuries the Church treated abortion at any stage of pregnancy as homicide, without regard to fetal development, is indicative of the illusory nature of the formed/unformed distinction.

In addition, the *Roe* Court's reliance upon the writings of Augustine of Hippo (354-430) and Thomas Aquinas (1225-1274), as indicative of early Christian

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[18] Apostolic Canon 66 permitted penitents to return to communion only on their deathbeds. As the name suggests, an Apostolic Canon is a teaching received directly from the Twelve Apostles.

thought was misplaced.[19] While concepts such as "ensoulment" or "quickening" gained some currency in certain ecclesiastical circles beginning in the fifth century, this serves only to underscore the danger inherent in drawing broad-based conclusions based upon excerpts of writings from selected theologians. Augustine never laid claim to being infallible, nor did he presume to speak for the entire Church.[20] In fact, in the conclusion of his final treatise, he offered his opinions humbly to the judgment of the Church: "Let those who think that I am in error consider again and again carefully what is here said, lest perchance they themselves may be mistaken. And when, by means of those who read my writings, I become not only wiser, but even more perfect, I acknowledge God's favor to me."[21]

However, there is no doubt that despite their misunderstanding of fetal development, they sought to protect

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[19] 410 U.S. at 133 n.22.

[20] "If some have spoken imprecisely, or for some reason unknown to us, even deviated from the right path, but no question was put to them nor did anyone challenge them to learn the truth – we admit them to the list of Fathers, just as if they had not said it, because of their righteousness of life and distinguished virtue and their faith, faultless in other respects. We do not, however, follow their teaching in which they stray from the path of truth." St. Photius, *Letter to the Patriarch of Aquileia, quoted in,* Haugh, *Photius and the Carolingians,* 136-137 (Belmont, Mass: Nordland, 1975); and Archbishop Philaret of Chernigov, 3 *Historical Teaching of the Fathers of the Church,* 254-255 (St. Petersburg, 1882).

[21] Augustine of Hippo, *On the Gift of Perseverance,* ch. 68. *See also,* Fr. Seraphim (Rose), *The Place of Blessed Augustine in the Orthodox Church* (Platina, California: St. Herman of Alaska Brotherhood, 1983).

the fetus and considered its destruction homicide. We can, with the benefit of historical and scientific hindsight, attribute the misapplication of a correct impulse to a biological error stemming ultimately from Aristotle. The *Roe* Court adopted this error as the basis of its analysis of the moral acceptability of abortion over the past two thousand years; but as would be the case with a hypothetical body of jurisprudence based on the Ptolemaic geocentric system or the phlogiston theory of combustion, this Court should not hesitate to look beyond what we now understand to be a factual error, albeit a persistent one.

Historic Christianity recognized conception as the time at which life and soul were united, and regarded abortion at any stage of pregnancy as homicide. Though the Orthodox Church, for historical reasons relating to its organizational and doctrinal continuity with historic Christianity, is more acutely aware of this fact, this should not be taken as sectarian pleading. Rather, it is a unique witness to an older and sounder tradition that is our common heritage. The fact that the theological writings of Christian antiquity were formulated by men with little understanding of biology, but whose views are entirely compatible with our modern understanding, is further testament to their moral perspicacity.

B. Human Life Begins at Conception

The incorrectness of the *Roe* Court's assertion that there has been a historic lack of consensus on abortion has been demonstrated in section II A, *supra*. Even so, it is not the judiciary's proper role to evaluate consensus. *The*

Federalist No. 78 (A. Hamilton.) The legal and social morass resulting from the *Roe* decision is in large part a product of the confusion over what was actually decided. The *Roe* Court blurred the strictly *factual* question of when life begins with the quite distinct *legal* determination of what constitutional value attends to that life.

Modern science has borne out the prescient wisdom of the Holy Fathers of the Church, that life begins at conception, and at no other arbitrary or scholastically derived juncture.[22] However, this Court need not make a scientific determination of when life begins, any more than it was necessary in *Roe* to determine when a fetus is "viable;" this is a matter which is properly committed to the political processes. The Missouri legislature has undertaken to make findings of fact, as is appropriate in matters of social and economic regulation. It is improper for the judiciary to enjoin the political processes from determining the factual basis for proposed legislation. Traditionally, the federal courts give the greatest possible deference to legislative determinations with respect to such questions.[23]

This Court need only interpret the term "person," and thereby determine the constitutional value of unborn human life. Unless this Court should foreclose the option by taking judicial notice, or adopting a constitutional definition of "life" embracing a manifest legal fiction, the

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[22] *See*, Subcommittee on the Separation of Powers, Senate Committee on the Judiciary, *The Human Life Bill*, S. 158, 97th Cong., 1st Sess. 7-13 (1981).

[23] *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938).

State of Missouri is entitled to make a judgment as to when life begins. The judiciary's role is to determine the constitutional value of that life.

C. A Human Life is a "Person" for Purposes of the Constitution

To the extent that a construction of the term "person," as used in the Constitution, was made in *Roe*, it was done on the basis of the facts as presented and understood by the Court as that time. Amicus respectfully submits that the factual underpinnings of *Roe v. Wade* were erroneous, or at best incomplete. Reliance upon Aristotle and other selected writers from antiquity do not validate the *Roe* Court's conclusion that the morality of abortion has traditionally been ambivalent. As shown *supra*, some theorists have had erroneous views of the factual question of when life begins, but there has been no divergence as to the legal and moral value of that life once it has been established.

In *Roe* the Court went to some lengths to demonstrate that most references to "persons" in the Constitution had solely a postnatal connotation. However, this begs the question as to what "person" means in the Fourteenth Amendment. It must also be observed that most constitutional references to persons only dealt with adults, and in the original intent of the document, only white males. However, again, this still does not speak to the Fourteenth Amendment, which obviously was intended to vindicate the rights of black children as well as adults, and has subsequently been applied to protect the rights of women as well as men. There is no basis in history,

jurisprudence, or simple logic to justify specially exempting the unborn from the scope of the Amendment.

Furthermore, the appropriate constitutional definition of "person" has already been made by this Court. Justice Douglas, writing for the Court, found that illegitimate children are "persons," on the grounds that:

> They are humans, live, and have their being. They are clearly "persons" within the meaning of the Fourteenth Amendment.

Levy v. Louisiana, 361 U.S. 68, 70 (1968).

Unborn children clearly are human, do live, and have their being, in accordance with Justice Douglas' perceptive holding. An unborn child has as little control over its status as an illegitimate child, and is far more vulnerable. They are "persons" under the Constitution, and there is no rational basis whatsoever for creating an arbitrary or scholastic distinction so as to exclude them.

Another critical distinction which the *Roe* Court ignored was the Fourteenth Amendment's differentiation of citizenship and personhood:

> No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.[24]

As understood by the Framers of the Fourteenth Amendment, citizenship relates to political rights, while personhood deals with the more basic rights inherent in

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[24] U.S. Const. amend. XIV, sec. 1 (emphasis supplied).

all human beings. *See, e.g.*, Bishop, *The Privileges or Immunities Clause of the Fourteenth Amendment*, 79 Nw. U. L. Rev. 142, 151-153 (1984). The latter is a much broader classification than the former, encompassing both citizens and non-citizens; all citizens are persons, but the reverse is not true. Even a decision as monstrous as *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), conceded that slaves were persons under the Constitution, but denied them the privileges of citizenship.

Therefore, the many references to "persons" cited by the *Roe* Court in support of its finding of purely post-natal application were, contextually, referring to persons who were also citizens.[25] The references to "persons" relied upon by the *Roe* Court were made in political contexts, such as eligibility to vote or to hold political office, which of course would preclude *all* persons under a certain age, whether born or not. Such strict textual interpretation, done without regard for historical meaning and context, is devoid of constitutional justification.

In addition, this Court had already, some eighty-seven years prior to *Roe*, recognized corporations as "persons" under the Fourteenth Amendment. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886). That corporations are not male, female, black, white, pre-natal, nor post-natal, is transparently obvious. There is also no conflict between the recognition of personhood, but simultaneous denial of citizenship, as corporations cannot vote nor hold political office. Thus,

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[25] 410 U.S. at 157.

while *Santa Clara* is entirely consistent with the Fourteenth Amendment, *Roe* is not. The distinctions made in *Roe* and its progeny are artificial and have no basis in the adjudication of constitutional claims. This is made readily apparent through attempting to reconcile *Santa Clara* and *Roe*. Reading them together creates a result which is "hauntingly Orwellian – something can be a person without being human, and can be human without being a person.[26] No civilized society can possibly endorse such a conclusion.

The instant case clearly frames the contradictions and ambiguities precipitated by the *Roe* decision, and Amicus urges this Court to resolve them by reaffirming the moral, social, and legal recognition of the value of unborn human life.

CONCLUSION

The historic morality which forms the foundation of American constitutional thought is firmly grounded in the Judeo-Christian tradition. That tradition has unambiguously recognized that life begins at conception, and that abortion is murder. The notion that abortion on demand is an inherent right which cannot be denied, is of recent origin. Samuel Adams recognized that such innovations should be resisted: "If the liberties of America are ever compleatly ruined, . . . it will in all probability be the

[26] East and Valentine, *Reconciling Roe v. Wade*, in Horan, Grant, and Cunningham, *Abortion and the Constitution*, at 90 (Washington: Georgetown University Press, 1987).

consequence of a mistaken notion of *prudence*, which leads men to acquiesce in measures of the most destructive tendency for the sake of present ease."[27]

The "present ease" of abortion on demand does not, and cannot, alter the historical and moral truth that "universal life would proceed according to nature if we would practice continence from the beginning instead of destroying, through immoral and pernicious acts, human beings who are given birth by Divine Providence."[28] The assembled jurisdictions of the Holy Orthodox Church in the United States speak with one voice in urging this Court to recognize the sanctity of human life, and reverse the decision of the Court of Appeals.

Dated this 21st day of February, 1989.

Respectfully submitted,

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[27] 2 *The Writings of Samuel Adams*, 287-288 (New York: G.P. Putnam's Sons, H.A. Cushing ed., 1904) (emphasis in original).

[28] Clement of Alexandria, II *Paedagogus*, ch. X, 96, I.

AMICUS CURIAE

BRIEF

FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE MISSOURI CATHOLIC CONFERENCE IN SUPPORT OF APPELLANTS

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Dandridge v. Williams, 397 U.S. 471 (1970) 16

Griswold v. Connecticut, 381 U.S. 479 (1965) 6,12

Harris v. McRae, 448 U.S. 297 (1980) 5,20

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) 14

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Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1982) 4,20,21

Poelker v. Doe, 432 U.S. 519 (1977) 4,20

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).....12,13,15

Stanley v. Georgia, 394 U.S. 557 (1969) 13,14

Thornburgh v. American College of Obstetricians, ____ U.S. ____, 106 S.Ct. 2169 (1986) (White, J. dissenting).....6,12,13

United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973) .. 14,17

Williams v. Zbaraz, 448 U.S. 358 (1980) 20

Statutes:

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Mo.Rev.Stat. §188.205 (1989) 18

Mo.Rev.Stat. §1.205 (1989) 19

Treatises and Commentaries:

Pastoral Plan for Pro-Life Activities; A Reaffirmation . 2

B. George, *State Legislatures versus the Supreme Court: Abortion Legislation in the 1980's,* 12 Pepperdine Law Review 427 (1985) 6

Imber, *Abortion and the Private Practice of Medicine* (1986) 7,8,9,10

Taussig, *The Prevention and Treatment of Abortion* 162 (1910) 9,10,11

Callahan, *How Technology is Framing the Abortion Debate,* Hastings Center Report, Feb., 1986 at 33 . 10

Bartlett & Hoffman, *Missouri Indigent Health Care Study* (April, 1986) 18

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE MISSOURI CATHOLIC CONFERENCE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Missouri Catholic Conference is the joint public policy agency of the four Catholic dioceses of Missouri. It was formed in 1967 to promote the material and spiritual well being of all people in the State of Missouri in fields of health, education and social welfare. The board of directors of the Missouri Catholic Conference consists of the Catholic Bishops in the State of Missouri who represent the 800,000 Catholic residents of Missouri.

The interest of the Missouri Catholic Conference in this case arises from the position of the Catholic Church as expressed by

the National Council of Catholic Bishops, which includes all of the Catholic Bishops of Missouri, that "human life is a precious gift from God; that each person who receives this gift has responsibilities toward God, toward self and toward others and that society through its laws and social institutions, must protect and sustain human life at every stage of existence. These convictions grow out of [the] Church's constant witness that life must be protected with the utmost care from the moment of conception." *Pastoral Plan for Pro-Life Activities; A Reaffirmation,* Nov. 14, 1985. Based on these principles, the Missouri Catholic Conference supported, through testimony before committees of the Missouri General Assembly, the legislation which is the subject of this lawsuit.

The Missouri Catholic Conference believes that the Missouri legislature should be permitted to express the wishes of the majority of the residents of the State, including the Catholics of Missouri, regarding when an unborn child is deemed to be a human being, and regarding the use of public facilities or public employees to perform or assist in an abortion as provided in the challenged statute.

This Amicus supports the position of the Attorney General of Missouri that if *Roe v. Wade*, 410 U.S. 113 (1973) constitutes authority for the decision of the Eighth Circuit in its overturning of the Missouri statutes in this case, then that decision and its premises should be reconsidered.

Specifically, this Amicus will address, first, the question of whether the holding of *Roe v. Wade* that a woman has a fundamental right to abortion should be reconsidered, and, second, the question of whether the Missouri statute declaring that life begins at conception and making it unlawful: (i) for public employees within the scope of their employment to perform or assist in an abortion not necessary to save a life of the mother; and (ii) for any public facility to be used for the purpose of performing or assisting in an abortion not necessary to save the life of the mother, are within the permitted scope of legislative authority.

SUMMARY OF ARGUMENT

1. The holding in *Roe v. Wade*, 410 U.S. 113 (1973) that a woman has a fundamental right to an abortion, should be reconsidered and rejected in favor of evaluating state abortion regulation under the rational relationship test.

Fundamental rights are found only in the express language of the Constitution or are implied from the history and tradition of our Nation. Because there is admittedly no express right to an abortion in the Constitution, such a right can only exist if implied.

The history and tradition of the Nation should be considered from that point at which medical science enabled the public to be informed regarding abortion, in particular the life of the unborn. This history — from the late Nineteenth Century to date — shows, at best, sincere and deep division about the permissibility of abortion. *Roe v. Wade* erroneously relied upon historical events and thinking based on information that predated the development of current medical understanding — information which even *Roe v. Wade* acknowledged was incorrect. This reliance on unenlightened history allowed *Roe v. Wade* to take the ambivalence of long past times as a social decision to permit abortion.

Similarly, *Roe v. Wade* employed an incorrect test for implying fundamental rights. The abortion right was implied from an implied right of procreation which was in turn implied from the implied right of privacy. However, no privacy right exists because of the presence of the life of the unborn. In addition, by simply implying a right to abortion, *Roe v. Wade* failed to apply the proper standard for declaring fundamental rights. An implied right is found only when it derives from an express protection in the Constitution. To determine whether there is such a right it is necessary to ascertain whether the abortion decision is an inherent component of some express Constitutional right. This Court's decisions in areas of education, housing and public

welfare establish that implied rights are not found just because a person may suffer physical, emotional or social harm. *Roe v. Wade* incorrectly relied upon potential burdens from carrying a child and thereafter raising that child to derive a fundamental right to abortion. Consequently, no fundamental right is involved when states, such as Missouri, refuse to subsidize a woman's wish to be relieved of the burden of bearing and raising a child. Those state regulations should be judged only on a rational relationship basis.

2. Missouri's statutory declaration of life at conception and prohibition of abortion services at public facilities or by public employees is rationally related to Missouri's legitimate state interest of protecting unborn life.

Missouri has the right to adopt a statutory theory that life begins at conception, because the statute contains no restrictions on abortion rights and legitimate state interests are served by giving protections to the unborn from conception.

Finally, Missouri has the right to refuse to subsidize abortion by denying access to its publicly supported facilities and its employees for abortion services, pursuant to *Poelker v. Doe,* 432 U.S. 519 (1977). The Eighth Circuit's holding in *Nyberg v. City of Virginia,* 667 F.2d 754 (8th Cir. 1982), that governmental entities must permit private pay abortions in public facilities, should be overturned as incompatible with *Poelker v. Doe.*

ARGUMENT

I. A RATIONAL RELATIONSHIP TEST SHOULD BE EMPLOYED BY THE COURTS WHEN REVIEWING THE CONSTITUTIONALITY OF STATE LEGISLATION REGULATING ABORTION BECAUSE THERE IS NO FUNDAMENTAL RIGHT TO AN ABORTION.

It is well established that absent a countervailing fundamental right, states may fully regulate the activities of their citizens so long as the regulations bear a rational relationship to a legitimate state interest. See *Maher v. Roe,* 432 U.S. 464, 470 (1977); *Harris v. McRae,* 448 U.S. 297, 324-25 (1980). As this Court has repeatedly admonished, the rational relationship test requires only that the reviewing court find that the state regulation bears some rational relationship to a legitimate state interest. See *Maher,* 488 U.S. at 326. Once that finding is made, no further scrutiny of the state regulation is constitutionally permissible even though the state regulation may be inartfully crafted to effect its purpose or there may be superior methods of achieving the state's purpose. See *Id.*

A heightened level of scrutiny is permissible only when the state regulation unduly burdens a constitutional right fundamental to the people. See *Roe v. Wade*, 410 U.S. 113, 155 (1973). In this context, fundamental rights are found only in the express language of the Constitution or in the history and tradition of the Nation as inherent features of the liberty assured to the people in the Fourteenth Amendment. See *Bowers v. Hardwick,* ____ U.S. ____, 106 S.Ct. 2841, 2844 (1986).

In the context of the states' regulation of abortion, it is beyond dispute that the express language of the Constitution contains no protection for the abortion decision. See *Roe v. Wade*, 410 U.S. 113, 116 n.2 (1973). Thus, if a woman's right to an abortion exists, it can only be found if the right to an abortion is a part of the history and tradition of our Nation inherent to our concept of liberty as embodied in the Fourteenth

Amendment. See *Thornburgh v. American College of Obstetricians,* ____ U.S. ____, 106 S.Ct. 2169, 2194 (1986) (White, J. dissenting); *Bowers v. Hardwick,* ____ U.S. ____, 106 S.Ct. 2841, 2844 (1986); *Griswold v. Connecticut,* 381 U.S. 479, 493-94 (1965). Although *Roe v. Wade* purported to find a fundamental right to an abortion, it did so by ignoring the traditional analysis, and by simply extrapolating the right to an abortion from an implied right to privacy.

A. The History And Tradition Of The Nation, When Considered At The Time Of Informed Public Debate, Shows Fundamental Disputes Over, If Not The Repudiation Of, Abortion Upon Demand.

If our Nation's history and tradition shows anything in this area it is that we, as a people, are deeply divided over the question of abortion. From the outset, this Court has acknowledged "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires." *Roe v. Wade*, 410 U.S. 113, 116 (1973). See also, *Thornburgh v. American College of Obstetricians,* ____ U.S. ____, ____ 106 S.Ct. 2169, 2184 (1986) ("[A]bortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly.") Thus, the most that can be said of history's view of abortion is that "many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy. . . ." *Id.* at 2196 (White, J., dissenting).

For example, at the time *Roe v. Wade* was decided, thirty-one states had criminalized abortion except to save the life of the mother. See *Roe v. Wade*, 410 U.S. at 118-19 n.2. Of the remaining states, abortion was permitted only to safeguard the health of the mother, with a few of those states allowing abortion if the child was severely handicapped or the product of rape or incest. See, B. George, *State Legislatures versus the Supreme*

Court: Abortion Legislation in the 1980's, 12 Pepperdine Law Review 427, 441 (1985). Only three states permitted abortion for convenience, the result embraced by *Roe v. Wade*. *Id.* at 441-42. Since *Roe v. Wade*, legislative activity to narrow abortion practice has accelerated. Nearly every state has promulgated new legislation since 1973 to restrict abortion. *Id.* at 427. It is reported that well over one hundred statutory formulations regulating abortion practice have evolved since 1973. *Id.*[1]

The judiciary's experience mirrors the tensions and divisiveness within society over this issue. No less than 250 federal court decisions and countless state decisions have been handed down since *Roe v. Wade* regarding the permissible scope of abortion. Not even this Court has been immune from the controversy. More than any other single issue, abortion regulation has dominated the constitutional landscape of this Court for more than fifteen years producing no less than 10 decisions, almost all of which were decided by the slimmest of margins. And with each new decision another outbreak of legislative resistance occurs. See, B. George, *supra* p. 7, at 511-12.

The only conclusion one can draw from this history is that the people, or at least a substantial majority of them, have chafed against the holding in *Roe v. Wade*. Although, it may be fair also to say there is no unity of views, that concedes *a priori* that abortion has never been a part of the history and tradition of our Nation such that it is inherent in our concept of liberty.

The same may also be said for the religious, moral, and even scientific debate over abortion. See generally, Imber, *Abortion and the Private Practice of Medicine* (1986). There is no consensus, and none has ever existed.

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[1] The federal government has not been immune from the vicissitudes of the abortion debate. The so-called Hyde Amendment restricting the use of federal funds, in various formulations, has already been approved by the Court. See, *Harris v. McRae,* 448 U.S. 297 (1980).

Roe v. Wade's discussion of our history and tradition shows, at best, that there was ambiguity in the views of those scholars of earlier times who focused on "quickening" as a noteworthy event during pregnancy. See *Roe v. Wade*, 410 U.S. 113, 130-147 (1973). However, ancient, medieval, Victorian, and even some early thinkers of this century cannot be said meaningfully to have considered and resolved the abortion question as we know it today because the science of those times did not identify the character of the unborn nor were abortion services, as we know them today, readily available so that anyone could even be given the opportunity meaningfully to debate the question.

It is now acknowledged that "[i]gnorance about the biological origins and development of life also resulted in many differences of opinion about the circumstances in which abortion should be permitted. But with the increased sophistication of scientific medicine in the nineteenth century, a new consensus began to form among physicians." Imber, *Abortion and the Private Practice of Medicine* 2 (1986). Once science developed an understanding of unborn life akin to that possessed today, the medical community at first, and then society at large, rebelled against the concept of abortion:

> Nineteenth-century American doctors' efforts to restrict abortion were indebted to a growing understanding of fetal development, as yet unknown to the lay population: "Scientifically, regulars had realized for some time that conception inaugurated a more or less continuous process of development which would produce a new human being if uninterrupted. . . . From this scientific reasoning stemmed the regulars' moral opposition to abortion at any state in gestation." (Mohr, 1978:35-36). . . . The cultural resistance to abortion in America originated not in public opinion or in particular theological doctrine as much as in the medical profession's commitment to scientific findings. . . . Instead of creating new exceptions to the laws

> prohibiting abortion, the scientific knowledge of conception formed the basis for a powerful opposition to it and strengthened theological valuation of the sanctity of unborn life.

Id. at 3.

Thus, by the beginning of this century, the leading medical thinkers had concluded that abortion was only permissible when necessary to save the life or physical well-being of the mother. See Taussig, *The Prevention and Treatment of Abortion* 162 (1910).[2]

It was this first real understanding of the scientific evidence regarding fetal life that produced any meaningful social debate and that debate resulted in a societal decision beginning in the Nineteenth Century to criminalize abortion in most states. Imber, *supra* p. 9, at 2. Thus, when *Roe v. Wade* purports to find up until the late Nineteenth Century that "abortion was viewed with less disfavor than under most American statutes currently in effect," that finding is correct as far as it goes, but it fails to go far enough. *Roe v. Wade*, 410 U.S. at 114. The error in *Roe v. Wade* is that the Court failed to recognize that the dramatic shift in public sentiment to outlaw abortion was directly attributable to the medical ability to document the existence of fetal life not only before birth but before quickening as well. As the scholars predicted nearly eighty years ago:

> The myth that life does not begin until fetal movements are felt ["quickening"] is still so widespread that it will take many years before it is finally put aside. Almost daily the physician hears the story that the woman did not think it was wrong to stop pregnancy in the early months before the child was alive. . . . Women of all classes should know

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[2] Dr. Taussig is recognized as the early pioneer in medical-social thought regarding abortion. See, Imber, *Abortion and the Private Practice of Medicine at 3-4 (1986).*

more concerning the processes of gestation. They should be shown how early the fetal heart begins to pump blood through the vessels.

Taussig, *The Prevention and Treatment of Abortion* 79 (1910).

Society can be said to have developed its "history and tradition" with respect to abortion only after society has assimilated the scientific knowledge of fetal life. Technology, having framed the abortion issue, cannot be ignored when searching for society's values. See Callahan, *How Technology is Framing the Abortion Debate,* Hastings Center Report, Feb., 1986 at 33. Yet *Roe v. Wade*, with its inconsistent adherence to antiquated medical science to define the abortion right, disregarded the role that current scientific discoveries have played in framing the abortion issue for debate and resolution in the public forum during the last of the Nineteenth and the Twentieth Centuries.[3]

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[3] One example of this distortion is found in the treatment of medical science's progress in reducing the mother's morbidity and mortality from the abortion procedure. *Roe v. Wade* declares that with advances in medical science it was safer for a mother to have an abortion in the first trimester than to undergo a full term pregnancy, and therefore abortions could not be forbidden for any reason by the states during the first trimester. See *Roe v. Wade*, 410 U.S. 113, 163 (1973). Yet the historical motivations behind those advances in medical science were manifestly not to enhance a mother's right to seek abortion for convenience, but effectively to deal with the problem of incomplete illegal abortions and safely to perform those abortions when necessary for maternal health. See Imber, *Abortion and the Private Practice of Medicine* 7 (1986). However, the possibility that such improvements would be later distorted into some unwanted endorsement of abortion for convenience, was predicted by Dr. Taussig in 1910.

> "Taussig recognized that improved medical treatment of abortion had the unintended consequence of making the procedure a safer, and therefore, more reasonable form of birth control:
>
> > The discovery of asepsis and antisepsis has not proved any unmixed blessing. Criminal abortion can, at the present time, be done with less danger of blood-poisoning than formerly. The result is inevitable. One of the main detriment factors in the production of abortion is gone when the woman realizes that her own life is not necessarily imperiled."
>
> *Id.* at 7, quoting Taussig, *The Prevention and Treatment of Abortion* 78-79 (1910).

Not that Dr. Taussig wanted mothers to go at risk for appropriate abortions, rather he was concerned that developing safe medical abortion procedures for those limited situations noted above would be misinterpreted as approval for abortion. It is ironic that the Twentieth Century's first pioneer in developing safe abortion procedures would have his medical achievements used to insulate constitutionally abortion on demand — a phenomenon Dr. Taussig predicted would "become one of the most serious sociological problems of the coming years, for every community must in self-preservation erect laws and exert its utmost influence to stem this tide that will otherwise sweep it to destruction. Taussig, *The Prevention and Treatment of Abortion* 79 (1910)

Clearly then, the historical sources relied upon by *Roe v. Wade* are irrelevant because the medical scholars, and, it follows, society at large, lacked the current scientific knowledge of the consequences of the abortion decision with respect to the fetus. Once science developed to the point of making abortion for convenience a possible choice, and identified the life of the unborn, the people reacted with the regulatory proscriptions struck down by *Roe v. Wade*. Thus, the only meaningful history and tradition of our Nation regarding abortion shows that, when armed with the relevant knowledge, society rejected the notion of a right to an abortion on demand.

No one can question that the relevant time frame in which to examine whether a right has become a part of our history and tradition is when society is fully informed of the facts underlying that right. For example, historical concepts of procreation are largely unhelpful when one is called upon to decide whether genetic engineering can be regulated given that society has not, until recently, been supplied with any information to be able to judge such a phenomenon.

This is manifestly not a tyranny of an ephemeral majority as some have suggested. See *Thornburgh v. American College of Obstetricians,* ____ U.S. ____, 106 S.Ct. 2169, 2181 n.4 (1986) (Stevens, J., concurring). Rather, the bulwark against such tyranny is contained in the express limitations on governmental authority set forth in the Constitution. See *Bowers v. Hardwick,* ____ U.S. ____, ____, 106 S.Ct. 2841, 2844 (1986). However, when grappling with a "right" to be implied by the Court from the vague concept of liberty, this Court has counseled that only when our Nation's history and tradition clearly supports such a right, will such a right be found. Otherwise, the Court begins imposing its will as that of the people, rather than permitting the elected representatives to express the will of the people through legislation. See *Bowers v. Hardwick,* ____ U.S. ____, ____, 106 S.Ct. 2841, 2846 (1986); *San Antonio School District v. Rodriguez,* 411 U.S. 1, 30-31 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 501-502 (1965) (Harlen, J., concurring).

In sum, *Roe v. Wade* takes distant historical ambivalence toward abortion that was borne of ignorance and elevates that uninformed ambivalence to a fundamental right to an abortion. There is no dispute that once medical science dispelled historical concepts relied upon in *Roe v. Wade,* and allowed society to evaluate the merits of abortion in an informed manner, society rejected abortion on demand as a component of our fundamental sense of liberty. The most that has ever been said is that once the populace was informed, it became bitterly divided on the issue. This clearly falls short of the finding that abortion on demand is so rooted in the traditions and collective conscience of our people as to be ranked as fundamental. *Griswold v. Connecticut,* 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

B. No Fundamental Right To Abortion On Demand Can Be Implied From A Privacy Right.

Similarly flawed is *Roe v. Wade's* suggestion that an abortion right is necessarily implied from the implied right of privacy. First, it is disingenuous to suggest that a fundamental right to

abortion is present because the decision to bear a child is within the privacy zone of the individual, when at the same time the Court has declared that the "woman cannot be isolated in her privacy." *Roe v. Wade,* 410 U.S. 113, 159 (1973). The woman is not alone because of the life of another — the unborn. All recognize that some sort of other life is involved in the decision to abort regardless of whether it is labelled "potential life" — "fetal life" — or "life."

The presence of the other life, however characterized, destroys the mother's purported privacy interest to have an abortion. Thus, the abortion decision is inherently different from other contexts where privacy rights are found because none of those situations involves another life. *See e.g., Stanley v. Georgia,* 394 U.S. 557 (1969).

Merely because this life is not yet a person within the meaning of the Fourteenth Amendment does not mean that its presence can be totally ignored. As this Court observed in *Bowers v. Hardwick,* a privacy right does not attach to all activities in which there is no other person involved. 106 S.Ct. at 2846 ("*Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods.") Thus, the distinction between the day before conception and the day after is the presence of another life that precludes a finding that a woman is in her privacy. *Cf., Thornburgh v. American College of Obstetricians,* ____ U.S. ____, ____, 106 S.Ct. 2169, 2187 (1986) (Stevens, J., concurring).

Second, *Roe v. Wade* implied the right of abortion from another implied right, i.e. procreation, which was found from the implied right of privacy. See *Roe v. Wade,* 410 U.S. 113, 153 (1973). This approach improperly mixes concepts and constitutional analysis for finding a fundamental right. For each fundamental right implied from the broad guarantee of liberty, the Court must discover some basis in the Constitution. See *San Antonio School District v. Rodriguez,* 411 U.S. 1, 33 (1972). It is improper simply to state that new fundamental rights can be

implied as incident to the implied privacy right. This presupposes that the privacy right is absolute with the result that all so-called "private" decisions are automatically gathered within the fundamental rights category.[4] However it is beyond dispute that there is no absolute "privacy right." See *Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841 (1986). Whether a privacy right can be implied depends upon resort to the express provisions of the Constitution. *Roe* conveniently ignores this burden by simply implying the abortion right as necessarily included in the privacy or procreation rights. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

Beyond the stark declaration of the privacy right to abortion, the only justification offered in *Roe v. Wade* for finding a fundamental right is a panoply of potential social burdens and hardships. *Id.* at 153. Among the interests of the women identified by *Roe v. Wade* is the physical burden of carrying a child to term, the mental and physical wear and tear in raising a child, the problem of an unwanted child and the possibility of a social stigma attaching to unwed mothers. *Id.* When examining these interests of the woman, it is difficult to conceive of any express constitutional privilege that is implicated by such consequences attendant to the bearing and raising of children.

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[4] The tendency to, and fallacy of, ascribing absolute terms to implied rights was pointed out long ago by Mr. Justice Holmes:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

This passage was cited favorably by the Court in *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 127 n.5 (1973), when rejecting the concept that an unlimited right to privacy had been declared in *Stanley v. Georgia*, 394 U.S. 557 (1969).

The traditional foundations for privacy rights, the First Amendment free speech guarantee, the Fourth Amendment right to be free of unreasonable searches and seizures and the protection against self-incrimination in the Fifth Amendment, simply do not express a fundamental right to be free of the burdens set forth in *Roe v. Wade*. In effect, *Roe v. Wade* seems to find a fundamental right by comparing the personal and social consequences of pregnancy, particularly unwanted pregnancy, to the consequences of intrusion by the state into personal and private decision to use contraceptives which was found fundamental in *Griswold v. Connecticut*.

This Court has repeatedly rejected such an approach to finding fundamental rights based upon comparative social burdens. For example, in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), this Court found no fundamental right to an education. In so holding, the Court rejected the social burden approach to creating fundamental rights because that approach failed to adhere to the requirement of only implying rights that are found in the Constitution expressly or implicitly. This Court stated:

> The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the law. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

411 U.S. at 33.

The paramount importance of finding fundamental rights in the Constitution was underscored by this Court's acknowledgment

that education is of "grave significance . . . both to the individual and society" and education bears an intimate relationship to the meaningful exercise of the express rights to free speech and to vote. 411 U.S. at 30, 36.

The same result was reached by this Court in *Lindsay v. Normet,* 405 U.S. 56 (1972). In *Lindsay* the Court considered whether there is a fundamental right to "decent shelter" and "peaceful possession of one's home." 405 U.S. at 73. This Court recognized the "importance of decent, safe, and sanitary housing" but refused to find a fundamental right. *Id.* As the Court explained:

> But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of the lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions.

405 U.S. at 74.

Finally, in *Dandridge v. Williams,* 397 U.S. 471 (1970) this Court considered whether there is a fundamental right to public welfare. Finding no such right, this Court observed that "the intractable social and philosophical problems presented by public welfare programs are not the business of this Court [because] the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among a myriad of potential recipients." 397 U.S. at 487.

The possible social and personal consequences of having a baby, as real as they may be, simply are irrelevant to the analysis

of whether a fundmental right to abortion is articulated by the Constitution. Moreover, the physical burdens of giving birth can surely be no greater than being without shelter, food, medical care and other aspects of life that this Court has repeatedly rejected as pertinent to the fundamental rights discussion.

In sum, *Roe v. Wade* improperly implied rights from previously implied rights instead of employing the correct methodology of returning to the express provisions of the Constitution as to determine the existence of an implied right. As this Court observed in *United States v. 12 200-Ft. Reels,* 413 U.S. 123 (1973):

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance."

Id. at 127.

That is exactly what occurred in *Roe v. Wade* when the abortion right was implied from the right of procreation which was implied from the right of privacy which was implied in limited circumstances from carefully considered express provisions of the Constitution. If, as shown above, abortion is measured against those original Constitutional provisions, it is plain that no implicit fundamental right to abortion can be found. Accordingly this Court should reverse the *Roe v. Wade* decision. Because no fundamental right is present, the Missouri statutes should be judged against the rational relationship test.

II. MISSOURI'S STATUTE IS RATIONALLY RELATED TO ITS LEGITIMATE INTEREST OF PROTECTING THE LIFE OF THE UNBORN AND IS THEREFORE CONSTITUTIONAL IN ALL RESPECTS.

Among the provisions of the Missouri statute before this Court which the Eighth Circuit declared as unconstitutional are: (1) the statutory provisions declaring Missouri's view that life begins at conception and its interest in protecting such life; and (2) the provisions prohibiting public facilities and public employees from performing or assisting in abortions except to save the life of the mother. Mo.Rev.Stat. §§188.210 and 188.215 (1989).[5]

Missouri Catholic Conference believes that such provisions are rationally related to the State's legitimate interest in protecting unborn life. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (States have a legitimate interest in protecting "potential" life.) Further, Missouri can reflect that interest through legislative judgments about how best to allocate scarce state dollars for health care. Missouri, which is ranked 47th among all states in generosity of its Medicaid program also has over 600,000 residents who are unable to qualify for any government health care program and also lack any health insurance. Bartlett & Hoffman, *Missouri Indigent Health Care Study* (April, 1986). Missouri should have the right to use its limited health care dollars to promote life instead of supporting its destruction through publicly operated facilities and public employees.

Turning to the challenged legislative findings, Missouri has declared its position that life begins at conception and unborn children are entitled to "life, health and well-being" consistent

[5] Also before the Court is that section of the Missouri statute prohibiting the use of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." Mo.Rev.Stat. §188.205 (1989). Missouri Catholic Conference adopts those arguments set forth by the Catholic Health Association as fully addressing the issues implicated by that section of the statute.

with the decisional law of the Supreme Court. Mo. Rev. Stat. § 1.205 (1989). The statute carries with it no penalty for acts contrary to that policy. Notwithstanding this straight forward declaration of interest, the Eighth Circut held that such a statement impermissibly adopted a theory of life inconsistent with that recognized in *Roe v. Wade*.

Assuming that *Roe v. Wade* is good law, which Missouri Catholic Conference disputes, there is nothing contained in *Roe v. Wade* to prohibit states from adopting declarations of interest in protecting life which, in the judgment of the State, begins at conception. All that *Roe v. Wade* held was that a state cannot use a definition of life to restrict a woman's purported abortion right beyond the Constitutional limits expressed in *Roe v. Wade*. Thus, the Court stated: "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." *Roe v. Wade*, 410 U.S. at 162. This statement came in explanation as to why Texas could not move the point of its compelling interest in protecting potential life to the time of conception in order to justify its criminalization of abortion. *Id.* at 159.

In this case Missouri is not using its legislative findings in any way to restrict abortion rights. The language is unadorned by penalties, proscriptions or impediments to a woman's abortion decision. Thus, unlike the situation in *Roe v. Wade*, Missouri is not attempting to use the legislative findings to criminalize or otherwise regulate in any manner the mother's conduct. This is demonstrated by the inability of the Eighth Circuit to identify any manner in which the findings could operate to impair a woman's abortion rights. There is simply nothing in *Roe v. Wade* to prohibit the use of legislative findings as Missouri has done.

Moreover, there are a myriad of other legitimate state interests that are promoted by a recognition of life beginning at conception. For example, it may enable parents to claim for the

wrongful death of a non-viable unborn child. Clearly these legitimate purposes are rationally related to Missouri's legislative findings. Hence, under either *Roe v. Wade* or the rational relationship standard, there is no basis for invalidating Missouri's statute finding that life begins at conception and that such life is entitled to protection.

As to Missouri's control over its own facilities and employees, the Eighth Circuit invalidated those provisions based on its decision in *Nyberg v. City of Virginia,* 667 F.2d 754 (8th Cir. 1982). In *Nyberg* the Eighth Circuit restricted the holdings of this Court's prior opinions to simply read that governmental funds need not be used to fund abortion decisions. *Id.* at 757-58, interpreting *Williams v. Zbaraz,* 448 U.S. 358 (1980); *Harris v. McRae,* 448 U.S. 297 (1980); *Poelker v. Doe,* 432 U.S. 519 (1977); *Maher v. Roe,* 432 U.S. 464 (1977). However, *Nyberg* enjoined the city operated hospital in Virginia, Minnesota from refusing to perform abortions because the hospital was required to accept a patient who was willing to pay privately for an abortion. 667 F.2d at 758. Thus, under *Nyberg's* formulation, public resources cannot be denied to an abortion patient so long as that patient pays for the services out of her own pocket so that no public funds will be used to support abortion.

As the State of Missouri ably demonstrates, *Nyberg's* strained construction simply cannot be squared with this Court's holding in *Poelker v. Doe,* 432 U.S. 519 (1977). In *Poelker* this Court held that the City of St. Louis could, consistent with *Roe v. Wade*, "[prohibit] the performance of abortions in the city hospitals except where there was a threat of grave physiological injury or death to the mother." *Id.* at 520. No exceptions for private pay abortions was contained in the City's policy nor did this Court carve out any such exceptions in *Poelker*. Moreoever, to suggest, as *Nyberg* does, that no public funds are used to support a private pay abortion in a public facility ignores the reality that the facility would not be there but for the use of public monies to build and operate the facility.

The untenable nature of the Eighth Circuit's position is demonstrated further by the necessary, but surely over broad, results implicated by its standard. For example, if a private pay patient demanded an abortion from a rural community without any private or public health care facilities, would the rural community be required to develop such a facility because the decision not to have such facilities "restricts access to the abortion decision." *Nyberg,* 667 F.2d at 758. In that same regard if a rural community had a hospital as the sole community health care facility, but for financial reasons wished to close the hospital, a private pay abortion patient could conceivably challenge that result because it would restrict access to abortion services.

Of course, such strained results would never occur because this Court has held that government may withdraw its subsidy even if as a practical matter it eliminates access to service. For example, in *Maher v. Roe,* 432 U.S. 464 (1977), this Court considered whether the denial of public funds for abortion services was permissible. In finding no fundamental right affected, this Court rejected the argument that the indigency of abortion patients would impermissably deny access to such services. The Court explained that indigency, not being of the State's making, cannot serve to create affirmative obligations on the State to address indigency. Similarly, here there is no obligation for cities or states to build hospitals and hire health care professionals. If as a practical matter no facility is present for abortion services, that is a consequence of events that are independent of the state's action.

However, this Court need not address *Nyberg,* resting as it does on the strict scrutiny standard set forth by *Roe v. Wade.* As discussed above, no fundamental right to an abortion exists. Consequently, Missouri's statute passes muster because it is rationally related to a legitimate state goal of protecting the life of the unborn.

CONCLUSION

For all of the above reasons, Missouri Catholic Conference respectfully requests that this Honorable Court reverse the decision of the Eighth Circuit by finding that the Missouri statute is rationally related to a legitimate state interest and remand this action to the District Court for entry of judgment in favor of the State of Missouri.

February 21, 1989

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February 21, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES IN SUPPORT OF APPELLANTS

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BRIEF OF AMICUS CURIAE THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Catholic Health Association of the United States (CHA) is the national service organization composed of Catholic hospitals and long-term care facilities, their sponsoring organizations (Catholic religious orders and dioceses), and related multi-institutional healthcare systems.

CHA comprises approximately 600 Catholic hospitals, 260 Catholic long-term care facilities, 265 religious orders, 30 dioceses, and 60 systems. All of these institutional members of CHA are operated, supervised, or controlled by or in connec-

tion with the Roman Catholic Church in the United States, and each complies with Catholic teaching regarding abortion, the sanctity of life, and related issues.

Thus, this Amicus represents organizations that have a substantial interest in the constitutional issues presented by the instant case.

SUMMARY OF THE ARGUMENT

1. Missouri has made a legislative decision to favor childbirth over abortion and to protect fetal life. It implemented that decision by the passage of Mo.Rev.Stat. §188.205 which prohibits the use of public funds for performing abortions or for counseling or encouraging women to have abortions. This Court has consistently held that a legislative choice not to subsidize the provision of abortion services is constitutionally valid and does not infringe upon a woman's choice to terminate her pregnancy.

2. Missouri does not withhold all public funds from entities providing abortions or abortion counseling but merely prohibits the recipients of public funds from utilizing those funds to provide abortions or to counsel or encourage women to have abortions. Missouri's statutory prohibition is rationally related to Missouri's desire to favor childbirth over abortion, a choice which this Court has held constitutional in *Maher v. Roe*, 432 U.S. 464 (1977). Because the statute has a rational basis and does not rise to the level of a penalty, there is no constitutionally forbidden limitation on the First Amendment rights of either health care providers or women seeking abortions. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).

3. As evidenced by the successful provision of quality medical care by Catholic healthcare facilities throughout the United States, the failure to offer abortion on demand does not compromise the provision of quality medical care to pregnant women.

4. *Roe v. Wade*, 401 U.S. 113 (1973) should be reconsidered, and on reconsideration overturned, so as to allow states to assert their compelling interest in the preservation of human life from the moment of conception.

Neither the language of the Constitution nor the history and tradition of our Nation provide a woman with a fundamental right to choose to terminate her pregnancy. The reliance of *Roe v. Wade* on a trimester approach to identify the point at which a state's interest in protecting fetal life becomes "compelling" is technologically flawed and should be abandoned. A state's interest in protecting fetal life starts at the moment of conception. This Court should uphold as constitutional a legislative restriction on abortion which is rationally related to the state's interest in protecting fetal life from the point of conception.

ARGUMENT

I. MISSOURI'S STATUTORY PROHIBITION ON THE USE OF PUBLIC FUNDS TO PERFORM AN ABORTION OR TO COUNSEL OR ENCOURAGE A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE DOES NOT IMPINGE ON THE ABILITY OF A PREGNANT WOMAN TO HAVE AN ABORTION.

It is well established that a woman's constitutional right to an abortion -- a right the Amicus does not recognize as valid — does not entitle her to government financial assistance to enable her to exercise that right. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). A state's refusal to subsidize abortions despite its payment for childbirth of indigent women does not "impinge upon the fundamental right recognized in *Roe*." *Maher*, 432 U.S. at 474. *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds." *Id*.

Missouri's failure to subsidize abortions does not penalize a woman for exercising her constitutional right to choose to terminate her pregnancy. In *Maher*, this Court stated that a penalty analysis might be applicable "if Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits." 432 U.S. at 474-75 n.8. Likewise, in *McRae*, this Court rejected the argument that the Hyde Amendment unconstitutionally penalized the exercise of a woman's right to choose an abortion. The Court opined that "[a] substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pergnancy by abortion." 448 U.S. at 317 n.19. Missouri distributes public funds on a non-

discriminatory basis but requires that such funds not be used to support abortion. Missouri's funding conditions thus implement a constitutionally permissible subsidy decision and do not interfere with a woman's right to an abortion.

II. MISSOURI'S REFUSAL TO SUBSIDIZE A HEALTH CARE PROVIDER'S CHOICE TO COUNSEL OR ENCOURAGE A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE DOES NOT CONSTITUTE AN INFRINGEMENT OF THAT CHOICE.

This Court has repeatedly held that the government's refusal to subsidize an individual's exercise of his or her constitutional rights does not constitute an infringement of those rights. *See, Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). A legislature's refusal to subsidize constitutionally protected free speech neither infringes upon nor regulates the exercise of First Amendment rights. *Regan*, 461 U.S. at 546. The selection of particular entities or persons for entitlement to public funds is not open to judicial review and does not infringe upon the non-recipients' constitutional rights. *Lyng v. International Union*, ____ U.S. ____, ____, 108 S.Ct. 1184, 1191-92 (1988). Although the aggrieved entity or person may "not have as much money at it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer the entitlement to such funds as may be necessary to realize all the advantages of that freedom' (cites omitted)." *Regan*, 461 U.S. at 550.

Missouri's public policy decision to foster its preference for childbirth over abortion and to protect the life of the fetus by not subsidizing the counseling and encouragement of abortions is clearly permissible under *Regan*. Moreover, it is indistinguishable from Connecticut's refusal to subsidize non-therapeutic abortions, which withstood Constitutional attack in

Maher. Missouri's proscription of the use of public funds to encourage or counsel a woman to have an abortion in no way infringes on health care providers' first amendment rights to counsel their patients. Health care providers may still offer counsel regarding abortions or suggest them to woman for whom physicians believe they are medically necessary; they are merely precluded from relying on public funds to support such activities. *See, Maher v. Roe*, 432 U.S. at 474.

Lower courts which have specifically considered whether the state or federal government's refusal to subsidize abortion counseling infringes upon health care providers' freedom of speech have reached similar conclusions. In *State of New York v. Bowen*, 690 F.Supp. 1261 (S.D.N.Y. 1988) the district court found that HHS' regulations prohibiting Title X projects from encouraging, promoting or advocating abortion as a method of family planning do not interfere with health providers' first amendment right to counsel their patients. *Id.* at 1273. Relying on *Regan*, the Court found that HHS's regulations reflect the Secretary's decision to favor childbirth over abortion . . . . Congress has already forbidden funding for that purpose, a choice which can hardly be argued to have 'interfered' with free speech." *Id.* at 1273. "The regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech." *Id.* at 1274.

The Ninth Circuit utilized the same analysis when it considered a first amendment challenge to Arizona's prohibition on the expenditure of state social welfare funds to support private organizations which perform abortions and engage in abortion-related activities. *Planned Parenthood of Central & Northern Arizona v. State of Arizona*, 718 F.2d 938 (9th Cir. 1983), *later app. Planned Parenthood of Central & Northern Arizona v. Arizona*, 789 F.2d 1348 (9th Cir. 1986), *aff'd sub. nom Babbit v. Planned Parenthood of Central & Northern Arizona*, 479 U.S. 925 (1986), *app. dism'd Planned Parenthood of Central &*

Northern Arizona v. Babbitt, 479 U.S. 926 (1986). Relying on this Court's pronouncements in *McRae* and *Maher*, the Ninth Circuit concluded that "the State of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities, *but the State need not support, monetarily or otherwise, those activities*." (Emphasis added). *Id.* at 944.

The Ninth Circuit remanded the case to the district court to determine the correctness of Arizona's contention that its withdrawal of all funds was the only way Arizona could ensure that Planned Parenthood would not use state funds to support its abortion related activities. *Id.* at 945. Following remand the district court concluded Arizona had not met its burden and the Ninth Circuit affirmed. *Planned Parenthood of Central & Northern Arizona v. State of Arizona*, 789 F.2d 1348 (9th Cir. 1986), *aff'd sub. nom Babbit v. Planned Parenthood of Central & Northern Arizona*, 479 U.S. 925 (1986). But if a statutory scheme withholding all funds from entities performing abortion related activities is constitutionally infirm, Missouri's statute avoids any such infirmity. Missouri merely precludes recipients of public funds from using such funds to support activities in which women are counseled or encouraged to have abortions not necessary to save their lives. Missouri's statute is drawn as narrowly as possible to further its legitimate and strong state policy of encouraging childbirth over abortion and protecting fetal life. Therefore it does not infringe on health care providers' abortion-related speech activities. *See, Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d at 944-945.

Two district courts have held that the Title X regulations do violate the first amendment, *Planned Parenthood Federation of America v. Bowen*, 680 F.Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.) and *Commonwealth of Massachusetts v. Bowen*, 679 F.Supp. 137 (D.Mass. 1988), appeal pending, No. 88-1279 (1st Cir.). The Massachusetts district

court found that the Title X regulations penalize the exercise of constitutional rights because a Title X project could be denied a grant solely because its non-federally funded activities include abortion referral and counseling. 679 F.Supp. at 145. The challenged Missouri statute in the present case avoids this problem. Furthermore, the district court's suggestion that the Title X regulations are an unconstitutional content-based restriction runs contrary to this Court's previous decisions. It is clearly within the power of a state to implement, through discretionary allocation of public funds, a value judgment favoring childbirth and adoption over abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977). The federal government's Title X funding prohibitions, like Missouri's are nothing more than an exercise of this value judgment.

The Colorado district court found that the Title X regulations "violate a physician's First Amendment right to disseminate necessary medical information, as well as a woman's First Amendment right to receive necessary medical information to enable her to . . . choose whether to have an abortion." 680 F.Supp. at 1476. Missouri's funding provision does not preclude physicians from disseminating or women from receiving abortion-related information. A physician is free to provide this information; Missouri is just not willing to pay for it, which is clearly within Missouri's power, as already decided by this Court in *Maher* and *McRae*.

In *Planned Parenthood Association of Chicago v. Kempiners*, 700 F.2d 1115 (7th Cir. 1983), Judge Cudahy in a separate opinion[1], found that "[s]ince a woman's freedom of choice does not carry with it a constitutional entitlement to the

[1] In *Kempiners*, the Seventh Circuit issued a Per Curiam decision vacating the district court decision and remanding the case to the district court for an evidentiary hearing to explore the questions of standing raised in a separate opinion by Judge Posner. 700 F.2d at 1116. Judge Cudahy issued a separate opinion on the merits although he deferred to the opinion of Judge Posner to create a majority in the Per Curiam decision. *Id.*

'financial resources' to have an abortion, it seems equally clear to me that there is no entitlement to funds for pregnancy counseling which includes the abortion option." *Id.* at 1126. Judge Cudahy went on to determine whether Illinois' denial of funds to Planned Parenthood, because it offered abortion counseling and referral services, was the equivalent of a refusal to subsidize or an unconstitutional penalty. Judge Cudahy found the Illinois funding scheme to be an unconstitutional penalty, concluding that "the Illinois Act clearly imposes an impermissible penalty on the exercise of protected free speech by counseling agencies." 700 F.2d at 1124.

Judge Cudahy's conclusion turned on the fact that Illinois denied benefits to an agency which would be otherwise eligible, "solely because its privately funded activities include abortion-related counseling. This kind of wholesale deprivation penalizes the agency for exercising its first amendment right to counsel for abortion." *Id.* Judge Cudahy's opinion is important to the present case in his observation that "[t]he State of Illinois could, if it desired, enact a valid law that restricts funding under the *program* to activities that do not involve abortion-related counseling." *Id.* at 1125. Missouri's law conforms precisely to the permissible alternatives described by Judge Cudahy.

Missouri's decision not to subsidize health care providers' provision of abortion counseling does not infringe either on providers' or women's first amendment right to free speech. Because the challenged statute does not implicate fundamental rights guaranteed by the first amendment, in this case the "right" to a subsidy, the statute should be subject to a rational basis review. *Lyng v. International Union*, ___ U.S. ___, ___, 108 S.Ct. 1184, 1191-92 (1988) and *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977). This standard of review is "typically quite deferential; legislative classifications are 'presumed to be valid'." *Lyng*, ___ U.S. at ___, 108 S.Ct. at 1192 (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).

Missouri's allocation of public funds to favor childbirth over abortion is rationally related to Missouri's legitimate determination to encourage childbrith and protect fetal life. Missouri's funding provision thus unequivocally qualifies as a permissible subsidy mechanism as previously contemplated by this Court. The Missouri legislature has granted funds to Planned Parenthood to assist in the provision of its services to indigent women, but conditions the grant of these funds, pursuant to the statute at issue, by providing that none of the funds received from or through the state may be used to encourage or counsel a woman to have an abortion not necessary to save her life.

This Court's decisions "uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Maher v. Roe*, 432 U.S. 464, 479 (1976). "The discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts." *Lyng*, ___ U.S. at ___, 108 S.Ct. at 1193. Missouri, which currently allocates approximately $1,701,839,000 per year to subsidize health programs, must certainly have the discretion to favor childbirth over abortion and to protect fetal life in making its disbursement decisions. Bartlett and Hoffman, *Missouri Indigent Health Care Study* (April, 1986).

Missouri's limitation on the use of public funds reflects a conscious decision by the legislature regarding the expenditure of limited health care funds. It neither evidences an intent to penalize, nor in fact penalizes, health care providers involved in counseling women considering the termination of their pregnancies.

III. MISSOURI'S REFUSAL TO SUBSIDIZE A HEALTH CARE PROVIDER'S ENCOURAGEMENT OR COUNSELING OF A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE DOES NOT CONTRAVENE THE PRACTICE OF GOOD MEDICAL CARE.

The Catholic Health Association ("CHA") asserts and its membership operates under the belief that facilities and health care professionals who strive to protect and promote the best interests of both the mother and her unborn child provide a higher standard of medical care than those providers who are willing, to compromise the life of the unborn. CHA believes that the standard of care practiced by its membership is of superior benefit not only to the physical health and well-being of the mother and child, but also to their psychological, emotional and spiritual well-being.

CHA supports the spirit and intent of the Missouri laws currently before this Court and urges the Court to uphold these statutes as constitutional. Missouri's recognition that life begins at conception, and its prohibition on the use of public funds to counsel or encourage a woman to have an abortion not necessary to save her life, reflect the State's desire to protect the lives of both the pregnant woman and the unborn. *Roe v. Wade* and its progeny have recognized the compelling importance of both of these goals. The level of care provided at Catholic health care facilities throughout the country clearly demonstrates that Missouri's refusal to provide public funds to enable health care professionals to encourage or counsel women to obtain abortions will not represent a departure from accepted medical practice and will not compromise the medical care provided to these women or their unborn children. On the contrary, standards of medical care for these patients, both mother and child, will be enhanced.

CHA represents over 600 Catholic hospitals in the United States whose mission incorporates the goals of protecting and

promoting not only maternal health and life, but also the health and life of the unborn. This continuing tradition belies the contention that the legal ability to perform abortions on demand is necessary to sustain quality medical care.

Many of the leading hospitals offering obstetric and gynecology services are Catholic facilities. Recent statistics reveal that 9.98% of the hospitals in the United States are Catholic facilities, in which 14.44% of the reported hospital births in this country occurred in 1987. *1987 American Hospital Association Data.* In Missouri, 17% of the hospitals are Catholic, and these Catholic hospitals account for 28% of the reported hospital births in Missouri. The top two hospitals for obstetrics and gynecology in Missouri, measured in terms of number of births, are Catholic. If the provision of obstetric care suffers from the lack of abortion services, one surely would not expect to find Catholic hospitals at the forefront of obstetric care.

Many Catholic hospitals are affiliated with secular institutions' residency training and nursing programs through which they assist in training the nation's newly licensed physicians and student nurses. These institutions are certified by the American College of Obstetrics and Gynecology. Surely no one would suggest that such certification is given to programs that fail to train health care professionals properly. On the contrary, given the role of Catholic hospitals in the field of obstetrics and gynecology, CHA believes that these physicians and student nurses receive some of the best training and experience available in the country. This experience clearly demonstrates that the availability of abortion services is not essential to the provision of quality medical care or to the training of health care professionals.

IV. *ROE V. WADE* SHOULD BE RECONSIDERED AND ON RECONSIDERATION OVERRULED

Amicus adopts the arguments of Amicus Curiae Missouri Catholic Conference that the Court should uphold the Missouri statutes challenged in this case and that the Court should reconsider its holdings in *Roe v. Wade* and its progeny.

Our Nation's experience both prior and subsequent to the Court's decision in *Roe v. Wade* reveals that that landmark decision was flawed jurisprudence from the start, based on technical data known today to be inaccurate, and essentially bad social policy. Clearly, the right to an abortion on demand cannot be found in either the express language of the Constitution, *Roe v. Wade*, 410 U.S. 113, 152-54 (1973), or the history and tradition of our Nation, *Thornburgh v. American College of Obstetricians*, ___ U.S. ___, ___, 106 S.Ct. 2169, 2196 (1986) (White, J., dissenting) and therefore most certainly cannot be deemed a "fundamental right" entitled to the highest level of Constitutional protection. *Roe* itself recognizes that the abortion decision was limited by certain legitimate state interests. *Roe*, 410 U.S. at 154. The Missouri statutes at issue here provide an opportunity for the Court to affirm that it meant what it said in *Roe* about the States' ability to regulate some aspects of the abortion decision.

In the years since *Roe v. Wade* this Court has protected the abortion decision to a greater extent than other medical decisions even though the same kind of physician-patient relationship was implicated. This had led to expansion of the "right" to demand abortion generally in society and, notwithstanding the language in *Roe v. Wade* relating to state interests, a diminution of the ability of the states to regulate. It has also led

to greater and greater pressure on health care facilities and providers to permit abortion and related services.[2]

In contrast to these kind of pressures, Missouri's legislative pronouncements that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being," Mo.Rev.Stat. §1.205 (1986), reflect the position and belief of Missouri's citizens, as declared by their elected representatives. Missouri's legislative attempts to protect fetal life are legitimate state interests. This Court should reconsider *Roe v. Wade* to enable states to assert their interests in protecting fetal life from the point at which human life commences — conception.

The technological developments in reproductive technologies, even in the short time since 1973, underscore the misconceptions upon which the trimester approach adopted in *Roe v. Wade* is based. Amicus urges this Court to abandon the conceptually flawed technological underpinnings of *Roe v. Wade* and to return to states the power to protect life from the moment of conception.

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[2] For example, *St. Agnes Hospital v. Riddick* is an action pending in the U.S. District Court for the District of Maryland (No. HM86-3071) relating to the attempt to the Accreditation Council for Graduate Medical Education to withdraw accreditation from St. Agnes' residency training program in obstetrics and gynecology. One of the alleged justifications for the ACGME's action was the absence of full family planning services (including sterilization and abortion) at St. Agnes. Because of its Catholic ethics, St. Agnes is religiously opposed to providing those kinds of services and will not do so.

CONCLUSION

For the reasons stated above, Amicus Curiae The Catholic Health Association of the United States respectfully requests that the Circuit Court's judgment be reversed in so far as the Circuit Court's judgment declared the Missouri statutes unconstitutional.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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BRIEF OF AMERICAN COLLEGIANS FOR LIFE, INC., AND THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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Interest of *Amici Curiae*

American Collegians for Life, Inc., is a non-profit voluntary organization, comprised of students and alumni from United States colleges and universities, the purpose of which is to educate students about the medical ethics issues of abortion, infanticide, and euthanasia. The Catholic League for Religious and Civil Rights is a non-profit voluntary association, nationwide in membership, organized to promote good will and harmonious

relations in the community, to combat all forms of religious prejudice and discrimination, and to defend the rights and sanctity of each human life.

Summary of Argument

The right of the people of Missouri, acting through their elected representatives, to declare that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health and well-being" is retained by them under the express terms of the Ninth and Tenth Amendments. The power of a State to protect the interests of unborn children in life, health and well-being in a manner consistent with the views of its people on the beginnings of human life is "reserved to the States respectively, or to the people," U.S. Const. amend. X, to the extent that its exercise goes no further than permitted by "the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court." Mo. Rev. Stat. § 1.205.2 (1986).

Your *amici* will argue below that enactment of the two provisions of the challenged Missouri statute, its preamble or statement of purpose, § 1.205.1, and its requirement of viability testing at twenty or more weeks of gestational age, § 188.029, are legitimate exercises of state legislative authority under both the Ninth and Tenth Amendments to the Constitution. Neither *Roe v. Wade*, 410 U.S. 113 (1973), nor any of its progeny claim for this Court the right or the authority to declare that the courts of the United States are the final arbiter of when life begins for purposes of State law. Concerning abortion, *Roe* held that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." 410 U.S. at 163. Missouri's requirement that the physician test for viability from and after twenty weeks is therefore the only way in which the State may determine whether its important and legitimate interest in the life of the unborn has become "compelling." To strike a requirement that "[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable" is to render wholly illusory the power to protect what this Court held in *Roe* to be a "compelling" interest. The decision below effectively construes *Roe* to permit no limit on legal abortion up to the time of birth.

Argument

I. THE NINTH AMENDMENT RESERVES TO THE PEOPLE, ACTING THROUGH THEIR ELECTED REPRESENTATIVES, THE RIGHT TO DECLARE THAT "THE LIFE OF EACH HUMAN BEING BEGINS AT CONCEPTION" AND THAT "UNBORN CHILDREN HAVE PROTECTABLE INTERESTS IN LIFE, HEALTH AND WELL-BEING."

The Court of Appeals ruled that Missouri's statutory preamble declaring that life begins at conception is unconstitutional because "the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." *Reproductive Health Service* [sic] *v. Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988). The District Court's rationale was even more pointed: "This legislative pronouncement by the Missouri General Assembly clearly conflicts with the essence of *Roe v. Wade*. Consequently, §§ 1.205.1(1) and (2) are invalid as a matter of law." *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 413 (W.D. Mo. 1987).

Your *amici* submit that the courts below have misread the holding in *Roe*, and have transformed it into precisely what this Court said it wanted to avoid in that case — an opinion by the federal judiciary on "the difficult question of when life begins."

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe v. Wade, 410 U.S. at 159.

The Court's holding in *Roe* was stated directly: a State may not, "by adopting one theory of life, . . . override the rights of the pregnant woman that are at stake." 410 U.S. at 161. Where, as here, the preamble is a simple declaration of public philosophy in the abortion context and a recognition of legally cognizable interests for the unborn in the non-abortion setting, there are no rights of pregnant women, or of anyone else, at stake. *See Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) ("the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous"); *National Wildlife Fed'n v. Marsh*, 721 F.2d 767, 773 (11th Cir. 1983) ("Preambles to statutes do not impose substantive rights, duties or obligations."); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (Preamble "is not an operative part of the statute and it does not enlarge or confer powers."). The Missouri preamble is a statement of public morality by the elected representatives of the people of Missouri that the people of Missouri regard the human fetus as a human being.

Missouri could not have spoken more clearly concerning its intent to legislate "to the full extent permitted by the Constitution of the United States [and] decisions of the United States Supreme Court"; its statute provides expressly that Missouri's laws "shall be interpreted and construed . . . subject only to" federal constitutional requirements and specific provisions to the contrary in Missouri law. Mo. Rev. Stat. § 1.205.2.

Since without injury there is no justiciable case or controversy under Article III, *Allen v. Wright*, 468 U.S. 737, 754-758 (1984), and there is no constitutionally valid reason why the rule

should change because the subject matter is abortion, *see Charles v. Carey*, 627 F.2d 772, 778-79 (7th Cir. 1980); *Wynn v. Scott*, 449 F.Supp. 1302, 1314-15 & n.9 (N.D. Ill. 1978) (3-judge court), the holdings of the courts below concerning the preamble represent, at most, an illegitimate attempt by the federal judiciary to police societal attitudes concerning abortion and the protection of unborn human life. *Cf. Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 795-96 n.4 (1986) (White, J., dissenting) ("Faced with such a decision [characterizing an asserted state interest in fetal life], the most appropriate course of action for the Court is to defer to a legislative resolution of the issue: in other words, if a state legislature asserts an interest in protecting fetal life, I can see no satisfactory basis for *denying* that it is compelling.") (emphasis in original); *Maher v. Roe*, 432 U.S. 464, 479-80 (1977) ("[W]hen an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."), *quoted in Harris v. McRae*, 448 U.S. 297, 326 (1980); *Roe v. Wade*, 410 U.S. at 222 (White, J., dissenting) ("This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.").

The fatal flaw in the decisions below is their reliance on what the District Court called the "essence of *Roe v. Wade*," rather than its holding. This Court's opinion in *Roe* rests on a view of the abortion controversy as a clash between State regulatory authority and individual liberty. The right of privacy accepted in *Roe* was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153, only because the unborn were not, in this Court's view, "persons" under the Fourteenth Amendment. *See* 410 U.S. at 156-57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.").

While it is certainly possible to read the Court's opinion in *Roe* to stand for the proposition that the humanity of the un-

born is constitutionally irrelevant to the question of whether an unborn child should be considered a "person" under the Fourteenth Amendment, this Court has never held that the point at which life begins and the human nature of the child are irrelevant to the manner in which the State formulates and executes policy not directed at prohibiting abortion. *See, e.g., Planned Parenthood v. Ashcroft*, 462 U.S. 476, 482 (1983) (recognizing the State's compelling interest in preserving life during post-viability abortions); *Harris v. McRae*, 448 U.S. at 325 (1980) ("Abortion is different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."). The Court's decision to recognize only "the less rigid claim that . . . at least potential life is involved," 410 U.S. at 150, does not preclude the States from recognizing the more substantial claim that an *actual* human life is involved. This Court's statement that "a legitimate state interest in this area need not stand *or fall* on acceptance of the belief that life begins at conception or at some other point prior to live birth," 410 U.S. at 150 (emphasis added) should be taken to mean precisely what it says.

Thus, the Court's holding "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," 410 U.S. at 158, is not a constitutional rule which precludes any State recognition of the interests of the unborn. It precludes only laws and regulations which effectively prevent or unduly inhibit abortion. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting); *Maher v. Roe*, 432 U.S. at 473 (quoting *Bellotti v. Baird*, 428 U.S. 132, 147 (1977)); *see also Harris v. McRae*, 448 U.S. at 314. The courts below, however, seemed to assume that the "essence" of *Roe* is that a State may not, consistent with the Constitution, even declare itself to be in fundamental disagreement with this Court's views on the beginning of human life or the interests of the unborn. This, we submit, is not only inconsistent with *Roe* itself, *see* 410 U.S. at 116 ("Our task . . . is to resolve the issue by constitutional measurement, free of emotion and of predilection."), it is precisely the evil at which the Ninth Amendment was directed.

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." While most of the recent scholarly commentary on the Ninth Amendment focuses on the degree to which — if at all — the Ninth Amendment supports judicial review of legislative decisions, *see, e.g., Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L.REV. 37-268 (1988), it would be impossible to conclude either from the language of the Amendment itself, its history, or the holdings of this Court, that the people, acting through their elected representatives at the State and federal levels, are not free to declare the existence of unenumerated or judicially "unrecognized" or unprotected interests. *See, e.g.*, National Defense Authorization Act for Fiscal Years 1988 & 1989, Pub. L. No. 100-180, title V, § 508, 101 Stat. 1086 (passed in response to this Court's decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986)); *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n.10 (1966).

The fact that this Court has not construed the Constitution to protect the interests of the unborn in the abortion context is, we submit, not relevant to a Ninth Amendment analysis, which speaks to non-preclusive effect of a constitutional enumeration. *Compare* Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.[-]KENT L. REV. 131, 154-171 (1988) *with* Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?*, 64 CHI.[-]KENT L. REV. 239, 237-251 (1988). It is only when a State attempts to use its regulatory power in a manner inconsistent with the Constitution that government action can violate the rights of individuals. Since the preamble has no operative effect, the State of Missouri's enactment of its preamble cannot be inconsistent with the Constitution.

II. THE EIGHTH CIRCUIT'S PRECLUSION OF VIABILITY-TESTING WOULD, IN EFFECT, RENDER MISSOURI'S — AS WELL AS EVERY OTHER STATE'S — COMPELLING INTEREST IN PROTECTING HUMAN FETAL LIFE MEANINGLESS.

A. The Eighth Circuit's Decision that Missouri's Viability-testing Statute Is Unconstitutional Amounts to a Substantial Expansion of *Roe v. Wade*.

Under the standards established in *Roe*, the States have an important and legitimate interest in protecting fetal life from conception until birth, which interest becomes compelling at viability. The Court in *Roe* thus addressed the maternal right of privacy against the acknowledged, proper, and important interests of the States: "this right [of privacy] is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. The Court held that "at some point the state interests as to protection of health, medical standards, and prenatal life[] become dominant [in the abortion decision]." 410 U.S. at 155.

The Court further held that the State has "an important and legitimate interest in preserving and protecting the health of the pregnant woman," 410 U.S. at 162, and that "from and after [the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S. at 164.

From the point at which a State's interest in protecting fetal rights becomes compelling, it "may go so far as to proscribe abortion . . . , except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-164. Accordingly, even after the Court's abortion decisions, the States can still regulate

abortion after the point of viability, even to the point of completely prohibiting abortions, except when it is necessary to preserve the life or the health of the mother. Your *amici* would adopt Justice O'Connor's more expansive view that "the States['] compelling interest in protecting and preserving fetal life . . . is extant throughout pregnancy." *Planned Parenthood v. Ashcroft*, 462 U.S. at 505 (O'Connor, J. concurring and dissenting).

If the States' interest in the protection of fetal life becomes compelling at viability, it necessarily follows that the States possess the ability to require that the point of viability be determined. Without that determination, a State would be unable to ascertain the point at which it could regulate or proscribe abortion, and the protection of its compelling interest would rest with the unfettered discretion of an abortionist whose fee depends upon the performance of the abortion. *Roe* does not require this result, and, we submit, the Tenth Amendment does not permit it.

If the compelling nature of a State's interest in unborn human life — not to mention the undeniable interest of a viable unborn child in the preservation of its own life — is to be anything more than illusory, then *Roe* and its progeny should be read to permit those States desiring to protect fetal life to require a physician to make a determination, consistent with sound medical practice, as to viability, "because the fetus [at viability] presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification." 410 U.S. at 164.

In rejecting attempts by States to determine objectively the point at which viability (and, consequently, a State's compelling interest in the life of the fetus under *Roe*) arises, the Court has stated that the determination of viability must be made by the attending physician:

> It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

Notably, the Court rejected the argument advanced by Planned Parenthood in *Danforth* that the statute at issue was unconstitutional for failing to specify a gestational time (in terms of weeks) as the point of viability. In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court reiterated that viability is reached when "in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." 439 U.S. at 388.

The first sentence of Missouri's fetal viability-testing statute provides that "[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable . . . ." Mo. Ann. Stat. § 188.029. This provision merely requires that the physician use such skills and tests as are necessary in his or her professional judgment to determine if the point of viability has been reached. The State's interest in protecting the life of the human fetus becomes compelling at that point. The Missouri statute does nothing more than prescribe a standard for viability testing which is fully consistent with *Colautti*, and which provides a method for supervising adherence to that standard.

If, as this Court held in *Roe*, viability is *the* relevant criterion to be examined in weighing the power of the State to regulate or prohibit abortion, it logically follows that a State wishing to protect fetal life by regulating or prohibiting abortion must proceed through the following two-step process. First, there

must be a determination as to whether the fetus is viable. If viability has not been reached, the State's interest is not compelling. If, however, the fetus is viable, then and only then can there be an examination as to whether the abortion is necessary to preserve the life or the health of the mother. To focus on the life or the health of the mother prior to a determination of viability would be contrary to the reasoning in *Roe*.

In enacting its viability-testing statute, Missouri has attempted to require performance of the first step of the *Roe* two-step process. Whether any subsequent attempt to regulate abortion is proper is an entirely different matter and is not before the Court in this case. The Eighth Circuit, by noting the additional cost of viability tests and the "risks" inherent in amniocentesis, 851 F.2d at 1075 n. 5, suggests that, even if the fetus were viable, these factors would outweigh the State's interest in determining whether its compelling interest had ripened. The Eighth Circuit thus bypassed the first step of the *Roe* test and prematurely reached the second.

By holding that the Missouri viability-testing statute is unconstitutional, the Eighth Circuit negates the very "essence" of the *Roe* holding the district court purported to preserve. The viability criterion is the linchpin which separates the Court's holding in *Roe* from what Chief Justice Burger denied was "abortion on demand." 410 U.S. at 208 (Burger, C.J., concurring). In essence, the Eighth Circuit's decision constitutes a rewriting of *Roe* and must therefore be reversed. Otherwise, the States' compelling interest in post-viability fetal life is illusory, and abortion on demand for all nine months of pregnancy is the law of the land. If the Court desires to provide for abortion on demand throughout pregnancy, it should so state and it should forego the use of a viability standard.

B. Missouri's Fetal Viability-testing Statute Is Not Inconsistent with *Colautti v. Franklin*.

Aside from the Eighth Circuit's attempt to re-write *Roe*, its reliance on *Colautti* for the proposition that a State may not "proclaim one of the elements entering into the ascertainment of viability" is misplaced. The Eighth Circuit stated that

> "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor." *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979). Nevertheless, this is precisely what the Missouri legislature has attempted to proclaim by requiring doctors to determine the fetus's [sic] gestational age, weight, and lung maturity.

851 F.2d at 1074-75 (parallel citations omitted). This quote purports to be a complete statement of the Court's holding in *Colautti*. However, the quote omits the conclusion of the Court's sentence, without which the quotation is extremely misleading. The Court's complete sentence follows:

> Because this point [i.e., viability] may differ with each pregnancy, neither the legislature nor the courts may proclaim *one* of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as *the* determinant of when the State has a compelling interest in the life or health of the fetus."

439 U.S. at 388-89 (italicized emphasis added, omitted language underlined).

Had the Eighth Circuit properly quoted the Court's *Colautti* decision, it would have been clear that the language used in *Colautti* is not applicable to this case. The Court in *Colautti* merely forbade the State from arbitrarily determining, under the

guise of a single medical factor, the point at which the State's compelling interest arises, because "[v]iability is the critical point." 439 U.S. at 389. The Missouri statute lists three factors, not one, and, more importantly, it neither proclaims *one* of the elements as *the* determinant nor suggests that all of the elements listed are collective "determinants" of when the State's compelling interest arises. Medically determined viability is still "the critical point."

The Missouri viability-testing statute certainly does not attempt to legislatively define when viability is reached; it merely requires that the attending physician perform certain tests as are necessary to make a finding of gestational age, weight, and lung maturity of the unborn child. This legislation is wholly consistent with the Court's holding in *Colautti*.

III. THE FEDERAL JUDICIARY MAY DENY A STATE NEITHER THE POWER TO MAKE A PRONOUNCEMENT ABOUT THE VALUE OF UNBORN HUMAN LIFE, EVEN IN THE ABORTION CONTEXT, NOR THE POWER TO ESTABLISH ITS COMPELLING INTEREST IN UNBORN LIFE.

At the heart of the controversy in this case, as in many abortion cases, is the federal judiciary's usurpation of a legislative power "reserved to the States respectively, or to the people." U.S. Const. amend. X. Your *amici* recognize that the Tenth Amendment will not save a statute that otherwise violates the subsequently enacted Fourteenth Amendment. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Since neither the preamble nor the viability-testing statute, properly construed, violates the Fourteenth Amendment, the Tenth Amendment requires federal judicial deference to Missouri's legislative judgment.

Our system of government is based upon the consent of the governed. Our Declaration of Independence proclaims that "Governments . . . deriv[e] their just powers from the consent of the governed." Our Constitution begins with "We the People," and Article V requires the consent of three-fourths of the States

for amendments to the Constitution. The Tenth Amendment formalizes the principle that unless a power has been consensually relinquished by the States or the people, the federal government may not usurp that power. *See* The Federalist No. 22, at 58 (A. Hamilton) (R. Fairfield ed. 1981) ("The fabric of American empire ought to rest on the solid basis of *the consent of the people.* The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.") (emphasis in original).

The substantive content of the Constitution, including the substantive content of its amendments, thus derives from the consent of the governed; if the people have not consensually abdicated a substantive power, such as the power to make policy choices which do not otherwise violate the federal constitution, *e.g.*, a non-binding moral pronouncement, the Court cannot deprive the people of a sovereign State of that power. U.S. Const. amend. X; *see e.g., Mugler v. Kansas*, 123 U.S. 623, 664 (1887) ("It cannot be supposed that the states intended, by adopting th[e Fourteenth Amendment], to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community."); *cf. Roe v. Wade*, 410 U.S. at 177 (Rehnquist, J., dissenting) ("[T]he drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to [abortion].").

A. The Tenth Amendment Applies to the Federal Judiciary.

The Constitution binds the federal judiciary as well as the other branches of government: "[T]he framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. . . . [*C*]*ourts*, as well as other departments, are bound by that instrument." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis added). Under the express language of the Tenth Amendment, the federal judiciary, as an organ of the "United States," is

bound by the federalism principles incorporated therein. *See* The Federalist No. 82, at 252 (A. Hamilton) (R. Fairfield ed. 1981) ("[T]hat the States will retain all *preëxisting* authorities which may not be exclusively delegated to the federal head . . . may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that [it is], in the main, just with respect to the former as well as the latter.") (emphasis in original); Exec. Order No. 12,612, 52 Fed. Reg. 41,685, 41,686 (1987) ("Acts of the national government — whether legislative, executive, or judicial in nature — that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.").

Although the Court has never expressly struck down a federal judicial decision on Tenth Amendment grounds, it has recognized restrictions placed on its own powers by the federalism principles in the Tenth Amendment. In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for instance, the Court upheld federal *legislative* encroachments on state functions under the Commerce power, holding that its own classification of governmental functions as "'traditional,' 'integral,' or 'necessary' . . . inevitably invites an unelected federal judiciary to make decisions about what state policies it favors and which ones it dislikes." *Id.* at 546. The Court explained: "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — *including the judiciary* — deems state involvement to be." *Id.* (emphasis added).

At one point, the Court construed the Tenth Amendment broadly, stating that it "is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." *Kansas v. Colorado*, 206 U.S. 46, 90-91 (1907). Recent Tenth Amendment cases have typically been in the context of federal legislative encroachment on State powers. *See, e.g., Garcia,*

supra. The cases sustaining federal legislation challenged under the Tenth Amendment are not dispositive here because they deal with the legislative branch of the federal government typically acting under the auspices of the Commerce Clause in Article I.

To the extent *Garcia* mandates a federal judicial deference to otherwise proper state or federal legislative action, it supports the Missouri legislature's enactment of the preamble and the viability-testing statute. Even if *Garcia* can be read to limit the responsibility of the Court to enforce the Tenth Amendment against federal *legislative* encroachment on an otherwise proper state action, *but see South Carolina v. Baker*, 108 S. Ct. 1355, 1369 (1988) (Scalia, J. concurring), it should not be read to limit the responsibility of the Court to enforce the Tenth Amendment against federal *judicial* encroachment on an otherwise proper state action. What Missouri has done here is proper state action.

B. Neither the States Nor the People Have Consensually Abdicated Their Power to Make Moral Pronouncements About the Value of Unborn Human Life or About Abortion.

Neither the States nor the people have surrendered their authority to make moral statements about the value of unborn human life or about abortion. "The question is not what power the federal government ought to have, but what powers in fact have been given by the people. . . . Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves." *United States v. Butler*, 297 U.S. 1, 63 (1936); *see generally* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 CHI. L. REV. 1043, 1055 (1988) ("The Constitution is a set of grants of authority from the People themselves to their government

agents for limited purposes. The corollary of these limited grants of power is that government agents generally possess no authority — no 'sovereignty' — other than that expressly or impliedly delegated by the People.").

At the time of the adoption of the Fourteenth Amendment, which according to *Roe* curtails the power of the States to regulate abortion, at least 36 state or territorial legislatures had enacted laws limiting abortion. *Roe v. Wade*, 410 U.S. at 174-75 (Rehnquist, J., dissenting). Of those 36 legislatures, 31 evinced the will of sovereign States. With only 37 States at the time, and only 28 necessary to ratify an amendment to the Constitution, it is mathematically impossible to dispute Justice Rehnquist's conclusion that "the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter." 410 U.S. at 177. *See generally* Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359, 389 (1978); Destro, *Abortion and the Constitution: The Need for a Life-protective Amendment*, 63 CALIF. L. REV. 1250, 1250-92, 1310-16, 1331-39 (1975).

The Eighth Circuit would now stretch the Fourteenth Amendment so far as to deny Missouri the power even to make a pronouncement about the value of unborn human life. Neither the people nor the States abdicated this power in the Fourteenth Amendment, nor have the people or the States since consented to the usurpation of that power, either expressly or implicitly. The Eighth Circuit's holding is thus a raw usurpation of power "reserved to the States respectively, or to the people."

1. The Court's recent federalism cases reaffirm that the States retain certain sovereign powers, including the power to make fundamental policy decisions.

In *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982), the Court stated that "'the authority to make . . .

fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 776 (citations omitted); *see id.* at 777 (O'Connor, J., dissenting) ("[E]ach State is sovereign within its own domain, governing its citizens and providing for their general welfare. . . . The Constitution contemplates 'an indestructible Union, composed of indestructible States,' a system in which both retain a 'separate and independent existence.'") (citations omitted).

The powers to make a fundamental declaration of policy on the value of unborn human life and to protect the State's compelling interest in the life of a viable unborn child are powers the exercise of which does not impinge on any constitutionally protected individual rights. Individuals do not have a right to be free from moral pronouncements of the majority, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), and *Roe* recognized the compelling nature of the States' interest in the viable unborn child.

The Court's most recent Tenth Amendment case, *South Carolina v. Baker, supra*, suggests that the Tenth Amendment would protect a State if "it [were] deprived of any right to participate in the national political process or [if it were] singled out in a way that left it politically isolated and powerless." 108 S. Ct. at 1361; *see id.* at 1372 (O'Connor, J., dissenting) ("The Court has failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution."). The Eighth Circuit's holding that Missouri may not promulgate its consensus policy decision that life begins at conception leaves Missouri "politically isolated and powerless" in the social debate over abortion. By disregarding Missouri's legitimate power to make a non-binding moral pronouncement about the value of unborn human life, the Eighth Circuit's holding runs counter to the principles of federalism formalized in the Tenth Amendment.

2. Abortion legislation falls squarely within the police power, a political realm reserved to the States under the Tenth Amendment.

The police power enables the States respectively to set standards of behavior so as to promote the public well-being, and extends to the protection of human life, public health and safety, and public morals. *See generally Berman v. Parker*, 348 U.S. 26, 32 (1954). This power necessarily involves legislative line-drawing between competing interests, and judicial review of this sovereign line-drawing has traditionally been very narrow. *Id.* ("The role of the judiciary in determining whether [state police] power is being exercised for a public purpose is an extremely narrow one.").

In *Mugler v. Kansas, supra*, the Court spelled out the fundamentally legislative nature of the State police power, and warned that judicial usurpation of this power violates the principles of federalism formalized in the Tenth Amendment:

> It belongs to [state legislatures] to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> [T]he courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.
>
> * * *
>
> It cannot be supposed that the states intended, by adopting [the 14th] amendment, to impose restraints

> upon the exercise of their powers for the protection of the safety, health, or morals of the community.

123 U.S. at 661-64 (citation omitted).

a. *Protection of human life*

One of the most fundamental state police powers is the power to protect human life. In the context of First Amendment cases, the Court has consistently recognized that the broad power to protect human life is a power reserved to the States under the Ninth and Tenth Amendments: "'[T]he essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty. . . . [T]he protection of life itself [is] left primarily to the individual states under the Ninth and Tenth Amendments.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974), in turn quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). The Court has recognized that this power includes the power to protect unborn or "potential" human life. *See* discussion of *Roe v. Wade, supra.*

b. *Regulation of medical practice*

The power to regulate the medical profession, like the power to protect life, belongs to the States. In *Roe*, the Court referred to this power as an important state interest "in maintaining medical standards." 410 U.S. at 154; *see City of Akron*, 462 U.S. at 459 (O'Connor, J., dissenting) ("This Court has never failed to recognize that 'a State may properly assert important interests in safeguarding health [and] in maintaining medical standards.'" (quoting *Roe v. Wade*)).

c. *Regulation of public health & welfare*

The power of the States to regulate for the sake of public health has been recognized since the earliest days of the Republic: "Health laws of every description constitute . . . a part of that mass of legislation which 'embraces everything within the territory of a state, not surrendered to the general government;

all which can be most advantageously exercised by the states themselves.' *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting). Likewise, the States have retained the power to regulate for the public welfare. *See generally Berman v. Parker*, 348 U.S. at 33 ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.") (citation omitted).

d. *Domestic relations*

Various aspects of abortion regulation can appropriately be classified within the sphere of domestic relations. For instance, parental or spousal notification requirements impinge on the relations of husband and wife or parent and child. The Supreme Court has "consistently recognized that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Rose v. Rose*, 107 S. Ct. 2029, 2033 (1987) (citations omitted); *see De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern.").

The Court has enunciated a very narrow standard of reviewing State domestic relations statutes:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citations omitted). Abortion is the glaring exception.

C. *Roe v. Wade* Does Not Require that State Policy on the Value of Unborn Human Life Be Abortion-neutral.

The Eighth Circuit's implicit holding that State legislation must be abortion-neutral has no basis in the Constitution or in the Court's decision in *Roe*. Implicit in the *Roe* decision is that each State retains the power to define its "important and legitimate interest in potential life," even before viability. *See City of Akron*, 462 U.S. at 427-28 (State's "'important and legitimate interest in protecting the potentiality of human life' exists 'throughout the course of the woman's pregnancy.'") (citations omitted); *Thornburgh*, 476 U.S. at 828 ("The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.'") (O'Connor, J., dissenting) (citation omitted); *cf. Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. at 761 ("Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature.").

As the States possess an "important and legitimate interest" in protecting all pre-natal human life, Missouri's promulgation of a policy statement is protected by the Tenth Amendment.

D. Due to the Compelling Nature of Missouri's Interest in the Protection of the Lives of Viable Unborn Children, This Is the Paradigmatic Case for Tenth Amendment Judicial Restraint.

The policy of judicial restraint implicitly recognizes the Court's restriction by the federalism principles formalized in the Tenth Amendment. Various dissenting opinions in the Court's privacy cases have suggested that the Court's expansive reading of the Constitution in this area is unconstitutional as a *de facto* judicial amendment to the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting); *cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983) (Powell, J., dissenting) ("The hydraulic

pressure inherent within *each of the separate [federal] Branches* to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.") (emphasis added) (quoted at *Garcia*, 469 U.S. at 565 (Powell, J. dissenting)). Where, as here, this Court has recognized the compelling nature of the State's interest, Missouri's legislative judgment should be respected.

In numerous other contexts, the Court has restrained itself from the temptation to usurp legislative powers of the States. The ramifications of such judicial encroachments go to the very heart of our constitutional democracy, a system fundamentally rooted in the concept of self-government:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Lincoln, First Inaugural Address, March 4, 1861, in A. Lincoln, *Speeches and Letters* 171-72 (M. Roe ed. 1894).

The Court's most noted intrusion into the legislative realm reserved to the States involved the Court's reliance on substantive due process in the field of economic regulation. The dissenting opinions of Justices Holmes and Harlan in *Lochner, supra*, decried the Court's usurpation of legislative power reserved to the States: "[M]y agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law," 198 U.S. at 75 (Holmes, J., dissenting); "'No evils arising from ... legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon

grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.'" *Id.* at 74 (Harlan, J., dissenting) (quoting *Atkin v. Kansas*, 191 U.S. 207, 223 (1903)).

By the middle of the 20th Century, the Court had rejected the *Lochner* approach to substantive due process: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in Munn v. State of Illinois, 94 U.S. 113, 134, 24 L.Ed. 77, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955), *quoted in Harris v. McRae, supra*, 448 U.S. at 326; *cf. Berman v. Parker, supra*, 348 U.S. at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .").

In *United States v. Butler, supra*, the Court announced its proper constitutional role vis-a-vis legislative power reserved to the States:

> The Constitution is the supreme law of the land ordained and established by the people. . . . [T]he judicial branch of the [federal] government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.

297 U.S. at 62-63.

As with substantive due process in the economic sphere, this Court has recently recognized the inherent danger of its intrusion into the realm of state legislative powers in the privacy context:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clause of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers v. Hardwick, supra, 478 U. S. at 194.

This case presents the Court with an opportunity to withdraw, at least partially, from the essentially legislative field of abortion regulation. Particularly when a preamble has no binding effect, and the regulation is narrowly tailored to protect a compelling state interest, the Court should recognize that it too is bound by the Tenth Amendment and accordingly refrain from usurping the power of the people of Missouri to proclaim their respect for unborn human life.

Conclusion

By disregarding Missouri's legitimate powers to make a nonbinding moral pronouncement about the value of unborn human life and to regulate the medical profession's determination of fetal viability, the Eighth Circuit's holding runs counter to the principles of self-government and federalism formalized in the Ninth and Tenth Amendments. If the Court adopts the position taken by the Eighth Circuit, the States and the people

will further lose control over one of the most vital social and moral debates facing this country.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 88-605

FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICI CURIAE OF HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. JOHN C. DANFORTH, AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS, IN SUPPORT OF APPELLANTS †

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February 23, 1989

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Edgar v. Mite Corp., 457 U.S. 624 (1982)	25
Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935)	4
Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938)	19, 20
Ferguson v. Skrupa, 372 U.S. 726 (1963)	11
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984)	25

TABLE OF AUTHORITIES—Continued

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First National Bank v. Maine, 284 U.S. 312 (1932)	18
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	5, 9, 19, 20
Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S.Ct. 1133 (1988)	4
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)	5
H.L. v. Matheson, 450 U.S. 398 (1981)	11
Hardwick v. Florida, 109 S.Ct. 185 (1988)	5
Harris v. McRae, 448 U.S. 297 (1980)	1, 13
Hudgens v. NLRB, 424 U.S. 507 (1976)	19
Illinois v. Gates, 462 U.S. 213 (1983)	19, 24, 27
In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)	25, 26
In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64 (1981)	25
Jones v. United States, 362 U.S. 257 (1960)	19
Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)	4
Kelley v. Johnson, 425 U.S. 238 (1976)	25
Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175 (1786)	9
Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910)	11
Levy v. Louisiana, 391 U.S. 68 (1968)	21
Liggett Co. v. Baldridge, 278 U.S. 105 (1928)	17
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949)	17
Lochner v. New York, 198 U.S. 45 (1905)	18
Mapp v. Ohio, 367 U.S. 643 (1961)	27
Matter of Conroy, 98 N.J. 321, 486 A.2d 1209 (1985)	25
Matter of Peter by Johanning, 108 N.J. 365, 529 A.2d 419 (1987)	25
Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936)	11
Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658 (1978)	5
National League of Cities v. Usery, 426 U.S. 833 (1976)	9, 19

TABLE OF AUTHORITIES—Continued

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North Dakota Pharmacy Board v. Snyder's Drug Stores, 414 U.S. 156 (1973)	16
O'Callahan v. Parker, 395 U.S. 258 (1969)	4
Oregon v. Mitchell, 400 U.S. 112 (1970)	5
Parden v. Terminal Ry., 377 U.S. 84 (1964)	4
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	25, 26
Parratt v. Taylor, 451 U.S. 527 (1981)	17
Patterson v. McLean Credit Union, No. 87-107	19
Paul v. Davis, 424 U.S. 693 (1976)	26
Plessy v. Ferguson, 163 U.S. 537 (1896)	12
Pollock v. Farmers' Loan & Trust, 157 U.S. 429, *modified*, 158 U.S. 601 (1895)	4, 5
Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983)	11
Puerto Rico v. Branstad, 107 S.Ct. 2802 (1987)	4
Robbins v. California, 453 U.S. 420 (1981)	18
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Runyon v. McCrary, 427 U.S. 160 (1976)	19
Simopolous v. Virginia, 462 U.S. 506 (1983)	10
Solorio v. United States, 107 S.Ct. 2924 (1987)	4
South Carolina v. Baker, 108 S. Ct. 1355 (1988)	4, 24
State Tax Commission v. Aldrich, 316 U.S. 174 (1942)	18
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	11, 19
The Antelope, 23 U.S. (10 Wheat.) 66 (1825)	21
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	6, 7, 9
United States v. Ross, 456 U.S. 798 (1982)	18
United States v. Salvucci, 448 U.S. 83 (1980)	18, 19
United States Parole Comm'n. v. Geraughty, 445 U.S. 388 (1980)	24, 25
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	25
Welch v. Texas Dept. of Highways & Transportation, 107 S.Ct. 2941 (1987)	4
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	16
Whalen v. Roe, 429 U.S. 589 (1977)	26

TABLE OF AUTHORITIES—Continued

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Whisenhunt v. Spradlin, 464 U.S. 965 (1983)	25
Zablocki v. Redhail, 434 U.S. 374 (1978)	25
Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir.), *aff'd by evenly divided court*, 108 S.Ct. 479 (1987)	11
CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. I, sec. 2	22
U S. Const. Art. V	4
U.S. Const. Amend. I	5, 19
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U.S. Const. Amend. XIV	*passim*
U.S. Amend. XVI	5
U.S. Const. Amend. XXVI	5
STATUTES AND REGULATIONS	
42 U.S.C. § 300-300a-6a (1982 ed. and Supp. IV)	14
42 U.S.C. § 1396 *et seq.* (1982 ed. and Supp. IV)	13, 14
42 U.S.C. § 300z *et seq.* (1982 ed. and Supp. IV)	14
Cong. Globe, 39th Cong., 1st Sess. 1089 (1866)	21
The Human Life Bill—S. 158: Report by the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary, 97th Cong. 1st Sess. (1981)	7
Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess.	13
Proclamation No. 5761, 53 Fed. Reg. 1464 (1988)	14
OTHER AUTHORITIES	
L. Arey, *Developmental Anatomy* (Rev. 7th ed. 1974)	22
J. Beck, *Elements of Medical Jurisprudence* (11th ed. 1860)	22
Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Pop. & Dev. Rev. 45 (1977)	7

TABLE OF AUTHORITIES—Continued

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Blaustein & Ferguson, *Desegregation and the Law* (1957) 12

Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151 (1958) ..4, 6, 15, 23

E. Blechschmidt, *The Beginning of Human Life* (1977) 21

Bush, *Fertility—Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111 (1983) 14

Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807 (1973) 22

Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 Buff. L. Rev. 107 (1982) 18

Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* (1987) 4

Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988) 9

C. Corliss, *Patten's Human Embryology: Elements of Clinical Development* (1976) 22

A. Cox, *The Role of the Supreme Court in American Government* (1973) 8

Dellapenna, *The History of Abortion: Technology, Law and Morality*, 40 U. Pitt. L. Rev. 359 (1979) 6

Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250 (1975) 22

Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949) 5, 10

Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973) 8, 15, 21, 22

Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 .....8, 16, 23

Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985) 15

TABLE OF AUTHORITIES—Continued

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Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1 22

Henshaw, et al., *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987) 27

Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411 (1988) 5

Horan and Balch, Roe v. Wade: *No Justification in History, Law, or Logic*, in *Abortion and the Constitution*, 57 (Horan, Grant, Cunningham, eds., 1987) 23

Horan, Grant, Cunningham, eds., *Abortion and the Constitution* (1987) 13

Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789 (1985) 20

J. Imber, *Abortion and Private Practice* (1986) 26, 27

Knicely, *The* Thornburgh *and* Bowers *Cases: Consequences for* Roe v. Wade, 56 Miss. L.J. 267 (1986) 7, 15

Koop & Grant, *The "Small Beginnings" of Euthanasia*, 2 Notre Dame J. of L., Ethics & Pub. Pol'y 585 (1986) 26

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467 ..... 4, 6

K. Moore, *The Developing Human: Clinically Oriented Embryology* (3rd ed. 1982) 22

Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) 7

Morgan, Roe v. Wade *and the Lessons of Pre-*Roe *Case Law*, 77 Mich. L. Rev. 1724 (1979) 15

Note, *Technological Advances and* Roe v. Wade: *The Need to Rethink Abortion Law*, 29 U.C.L.A. L. Rev. 1195 (1982) 15

N.Y. Times, Jan. 22, 1989, at 17, col. 1 7

TABLE OF AUTHORITIES—Continued

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P. Ramsey, *Ethics at the Edge of Life* (1979)	26
Reed, *Stare Decisis and Constitutional Law*, 9 Pa. Bar Assoc. Q. 134 (April 1938)	4, 10
Rehnquist, *Is an Exapnded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 Kan. L. Rev. 1 (1974)	16
Rice, *Overruling* Roe v. Wade: *An Analysis of the Proposed Constitutional Amendments*, 15 B.C. Ind. & Comm. L. Rev. 307 (1973)	8
J. Thayer, *John Marshall* (1920)	6
Wash. Post, Nov. 13, 1988, at C6, Col. 1	14
Torres & Forest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169 (1988)	27
Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231 (1985)	13, 14, 15
Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,
v.
REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF HON. CHRISTOPHER H. SMITH, HON. ALAN B. MOLLOHAN, HON. JOHN C. DANFORTH, AND OTHER UNITED STATES SENATORS AND MEMBERS OF CONGRESS, IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI

The *amici*, Members of Congress and Senators, have substantial interests in the disposition of this appeal. Congress has enacted broad restrictions on the funding of abortion, which have been upheld by this Court. *Harris v. McRae*, 448 U.S. 297 (1980). The decision of the court of appeals, if upheld, could adversely impact the ability of Congress to maintain such restrictions. Furthermore, among the questions accepted for review by this Court is whether *Roe v. Wade*, 410 U.S. 113 (1973) should be reconsidered or reversed. Congress is interested in this question, as it affects the correct interpretation of the Fourteenth Amendment's protections of the right to life and of due process under law, as well as the fundamental balance between legislative authority and judicial review under the federal Constitution.

SUMMARY OF THE ARGUMENT

Stare decisis, a doctrine of diminished importance in the field of constitutional law, provides no basis for declining to reverse the multiple errors of *Roe v. Wade*, 410 U.S. 113 (1973). More than 100 times, this Court has corrected itself on constitutional questions and overturned prior case law. The reasons for this self-correction —the difficulty of addressing constitutional error through amendment or legislation; the primacy of the text of the constitution over the interpretations placed upon it; and the inappropriateness of the nation's highest tribunal perpetuating constitutional error—apply with special force to *Roe*. Moreover, the interests furthered by stare decisis are not served by adherence to *Roe*. The doctrines of *Roe* have caused great instability and unpredictability in the law, such that reversal is necessary to restore an appropriate balance.

Reversal of *Roe* would also be consistent with past willingness to admit error. This Court has corrected decisions which, like *Roe*, have misinterpreted the "liberty" clause of the Fourteenth Amendment to place an undue strait-jacket on legislative authority. And it has renounced the role of "super-legislature," sitting in judgment on the wisdom of state statutes. Doctrines on which long-standing social institutions and conventions were established have been overturned, as have doctrines on which scores of criminal convictions were predicated. The overturning of such decisions has often caused change, some of it disruptive. But it has also returned to the political branches of government their rightful authority to respond to the pressing moral and social issues at the root of such change. *Roe*, contrary to this tradition, has usurped the legislative function, and exacerbated the social turmoil over abortion.

Roe also merits reversal because it erroneously removed the protections of the Fourteenth Amendment, intended to embrace "all human beings," from the unborn. The

humanity of the unborn cannot be debated in light of current medical technology, nor can the uniqueness of each individual unborn life be called into question. Redress of this error is imperative.

Finally, although this Court has shown an appropriate reluctance to reverse constitutional decisions where a less severe remedy is available, this case does not counsel such a cautious approach. The decision of the court of appeals illustrates the extent to which *Roe* has been utilized to frustrate even the most modest efforts to protect unborn life in general, and the viable unborn in particular. This opinion, unfortunately, typifies the application of *Roe* by the federal courts. *Roe* is constitutional error of the most radical variety, and the traditions of this Court call for such error to be dispatched without ambiguity.

ARGUMENT

I. STARE DECISIS DOES NOT PREEMPT RECONSIDERATION OF *ROE v. WADE*.

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-410 (1932) (Brandeis, J., dissenting)[1]. On almost 90

[1] The copious footnotes and citations in reference to this passage are omitted. Justice Brandeis identified 28 instances in which the Court had reversed or qualified its own prior reading of the

occasions since *Burnet*, this Court has exercised its liberty to review and reverse its decisions on constitutional law. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 494-496 (listing 47 constitutional decisions overturned 1960-1979); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying 60 constitutional law decisions among 90 overrulings of prior Supreme Court decisions). The Library of Congress, relying on these studies, has identified, through 1986, 184 cases in which this Court has reversed its own prior rulings.[2]

The overruling cases of the past 60 years amplify Justice Brandeis's criteria for permitting greater latitude in overruling constitutional decisions. First is the unique difficulty of amending the Constitution to correct an erroneous decision, particularly where a legislative reformation of the error is impossible.[3] This difficulty extends not only to the super-majoritarian requirements of Article V, but to the task of drafting an amendment that

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Constitution. As noted in the text, that number has at least tripled in the years since *Burnet*. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467.

[2] Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987). The following cases, decided since 1986, qualify to be added to the Library of Congress compilation: *Puerto Rico v. Branstad*, 107 S.Ct. 2802 (1987), *overruling Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861); *Solorio v. United States*, 107 S.Ct. 2924 (1987), *overruling, O'Callahan v. Parker*, 395 U.S. 258 (1969); *Welch v. Texas Dep't of Highways and Transportation*, 107 S.Ct. 2941 (1987), *overruling in part, Parden v. Terminal Ry.*, 377 U.S. 84 (1964); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988) *overruling, Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), *overruling, Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, mod. 158 U.S. 601 (1895).

[3] Reed, *Stare Decisis and Constitutional Law*, 9 Pa. Bar Assoc. Q. 134 (April 1938).

will strike the intended target without unintended effect on other constitutional provisions.[4] Second, and of no less importance, is the view that "precedent that conflicts with [constitutional] text is not precedent."[5] Justice Frankfurter stated, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. New York* ex rel. *O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring.) And Justice Douglas went so far as to say that the place of stare decisis in constitutional law is "tenuous" where a prior decision conflicts with the Constitution itself.[6]

A third and related reason is that it is wrong to go on being wrong.[7] Justice Black wrote that "[a] constitutional interpretation that is wrong should not stand." *Connecticut General Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting). This is particularly so

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[4] Only four decisions of this Court have been reversed by amendment to the Constitution. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (11th Amendment); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (13th and 14th Amendments); *Pollock v. Farmers' Loan & Trust*, 158 U.S. 601 (1895) (16th Amendment); and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (26th Amendment).

[5] Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411, 411 (1988).

[6] A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it.
Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

[7] *See, Monell v. N.Y. City Dep't of Social Services*, 436 U.S. 658, 659, *et seq.* (1978) (Brennan, J.); *Garcia v. San Antonio Metro.*, 469 U.S. 528, 557 (1985) (Blackmun, J.). Note also that in death penalty cases, Justices Brennan and Marshall have, since 1976, dissented from precedent and voted in memorandum dissenting opinions to reverse death penalty convictions in more than 1000 cases. *See, e.g., Denney v. Texas*, 437 U.S. 911 (1978); *Hardwick v. Florida*, 109 S.Ct. 185 (1988).

where the Court's decision touches upon a matter of intense moral and political concern. Erroneous removal of such questions from the democratically-controlled branches of government, and from the states, may "deaden society's sense of moral responsibility," [8] and preclude the innovation of more just and satisfactory legal solutions. This is the salutary effect, noted by Justice Brandeis, of permitting "trial and error."

Roe v. Wade, 410 U.S. 113 (1973), is clearly the type of constitutional decision for which the doctrine of stare decisis holds diminished importance.[9] First, *Roe* is demonstrably *not* the type of decision where "correction can be had by [state] legislation." *Burnet, supra.* Legislative action by the states to simply curtail the impact of *Roe* has met with increasing judicial hostility. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 764 (1986). *Roe* is applied not only to restrict legislation which adversely

[8] J. Thayer, *John Marshall* 107 (1920).

[9] One significant reason for limiting application of stare decisis in the case of *Roe v. Wade*, is that *Roe* itself was a reversal of precedent. "Although it did not expressly disapprove any specific case, . . . [*Roe*] must be viewed as a significant departure from established precedent." Maltz, *supra*, 1980 Wis. L. Rev. at 492, n.119. *Roe* did not confirm an ongoing erosion of precedent. *Cf.* Blaustein & Field, 57 Mich. L. Rev. at 156-159 and cases cited therein. Rather, it uprooted and cast aside virtually all existing law on abortion, striking from the statute books laws more than a century old, as well as laws of much more reecnt vintage. *Roe*, 410 U.S. at 174-177 (Rehnquist, J., dissenting). These laws, moreover, reflected in part a progression from, and in part a codification of, centuries of common law developments regarding abortion. *See* Dellapenna, *The History of Abortion: Technology, Law and Morality*, 40 U. Pitt. L. Rev. 359 (1979). *See also*, Brief of Value of Life Committee as Amicus Curiae in Support of Appellants; and Brief of Certain American State Legislators as Amici Curiae in Support of Appellants. Reversal of *Roe*, now 16 years old, would restore a body of precedent gradually shaped and developed over the course of centuries.

impacts on a woman's access to abortion, but also, to disapprove legislation because it is "motivated" by an anti-*Roe* sentiment.[10] And although your *amici* do not concede the point, it appears that efforts to correct or ameliorate *Roe* through the Congressional powers of enforcement under the Fourteenth Amendment would likely be held, under current law, to run afoul of *Roe*.[11]

Second, public opinion polls show consistent majority support for restrictions on abortion far more stringent than allowed by *Roe*.[12] But, the task of moving such

[10] *See*, Knicely, *The* Thornburgh *and* Bowers *Cases: Consequences for* Roe v. Wade, 56 Miss. L.J. 267, 281 (1986) ("That the *Thornburgh* majority's perception of legislative motive weighs heavily in its decision cannot be doubted. It permeates virtually every aspect of the majority opinion.")

[11] Your *amici* do not concede that Congress is powerless in this regard, but note, for purposes of this Brief, that Congressional efforts to alter the central holdings of *Roe* have been rendered exceedingly difficult by the widely held legal opinion that Congress lacks the authority to so act. *See, The Human Life Bill—S. 158: Report by the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary*, 97th Cong. 1st Sess. (1981). Professor Monaghan has aptly described Congress's dilemma:

> Surely, if there is a reasonable chance that the Court would reverse itself on the merits, Congress is not disregarding its duty to obey the law in enacting a new abortion statute. Yet one can anticipate the reaction: many who have never uttered a kind word for stare decisis would rise against the congressional "usurpation" of judicial authority. Apparently, for them stare decisis resides in the judicial power: the Court may act entirely free of any constraint from its precedents, but Congress cannot insist that it do so.

Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 755 (1988).

[12] The National Opinion Research Center reports that 60 percent of those surveyed oppose the expansive abortion right created in *Roe*. *Views on Abortion Remain Divided*, N.Y. Times, Jan. 22, 1989, at 17, col. 1. Popular support for elective abortion has remained a minority position, approximately 40 percent, since 1973. *See Id.;* Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Pop. & Dev. Rev. 45 (1977).

opinion behind a constitutional amendment is complicated by *Roe*'s multiple and confusing holdings.[13] No less than five constitutional holdings may be identified: that the unborn are not "persons" under the Fourteenth Amendment;[14] that if the unborn were persons, no right to abortion would exist;[15] that the Fourteenth Amendment due process clause includes a right to decide to terminate pregnancy;[16] that states may not adopt a "theory of life" to override the right to terminate pregnancy;[17] and that no state interest in the unborn is sufficient to prohibit any abortion until the final "trimester" of pregnancy.[18] As many commentators have noted, the range and detail of these holdings is more characteristic of legislation than of constitutional law.[19] And the resulting task of drafting a constitutional amendment that fairly meets the errors of *Roe* is daunting, if not impossible.

Third, the growing polarization over *Roe* within this Court, and within society, confirm the assessment of legal scholars that many of these holdings were in error. It is wrong to propogate such a decision unless, under renewed scrutiny, the reasoning of *Roe* withstands the arguments

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[13] Rice, *Overruling* Roe v. Wade: *An Analysis of the Proposed Constitutional Amendments*, 15 B.C. Ind. & Comm. L. Rev. 307 (1973).

[14] 410 U.S. at 156-159.

[15] 410 U.S. at 156-157.

[16] 410 U.S. at 153.

[17] 410 U.S. at 162.

[18] 410 U.S. at 163-164.

[19] *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government*, 113-114 (1973); Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 159.

made against it.[20] Unless independent grounds exist for affirming *Roe*, stare decisis alone stands as no impediment to reversal.[21]

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[20] "[T]he long tradition of the Court [is] that previous decisions must be subject to re-examination when a case against their reasoning is made." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 31 (1959). It is no violation of stare decisis, therefore, to consider and act upon a better-reasoned argument that the precedent in question was in error. *See also*, Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988), *citing*, *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (1786) ("[I]f a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to the law.")

[21] *Roe* has been defended by this Court almost exclusively on grounds of stare decisis. *See, Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779-781 (1986). This is in marked contrast to the debate occasioned by the overruling of *National League of Cities v. Usery*, 426 U.S. 833 (1976) by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). While the *Garcia* dissenters invoked stare decisis, they recognized that this doctrine is a servant to principles of greater importance.

> Whatever effect the Court's decision may have in weakening the application of stare decisis, it is likely to be less important than what the Court has done to the Constitution itself. A unique feature of the United States is the federal system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

469 U.S. at 559-560. Thus, the *Garcia* dissents did not rest on stare decisis, but on the fundamental principle of federalism, and the specific dictates of the Tenth Amendment. *See, Id.*, at 560-589. *Roe*, however, rests on no such fundamental principle, or textual mandate.

II. AFFIRMATION OF *ROE v. WADE* SERVES NONE OF THE INTERESTS OF STABILITY, PREDICTABILITY OR CONSISTENCY THAT ARE FURTHERED BY STARE DECISIS.

The protection of stare decisis is qualified. As the full title of the doctrine—*stare decisis et non quieta movere* (stand by the precedents and do not disturb the calm)[22] —implies, respect for past decisions extends properly only to those doctrines that are "at rest." *Roe v. Wade*, however, is an unsettled doctrine with an unsettling effect. It is the inevitable result of the majority's failure to heed the counsel authored by one of its own number:

> From age to age the problem of constitutional adjudication is the same. It is to keep the power of government unrestrained by social or economic theories that one set of judges may entertain. . . . It is when a judiciary with life tenure seeks to write its social and economic creed into the Constitution that instability is created.

Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 754 (1949).

1. *Roe v. Wade* ostensibly intended to settle the issue of abortion in American law. However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. This is highlighted by *Roe*'s progeny, which has produced a growing body of intricate, arbitrary regulations surrounding the abortion decision. A state may require second trimester abortions to be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but may not require that they be performed in hospitals, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983). A state may require that certain information be provided to the mother by a doctor or his assistant, *Akron*, 462 U.S. at 448, but may not require that the doctor himself provide the same information, *Id.*, at 449. The quantum of information a

[22] Reed, *supra*, note 3, 9 Pa. Bar. Assoc. Q. 134.

state may require be provided has been scrupulously circumscribed. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 759, 765. Far from settling the debate, these subsequent decisions have multiplied confusion and spawned further unanswered questions.

2. Adherence to *Roe* promises more unpredictability, and more "justification" for this Court to "sit as a superlegislature to weigh the wisdom of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 730-731 (1963). Even supposedly "settled" questions of abortion law, such as the permissibility of requiring notification to parents before an abortion is performed on their minor daughter, *H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), can result in deadlock over a minor refinement of the issue. *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by evenly divided Court*, 108 S.Ct. 479 (1987). And this case presents the issues of post-viability regulation and abortion funding to this Court for the fourth and sixth time, respectively. State regulations in these three areas have all been upheld by this Court. But due to the ever-expansive nature of *Roe*'s restrictions on state authority, states regulate in these areas at their peril.

3. One indication of an "unsettled" constitutional doctrine is the controversy it continues to engender on this Court.[23] *Roe* is almost *sui generis* in that opposition to it

[23] The following were criticized prior to their eventual overruling: *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *criticized by, Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372 (1910) (Holmes, J., dissenting); and *Baltimore & Ohio R. Co. v. Bough*, 149 U.S. 368, 398-404 (1893) (Field, J., dissenting); *Adkins v. Children's Hospital*, 261 U.S. 525, 567-571 (1923) (Holmes, J., dissenting); *see, Morehead v. New York* ex. rel. *Tipaldo*, 298 U.S. 587, 635 (1936) (Stone, J., dissenting). For discussion of opinions criticizing and distinguish-

in this tribunal has never diminished, but appears to gain strength with each new case and with each new startling extension of the *Roe* doctrine. *Roe* was condemned at the outset as "judicial legislation." 410 U.S. at 174 (White, J., dissenting), and thus, a wrongful displacement of the proper functioning of the political process. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) ("This issue . . . should be left with the people and to the political processes the people have devised to govern their affairs."). *See also, Thornburgh*, 476 U.S. at 787 (White, J., dissenting) ("[D]ecisions that find in the Constitution principles or values that cannot be fairly read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation."). More recent abortion decisions have brought even stronger dissent, decrying the "major distortion in the Court's constitutional jurisprudence" caused by continued adherence to *Roe*, *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting), and challenging the arbitrary nature of the trimester framework, and the continuing validity of that scheme in light of advances in medical science. *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting). *Thornburgh* was further attacked as "symptomatic of the Court's own insecurity over its handiwork in *Roe v. Wade*. . . . Aware that in *Roe* it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively." 476 U.S. at 813-814 (White, J., dissenting).

4. Further indication that a doctrine is not "settled" is its effect on legal principles of more general application. In this regard, *Roe* has proven the judicial equivalent of a runaway freight train. In its zeal to affirm

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ing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *see*, Blaustein and Ferguson, *Desegregation and the Law* (1957).

Roe, the *Thornburgh* majority was compelled to ignore, abandon, or reverse prior legal and constitutional doctrine on statutory construction, plenary review of preliminary injunctions, informed consent, and state regulation of the professions.[24] "No legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." 476 U.S. at 814 (O'Connor, J., dissenting).

5. Political activity, scholarly analysis, and public opinion also reject the hypothesis that *Roe* is settled law. Since *Roe*, nearly 900 separately numbered resolutions relating to abortion have been introduced into Congress.[25] Over 300 are joint resolutions seeking Constitutional amendments that would overturn *Roe*.[26] Congress has also acted broadly to remove direct federal financial support for abortion.[27] Moreover, a 1988 Presidential proc-

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[24] The Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). In *Thornburgh*, the dissents identify the Court's abandonment of constitutional doctrine in the following areas: plenary review of preliminary injunctions and standards of appellate review, 476 U.S. at 815-825 (O'Connor, J., dissenting); abstention, *Id.* at 830-831; informed consent, *Id.* at 798-802 (White, J., dissenting); state regulation of the professions, *Id.* at 802-804; statutory construction, *Id.* at 810-812. *See generally*, Horan, Grant & Cunningham, eds., *Abortion and the Constitution*, 245, 253-255 (1987).

[25] Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U.L. Rev. 231, 247, *citing*, Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle) (600 resolutions, 1973-1985). Since 1985, over 300 more resolutions have been introduced. *See* Statistics prepared by Legislative Information Service, United States Senate, as of February 10, 1989.

[26] *See*, Wardle, *supra* note 24 at 247-248, n.86 (270, 1973-85).

[27] *Harris v. McRae*, 448 U.S. 297 (1980); *Bowen v. Kendrick*, 108 S.Ct. 2562 (1988). *See also*, 42 U.S.C. Sec. 1396 *et seq.* (1982

lamation declared the unborn to be protected under the Constitution, and directed the executive branch to carry out actions and programs consistent with that declaration.[28]

The strongest evidence of a popular rejection of the abortion right created in *Roe* is seen in the vast number of state legislative actions and public referenda designed to limit or regulate the performance of abortions. During the 1988 elections, public referenda in Michigan, Arkansas, and Colorado affirmed restrictions on abortion, and in Arkansas, granted rights to the unborn under the state constitution.[29] During the years since *Roe*, state legislatures from all regions have enacted hundreds of laws regulating abortion.[30] At least 23 state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution, and 19 state legislatures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[31] The democratic branches of government, therefore, have not accepted or endorsed *Roe*.

In academic circles, few if any opinions of this Court have attracted the barrage of criticism levied at *Roe*.

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. . . . Even some who approve of *Roe*'s form of judicial review concede that the opinion itself is inscrutable.[32]

Nor has *Roe* exhausted its critics, for the stream of published criticism continues to this day.[33] *Roe* remains vulnerable because it was inherently flawed from the outset,[34] and because as subsequent case law proves, the error has compounded itself.

III. RECONSIDERATION AND REVERSAL OF *ROE v. WADE* IS CONSISTENT WITH PRIOR REVERSAL OF CONSTITUTIONAL DECISIONS BY THIS COURT.

Roe not only exemplifies the type of constitutional decision for which stare decisis has limited application; it also fits the criteria established by the more than 190 opinions of this Court for a decision whose reversal is justified and necessary.[35] Furthermore, reversal of the specific doctrines of *Roe* would be completely consonant with this Court's history of overturning constitutional decisions in the following areas: substantive due process, individuals rights, and federalism. While *Roe* is unique in some respects, the questions posed by its reversal have

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ed. and Supp. IV) ("Hyde Amendment" restricting Medicaid funding of abortion); 42 U.S.C. § 300-300a-6a (1982 ed. and Supp. IV); 42 U.S.C. § 300z et seq. (Adolescent Family Life Act.)

[28] Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

[29] Wash. Post, Nov. 13, 1988, at C6, col. 1.

[30] Bush, *Fertility-Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111, 111 (Table 1) (1983). Wardle, *supra*, n.25 at 247, n.83.

[31] Wardle, *supra*, note 24 at 247.

[32] Morgan, Roe v. Wade *and the Lessons of Pre-*Roe *Case Law*, 77 Mich.L.Rev. 1724, 1724(1979) (footnotes omitted).

[33] *See*, Wardle, *supra* note 24; Knicely, *supra* note 9; Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L.Rev. 375 (1985); Note, *Technological Advances and* Roe v. Wade: *The Need to Rethink Abortion Law*, 29 U.C.L.A. L.Rev. 1195 (1982). While not all of these articles suggest reversal of *Roe* as the solution, they illustrate the continued difficulty of adhering to *Roe's* standards.

[34] Ely, *supra*, note 19, 82 Yale L.J. at 932, 935-936.

[35] Blaustein & Field, *supra* at 4, 57 Mich.L.Rev. at 168-177.

been addressed by this Court previously, and have not prevented this Court from abandoning its perceived errors.

1. *Roe v. Wade* is the modern archetype of substantive due process.[36] Its predecessors, likewise founded on the Fourteenth Amendment's protections of "liberty" and "due process," have generated numerous reversal decisions by this Court. The rationale of these latter decisions applies squarely to *Roe*.

> [The Constitution] speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937), *overruling*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). The determination of those evils which require restraint is, in the absence of a constitutional mandate to the contrary, the province of the legislature. "The courts are incompetent to judge the wisdom of state legislatures and may only preempt such wisdom where an act . . . violates an express provision of the Constitution." *Id.* at 398.

Echoing this holding, this Court in *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156

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[36] Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 Kan.L.Rev. 1,4-6 (1974); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup.Ct.Rev. 159.

(1973), rejected a due process argument against a state law restricting the ownership of drug stores to licensed pharmacists or their corporations. The Fourteenth Amendment "does not make it a condition of preventive legislation that it should work a perfect cure. It is enough that the questioned act has a manifest tendency to cure or at least to make the evil less. [T]wo opposed views of public policy are considerations for the legislative choice." *Id.* at 147, *overruling Liggett Co. v. Baldridge*, 278 U.S. 105 (1928). Likewise, in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), this Court wrote: "the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U.S. at 536-537.

That such cases concerned an improper expansion of Fourteenth Amendment "liberty" in the economic sphere makes them no less applicable to this case.[37] The point of these decisions is that "liberty" and "due process" cannot be employed to graft onto the Constitution a particular view of wise public policy on subjects where the Constitution is otherwise silent.[38] "To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment was intended to give us carte blanche to em-

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[37] Reversal of precedent as being an overbroad interpretation of Fourteenth Amendment rights is not limited to economic rights. In *Daniels v. Williams*, 474 U.S. 327 (1986), *overruling Parratt v. Taylor*, 451 U.S. 527 (1981), this Court reversed itself and held that the Fourteenth Amendment provides no basis for a statutory civil rights action alleging negligence on the part of prison officials. "Whatever other provisions of state law or general jurisprudence he may rightly invoke, the Fourteenth Amendment . . . does not afford [plaintiff] a remedy." *Id.* at 336.

[38] Your *amici* do not concede that the Constitution is silent as to the protection of the unborn's right to life by the Fourteenth Amendment. *See* Section IV, *infra*.

body our *economic or moral beliefs* in its prohibitions." *State Tax Commission v. Aldrich*, 316 U.S. 174, 181 (1942) (emphasis supplied), *overruling*, *First National Bank v. Maine*, 284 U.S. 312 (1932). Arguments that *Roe*'s exercise of substantive due process is different because *Roe* involves a "fundamental" liberty necessarily start from the assumption that freely-available abortion is beneficial to women,[39] or that it is a decision that ought to be left to individuals to make.[40] This type of assumption is virtually indistinguishable from the value-based defenses of "laissez-faire" economics which sustained the ascendancy of *Lochner v. New York*, 198 U.S. 45 (1905) for over a generation. And the cloaking of it in constitutional law is even more pernicious where, as in *Roe*, the countervailing interest is that of life itself.

2. This Court's reversals have limited the scope of protection afforded under prior case law by certain explicit rights under the Constitution. For example, in *United States v. Ross*, 456 U.S. 798 (1982), the Court held that its decision in *Robbins v. California*, 453 U.S. 420 (1981), excluding evidence obtained in a warrantless search despite the existence of probable cause that incriminating evidence would be found, was an overbroad interpretation of privacy rights under the Fourth Amendment. "[T]he doctrine of stare decisis does not preclude this action. Of greatest importance, we are convinced that the rule we apply in this case is faithful to the interpretation of the Fourth Amendment that the Court has followed with substantial consistency throughout our history." 456 U.S. at 824. Likewise, in *United States v.*

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[39] For a contrary view, *see* Brief of Feminists for Life of America as Amicus Curiae in Support of Appellants, and Brief of Focus on the Family and Family Research Council as Amici Curiae in Support of Appellants.

[40] *See*, Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 Buff.L.Rev. 107, 126-129 (1982).

Salvucci, 448 U.S. 83 (1980), this Court overruled the doctrine of *Jones v. United States*, 362 U.S. 257 (1960), granting automatic standing to defendants to challenge an invasion of privacy rights. "We are convinced that . . . *Jones* has outlived its usefulness in this Court's Fourth Amendment jurisprudence." 448 U.S. at 95. Also, in *Illinois v. Gates*, 462 U.S. 213 (1983), the exclusionary rule was modified by replacing the rigid "two-pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964) with a more flexible rule based upon the totality of the circumstances under which a warrant is obtained and a search conducted.

In the area of First Amendment rights, *Hudgens v. NLRB*, 424 U.S. 507 (1976) abandoned the holding in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), granting "public forum" status to certain forms of private property. And in a case presently before this Court, *Patterson v. McLean Credit Union*, No. 87-107, this Court is reconsidering whether it erred in granting a private right of action under a century-old civil rights statute. *See Runyon v. McCrary*, 427 U.S. 160 (1976).

3. This Court has also reversed decisions implicating core constitutional values, such as federalism. Over vigorous dissent that its decision "emasculat[es]" the rights of the states under the Tenth Amendment, 469 U.S. at 572 (Powell, J., dissenting), the *Garcia* opinion reversed the holding of *National League of Cities*. And in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court, also by a 5-4 vote, overruled the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) regarding the existence of a federal common law. These two cases demonstrate that a bare majority of this Court will correct a decision it believes to be erroneous, even where the decision implicates fundamental constitutional values. Again, any argument that *Roe* is more "fundamental" than the interests at stake in *Erie* and *Garcia* is unavailing. The fed-

eral structure of government is, in reality, the most basic assurance of individual liberty and protection from excessive governmental power. "Federalism is linked with individual liberty and with the health of the body politic," and thus, "[i]t is not less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution." [41]

Roe's ongoing breach of the principle of federalism should not be allowed to persist. As *Erie* and *Garcia* demonstrate, such decisions are often controversial. And controversy is certain to ensue no matter what path is taken regarding *Roe v. Wade*. However, perpetuating the erroneous and unworkable holdings of *Roe* cannot be justified for reasons of avoiding political strife. The highest traditions of this Court teach that in such circumstances, the proper resolution is faithfulness to the text and the fundamental values of the Constitution. That text, and those values, determine that *Roe*'s complete curtailment of the states' power to protect the unborn ought to be reversed.

IV. *ROE*'S HOLDING THAT THE UNBORN ARE NOT PERSONS UNDER THE FOURTEENTH AMENDMENT WAS CLEARLY IN ERROR AND SHOULD NOT BE PROTECTED BY STARE DECISIS.

One holding of *Roe* directly contradicted the text and legislative history of the Constitution, and thus, should be reversed: that the unborn are not "persons" subject to the Fourteenth Amendment's protection of the right to life. As Professor Ely noted, after employing the most imaginative possible construction of the Fourteenth

[41] Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga.L.Rev. 789, 795, 797 (1985).

Amendment to find a right of abortion, the Court resorted to the most literalistic possible form of strict construction to avoid finding the unborn to be persons.[42] This "strict construction" was erroneous at the time,[43] and is increasingly out of step with the course of medical knowledge concerning the unborn.[44]

Roe's holding on this point defies the fundamental jurisprudence of the Amendment. As stated in *Levy v. Louisiana*, 391 U.S. 68, 70 (1968), "persons" are those who "are humans, live, and have their being." Representative Bingham, the author of the Amendment, plainly stated the rights thereunder extended to "every human being." [45] Thus, the jurisprudence of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), and *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) was a dead letter in American constitutional law. No longer was the law free to treat human beings as "non-persons," "property," "slaves," or, in the words of *Roe*, less than "persons in the whole sense." 410 U.S. at 162. Recent advances in medical technology have only served to confirm what was already well-known in 1973: that the life of each individual human being begins at the time of conception.[46]

[42] Ely, *supra* note 19, 82 Yale L.J. at 926.

[43] *See Roe v. Wade*, Motion and Brief Amicus Curiae of Certain Physicians, Professors, and Fellows of the American College of Obstetricians and Gynecologists in Support of Appellee.

[44] Your *amici* note that at least one other brief prepared for this case will address the issue of Fourteenth Amendment personhood. *See* Brief of Knights of Columbus as Amicus Curiae in Support of Appellants.

[45] Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (Remarks of Rep. Bingham).

[46] [T]he evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of the fertilization of the ovum.

E. Blechschmidt, *The Beginning of Human Life* 16-17 (1977). The zygote "results from fertilization of an oocyte, or ovum, by a sperm,

Against this plain meaning of the Amendment's text, *Roe* argued that the word "person" as applied elsewhere in the Constitution applied only postnatally. But, these other provisions also apply, just as clearly, only to adults.[47] One could hardly make the argument that this usage implies that only adults are "persons" under the Fourteenth Amendment. Yet, *Roe* makes the equivalent argument in stating that only the born are "persons." *Roe* also looks for support in the fact that the unborn have never been counted in the census. This, too, is irrelevant, because Article I, sec. 2 provides for a decennial census "in such manner as [Congress] shall be law direct," and does not mention the word "person."

Roe's remaining arguments are equally unavailing. The fact that even the most restrictive abortion statutes permitted an exception for procedures necessary to save the life of the mother only means that principles of necessity and self-defense, well-established in the law of homi-

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or spermatozoon, and is *the beginning of a human being.*" K. Moore, *The Developing Human: Clinically Oriented Embryology* 1, 13 (3d ed. 1982) (emphasis in original)). *See also*, L. Arey, *Developmental Anatomy* 55 (Rev. 7th ed. 1974); C. Corliss, *Patten's Human Embryology: Elements of Clinical Development*, 30 (1976); J. Beck, *Elements of Medical Jurisprudence*, 276 (11th ed. 1860) ("The foetus is certainly . . . as much a living being immediately after conception, as at any other time before delivery.").

[47] The constitutional clauses in question all pertain to age qualifications for federal office. Numerous commentators have concluded that using such clauses to exclude the unborn from the protections of the Fourteenth Amendment is oxymoronic. *See, e.g.*, Ely, *supra*, 82 Yale L.J. at 925-926; Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford.L.Rev. 807, 852-857 (1973); Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif.L.Rev. 1250, 1283-1286 (1975); Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood" and the Supreme Court's Birth Requirement*, 1979 So.Ill.L.Rev. 1, 11-13.

cide and tort, are applicable to abortion as well.[48] The prevailing statutory immunity from punishment of women who submit to abortion likewise says nothing about the "personhood" of their offspring. Rather, it is a judgment of diminished culpability in the face of immense stress and pressure.[49] Finally, the fact that punishments for abortion were traditionally less severe than those for homicide is likewise irrelevant; the same is true of punishments for many forms of vehicular homicide and manslaughter as compared with murder of a law enforcement official.[50]

Measured against the text of the Fourteenth Amendment, its legislative history, and the Court's own prior interpretations, *Roe*'s holding on the personhood of the unborn is erroneous. Stare decisis notwithstanding, reversal of such error is justified and necessary.[51]

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[48] *See* Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup.Ct.Rev. 159, 180.

[49] Disparity of punishment is common in the law of homicide, but says nothing about the equality of the victims as persons before the law. *See* Horan and Balch, Roe v. Wade: *No Justification in History, Law, or Logic*, in *Abortion and Constitution*, 57, 73 (Horan, Grant, Cunningham ed., 1987).

[50] *See* 410 U.S. at 158, n.54. This entire line of argument is premised on the fallacious assumption that evidence of the unborn's status as persons under the Fourteenth Amendment can be divined from *state* criminal statutes, and that if such statutes do not treat the unborn as "persons," then neither does the Constitution. This is a complete reversal of Constitutional priorities. If the unborn are deemed persons under the Fourteenth Amendment, state statutes cannot take away from that holding. Indeed, the only question is whether those statutes are consistent with the constitutional mandate.

[51] *See* Blaustein & Field, *supra*, 57 Mich.L.Rev. at 168-177 (comparing "necessary" and "justified" overruling of Supreme Court precedent).

V. THE MOST "PRUDENTIAL" COURSE IN ADDRESSING THE PROBLEMS POSED BY *ROE v. WADE* IS TO OVERRULE THAT DECISION.

A "wise exercise of the powers confided in this Court" dictates that where prudent, this Court withhold decision on reversing challenged precedent, provided it is possible to resolve the case before it by distinguishing or modifying that precedent. *Illinois v. Gates*, 462 U.S. 213, 224 (1983) (noting "prudential" concerns for abstaining from reversal). However, the traditions of this Court also dictate that where constitutional error is palpable, where such error has caused legal instability and fomented social strife, correction by "gradual erosion" will not suffice. *See, Brown v. Board of Education*, 347 U.S. 483 (1954).[52] More direct action to cure the error is called for. *Roe v. Wade* is such a case.

1. One prudential reason for a gradualist approach is the citation of the challenged precedent in other cases. This argument, which presumes that outright reversal will be disruptive to the affected body of case law, is not applicable to *Roe*. Although *Roe* has been cited in almost 100 cases by this Court, and in more than 1000 cases by other federal and state courts, these citations, outside the context of abortion regulation, have been largely superfluous to the issues decided in those cases. Hundreds of the cited cases involve some regulation of abortion; this body of law will understandably be altered by the reversal of *Roe*. Of the remaining cases, however, very few, if any, could not be resolved by principles other than those pronounced in *Roe*.[53]

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[52] *See also, South Carolina v. Baker*, 108 S.Ct. 1355, 1362-1363 (1988).

[53] WESTLAW indicates that *Roe* has been cited in 99 opinions or summary dispositions by this Court. Of these, 18 were cases involving state regulation of abortion, or limitations on abortion funding. Eleven more were summary dispositions, issued shortly after *Roe* reversing and remanding cases to lower courts in light of *Roe*. In

For example, *Roe* is frequently cited in state court decisions regarding the right to refuse medical treatment. *See, e.g., In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (right to privacy includes right to refuse life-sustaining medical treatment where patient's prognosis is dim). However, these cases are resolvable under common law principles, which include a specific right to refuse medical treatment.[54] In application, there is virtually no distinc-

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13 cases, *Roe* was cited for its holding on the issue of mootness. *See e.g., United States Parole Comm'n v. Geraughty*, 445 U.S. 388, 398 (1980); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 593 (1984) (Blackmun, J., dissenting); *Edgar v. Mite Corp.*, 457 U.S. 624, 655 (1982) (Marshall, J., dissenting). In 16 cases *Roe* was cited in the body of an opinion, but as part of a string citation. *See e.g., Block v. Rutherford*, 468 U.S. 576, 597 (1984) (Blackmun, J., concurring); *Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 639 (1974). In 23 cases, *Roe* was cited in memorandum opinions or dissents therefrom. *See e.g., Whisenhunt v. Spradlin*, 464 U.S. 965 (1983) (Brennan, J., dissenting). The remaining cases, numbering 18, consist of more substantial reliance upon, or distinguishing of, *Roe*. *See e.g.*, cases cited at p. 26 and *Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976). However, in no case has this Court relied on *Roe*, to the exclusion of other caselaw, in extending individual rights under the Due Process clause of the Fourteenth Amendment. In fact, this Court began the process of backing away from the broader implications of *Roe* almost from the day it was written. Several dissenting opinions have made this accusation. *Bowers v. Hardwick*, 478 U.S. 186, 199-214 (Blackmun, J., dissenting); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 109 (1973) (Brennan, J., dissenting).

[54] The New Jersey Supreme Court, the author of *Quinlan*, has subsequently stated that the constitutional right of privacy need not be addressed in cases involving the termination of life-sustaining medical treatment. "While this right of privacy might apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event embraced within the common-law right of self-determination." *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209, 1223 (1985). *Accord, Conservatorship of Drabick*, 200 Cal.App.3d 185, 245 Cal. Rptr. 840 (1987); *Matter of Peter by Johanning*, 108 N.J. 365, 529 A.2d 419 (1987); *In*

tion in such cases between the common law and the constitutional view of the right. Neither is absolute, and each must be balanced against countervailing state interests.[55] Moreover, some have criticized the expansion of the constitutional right to privacy into this area as a potential predicate for removing legal barriers to euthanasia and mercy-killing.[56]

This Court's own reluctance to follow the extension of *Roe*'s right of autonomy into areas other than abortion illustrates the limited utility of *Roe* as a source of viable legal doctrine. In the very year *Roe* was decided, this Court refused to extend *Roe*'s autonomy right to the question of obscenity. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973). This trend has continued throughout the ensuing years. *See Whalen v. Roe*, 429 U.S. 589 (1977); *Paul v. Davis*, 424 U.S. 693 (1976). More recently, in *Bowers v. Hardwick*, 478 U.S. 186, 192-194 (1986) a majority of this Court repudiated the notion that a right could be "fundamental" if its exercise had been subject to criminal sanction throughout the history of the common law. *Bowers*, *Paris Adult Theater*, *Whalen*, and *Paul* teach that the broad principles announced in *Roe* are not applied, as constitutional principles usually are, to similar cases. Rather, like legislation, *Roe*'s principles are defined and applied solely to resolve controversies on a single subject, abortion.

2. The judgment that reversal be avoided because of "settled expectations" in law and society has little or no application to *Roe*. *Roe* has not been integrated into American law. And although the practice of abortion on demand is now legal, it has remained intensely controversial, and tainted. *See*, J. Imber, *Abortion and Private*

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re Storar, 52 N.Y.2d 363, 420 N.E.2d 64 (1981); *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988).

[55] *Quinlan*, 70 N.J. at 37-41, 355 A.2d at 663-664.

[56] *See* P. Ramsey, *Ethics at the Edges of Life* 292-297 (1979); Koop & Grant, *The "Small Beginnings" of Euthanasia*, 2 Notre Dame J. of L., Eth. & Pub. Pol'y 585 (1986) and sources cited therein.

Practice (1986). The fact that a majority of abortions are performed in free-standing clinics created primarily for that purpose, and often by physicians who specialize in that practice, suggests that abortion on demand has not been accepted, either by the medical profession or by society, for what it has become: a form of birth control. *See*, Imber, *supra*, Henshaw, et al. *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987); Torres and Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169 (1988).

3. The reconsideration of *Roe*, therefore, does not pose the problems which caused this Court to defer reconsideration of the exclusionary rule in *Illinois v. Gates*. The exclusionary rule enjoyed a long history of acceptance by state courts prior to its application to the Fourth Amendment, and to all the states, in *Mapp v. Ohio*, 367 U.S. 643 (1961). Moreover, the rule is tied to an explicit provision of the Constitution. And it functions as a rule of evidence—the type of rule peculiarly within the competence of the Courts to pronounce upon. These factors, plus the acceptance of the rule by law enforcement officials and the criminal justice system, provided reason for deferring reconsideration of *Mapp*. None of these factors, however, apply to *Roe*, which abruptly preempted a field of law consigned to the common law and state statute from the outset of the nation's history. Moreover, *Roe* adopted a rule of legal tolerance for abortion far more liberal than any of the abortion "reform" laws of modern vintage. *Roe* was out of step with the legal system and public opinion when first written, and it remains so today.

4. Finally, if this Court does not speak decisively by rejecting *Roe*, the controversy over that decision will continue unabated. If *Roe* has done nothing else, it has created inconsistency and confusion in the law. The nation, therefore, must still look to this Court, as it does now, for a resolution of the problems created by *Roe v. Wade*, for only this Court can overrule *Roe*. The history of conflict over *Roe* has proven that this Court is ill-positioned to resolve the myriad legal, moral, medical,

and social issues that are elements of the abortion debate. Yet, this Court alone is in the position to overrule *Roe* and return the question of abortion to the levels and branches of government more appropriately suited to address this issue. Until this is done, these other organs of government, including Congress, are virtually powerless to act in the protection of unborn life, and to resolve other pressing aspects of this controversy.

CONCLUSION

By its nature, *Roe v. Wade* is a limited decision, confined in practical application to the abortion issue, and meriting low deference pursuant to stare decisis. And because of its erroneous conclusions, and adverse impact upon constitutional law and society, it deserves to join the 190 decisions overruled by this Court. Your *amici* conclude with a plea that this Court act decisively in the matter of *Roe v. Wade*, and by speaking definitely, end the controversy that this decision has engendered.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE ASSOCIATION FOR PUBLIC JUSTICE, AND THE VALUE OF LIFE COMMITTEE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, WILLIAM L. WEBSTER

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February 23, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	27, 28
City of Richmond v. J.A. Croson Co., 57 L.W. 4132 (1989)	26
Colautti v. Franklin, 439 U.S. 379 (1979)	27
Colony v. Allen, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.)	18
Colony v. Powell (Va. 1635), 7 Am. L. Rec. 43 (1954)	18
Doe v. Bolton, 410 U.S. 179 (1973)	25, 26
Dougherty v. People, 1 Colo. 514 (1872)	22
Harris v. McRae, 448 U.S. 297 (1980)	27
In re the Stillbirth of Agnita Hendricks' Bastard Child (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681 at 274-275 (1904)	18
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New State Ice Co. v. Liebman, 285 U.S. 262 (1932)	28
People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886)	22
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Robins v. Robins, 41 Md. Archives 85 (1658)	18

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Simopolous v. Virginia, 462 U.S. 506 (1983)..... 26, 27
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English Cases:

Agnes' Appeal (1200), 1 Selden Soc'y 39 (no. 82) (1887) 4
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Avener's Appeal (1244), The London Eyre of 1244 at 36 (no. 84) (London Rec. Soc'y 1970).. 6
Beale v. Beale, 24 Eng. Rep. 373 (K.B. 1713).... 11
Burel's Appeal (1202), 1 Selden Soc'y 11 (no. 26) (1887) 7
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Cockaine v. Witnam, Cro. Eliz. 49 (1586) 8
Commonwealth v. Foxall (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937) 10
Commonwealth v. Simpson (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888) 10
Gras's Appeal (1276?), The London Eyre of 1276 at 73-74 (no. 261) (London Rec. Soc'y 1976).... 6
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Maynard's Appeal (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897) 4
Millar v. Turner, 1 Vesey 86 (K.B. 1748) 11
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Philippa's Appeal (1276?), The London Eyre of 1276 at 51 (no. 187) (London Rec. Soc'y 1976).. 7, 11
Phina's Appeal (1246), Just. 1/778, m.57 6
Porte's Appeal (1249), Just. 1/175, m.38 4
R. v. Adkyns (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I 510 (no. 3054) (J. Cockburn ed. 1975) 11
R. v. Anonymous, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [Y.B. Mich. 22 Edw. 3 (K.B. 1348), a.k.a *the Abortionist's Case*] 7, 11
R. v. Anonymous, M. Hale, *History of Pleas of the Crown* 429 (1685) 10
R. v. Anonymous, 3 J. Chitty, *Criminal Law* 798-801 (1816) 21
R. v. Beare, 2 The Gentlemen's Magazine 931 (Aug. 1732) 4, 21
R. v. Botevylayn (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978).... 4

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R. v. Cokkes (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422 at 296 (no. 523) (1968) 6
R. v. de Bourton, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [a.k.a. *the Twinslayers' Case*] 7, 11
R. v. Hodges (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615 at 345 (1936) 10
R. v. le Petiprestre (1244), The London Eyre of 1244 48 (no. 116) (London Rec. Soc'y 1970) 4
R. v. Lichefeld, K.B. 27/974, Rex m.4 (1505) 8
R. v. Meadow (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I 233 (no. 1212) (J. Cockburn ed. 1975) 11
R. v. Parker, 73 Eng. Rep. 410 (1580) 17
R. v. Poope (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I 289 (no. 1751) (J. Cockburn ed. 1975) 11
R. v. Portere (K.B. 1400), The Shropshire Peace Role 1400-1414 57-58 (no. 24) (E. Kimball ed. 1959) 4, 11
R. v. Robynson, Q/SR 110/68 (Coroner's Inquest 1589) 8
R. v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601) 5, 9
R. v. Tinckler (1781), 1 E. East, *Pleas of the Crown* 354 (1806) 21
R. v. Turnour, Assize 35/23/29 (Essex 1581), Calendar of Assize Rec., Essex Indictments, Eliz. I 212 (no. 1225) (J. Cockburn ed. 1978) 8, 9
R. v. Webb (Q.B. 1602), Calendar of Assize Records, Surrey Indictments, Eliz. I 512 (no. 3146) (J.S. Cockburn ed. 1980) 4, 5, 10, 13
R. v. Wodlake, K.B. 9/513/m.23 (1530), K.B. 29/162/m11d (1531) 8
R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838) .. 25
R. v. Wynspere, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12..... 8, 13
Sauter's Appeal (1221), Pleas of the Crown for Gloucester Cnty. 1221 16 (no. 69) (F. Maitland ed. 1884) 4

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Serlo's Appeal, The London Eyre of 1276 at 62-64 (nos. 157-158) (London Rec. Soc'y 1976) 6
Sibil's Appeal (1203), 1 Selden Soc'y 32 (no. 73) (1887) 4
Sorel's Appeal (1276?), The London Eyre of 1276 at 61 (no. 222) (London Rec. Soc'y 1976) 6
Swayn's Appeal (1249), Just. 1/359, m.36 6

English Statutes:

5 Eliz. I, c.15 (1573) 9
"An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624) 17
Lord Ellenborough's Act, 43 Geo. III, c. 59 (1803) 5, 17, 21
The Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837) 24

Secondary Authorities:

Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595) 15
D. Bakan, *The Slaughter of the Innocents* (1971) .. 16
J. Bates & E. Zawadski, *Criminal Abortion* (1964) 12, 13, 14, 21
O. Bartley, *A Treatise on Forensic Medicine* (1815) 21
Before the Bawdy Court (P. Hair ed. 1972) 6
A. Bickel, *The Least Dangerous Branch* (1962) 26
A. Bickel, *The Morality of Consent* (1975) 23
W. Blackstone, *Commentaries* (1765-1769) 10
Boke of the Justyces of the Peas (1515), 94 Seldon Soc'y 306 (1979) 9
H. Bracton, *On the Laws and Customs of England* (S. Thorne ed. 1968) 7, 24
Britton (F. Morgen ed. 1901) 8
B. Brookes, *Abortion in England 1900-1967* (1988) 28
R. Burn, *The Justice of the Peace and the Parish Officer* (3d ed. 1756) 10

TABLE OF AUTHORITIES—Continued

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J. Burns, *The Anatomy of the Gravid Uturus* (1799) 21
D. Callahan, *Abortion: Law, Choice and Morality* (1970) 24
A. Castiglioni, *A History of Medicine* (2d ed. 1947) 16
E. Coke, *Third Institute* (1644) 10
Compleat Herbal (G. Swindells ed. 1787) 15
A. Cox, *The Role of the Supreme Court in American Government* (1976) 27
Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 5, 6, 7, 11, 13, 14, 16, 17, 19, 21, 23
G. Devereux, *A Study of Abortion in Primitive Societies* (1955) 12, 13, 15
J. Donnison, *Midwives and Medical Men* (1988).. 17, 28
R. Dworkin, *Taking Rights Seriously* (1976)..... 27
E. East, *A Treatise on the Pleas of the Crown* (1803) 10, 21
A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* (1982) 12
Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973) 27
M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* (3d ed. 1712) 15
Fleta (Seldon Soc'y ed. 1955) 7
Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981) 10, 14
T. Forbes, *The Midwife and the Witch* (1966).. 17
M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* (1949) 18
F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785) 14
J. Guillemeau, *The Nursing of Children* (1612).... 17
M. Hale, *History of the Pleas of the Crown* (1685) 6, 10
M. Hale, *Pleas of the Crown* (1682) 10

TABLE OF AUTHORITIES—Continued

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W. Hawkins, *Treatise on the Pleas of the Crown* (1716) 10
L. Hellman & J. Pritchard, *Williams Obstetrics* (14th ed. 1971) 29
Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379 (1975) 6, 16
N. Himes, *Medical History of Contraception* (1936) 13, 15
A History of Science (R. Taton ed. 1965) 24
P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984) 16, 18, 19
W. Holdsworth, *A History of English Law* (1938) 4, 6, 7
R. Houlbrooke, *Church and the People during the English Reformation 1520-1570* 78 (1979 9
M. Kenny, *Abortion: the Whole Story* (1986) 16, 19
J. Keown, *Abortion, Doctors and the Law* (1988).. 4, 6, 8, 11, 17, 21, 22, 28
L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* (1980) 18
Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984 at B1, col. 1 30
L. Lader, *Abortion II* (1973) 30
1W. Lambard, *Of the Office of the Justice of the Peace* (1st ed. 1581) 8, 16
Langer, *Infanticide: A Historical Survey*, 2 Hist. Childhood Q. 353 (1974) 16
P. Laslett, *The World We Have Lost* (1966) 13
Leges Henri Primi c. LXX.14 (L.J. Downer ed. 1972) 4
G. Male, *An Epitome of Judicial or Forensic Medicine* (1816) 21
S. Massengill, *A Sketch of Medicine and Pharmacy* (2d ed. 1942) 18
A. McLaren, *Reproductive Rituals* (1984) 12, 14, 15

TABLE OF AUTHORITIES—Continued

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Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968) (cited as Means I) 5, 19, 20
Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right of Ninth-Amendment about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N.Y.L.F. 335 (1971) (cited as Means II) 5, 11, 19
C. Meekings, *Studies in 13th Century Justice and Administration* (1981) 6
Mangel, *Legal Abortion: the Impending Obsolescence of the Trimester Framework,* 14 Am. J.L. & Med. 69 (1988) 29
A. Meyer, *The Rise of Embryology* (1939) 24
Mirror of Justices (Selden Soc'y 1895) 16
J. Mohr, *Abortion in America* (1978) 5, 12, 14, 20, 22, 24, 28
B. Nathanson, *The Abortion Papers* (1983) 25
B. Nathanson, *Aborting America* (1979) 25
J. Needham, *A History of Embryology* (1959) 24
J. Noonan, *Contraception* (1965) 14, 15
M. Piers, *Infanticide: Past and Present* (1974) 16
J. Pechey, *Compleat Herbal of Physical Plant* (1707) 15
Philadelphia Inquirer, Sept. 29, 1983 at 14A, col. 2 29
F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I* (2d ed. 1898) 4, 7, 16
M. Potts, P. Diggory, & J. Peel, *Abortion* (1977) ... 20, 23
G. Quaife, *Wanton Wenches and Wayward Wives* (1979) 12, 13
Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II),* 49 Geo. L.J. 395 (1961) ... 5, 19
Reports of Sir John Spelman (J. Baker ed.), 94 Selden Soc'y 306 (1978) 8
Rhazes, *Liber ad Almansorem* (1497) 15

TABLE OF AUTHORITIES—Continued

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Rolph, *A Backward Glance at the Age of 'Obscenity',* 32 Encounter 23 (June 1969) 16
W. Russell, *A Treatise on Crimes and Misdemeanors* (1819) 10
M. Sanger, *Motherhood in Bondage* (1928) 23
E. Shorter, *A History of Women's Bodies* (1982) .. 12, 13, 14, 15, 20, 23
W. Staunford, *Pleas of the Crown* (1557) 8, 16
J. Stephen, *A History of the Criminal Law of England* (1883) 9
F. Taussig, *Abortion Spontaneous and Induced* (1936) 12, 14, 15
A. Taylor, *Manual of Medical Jurisprudence* (1842) 21
J. Thrupp, *The Anglo-Saxon Home* (1862) 16
J. Weeks, *Sex, Politics and Society* (1981) 14
Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 Yale L.J. 221 (1973) 27
G. Williams, *Textbook of Criminal Law* (2d ed. 1983) 29
J. Winthrop, *History of New England 1630-1649* Hosmer ed. 1908) 18
Witherspoon, *Reexamining Roe; Nineteenth-Century Abortion Statutes and the Fourteenth Amendment,* 17 St. Mary's L.J. 29 (1985) 5, 19

BRIEF OF THE ASSOCIATION FOR PUBLIC JUSTICE, AND THE VALUE OF LIFE COMMITTEE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, WILLIAM L. WEBSTER

INTEREST OF THE *AMICUS CURIAE*

This brief is filed under United States Supreme Court Rule 36, with the consent of the parties, on behalf of The Association for Public Justice and The Value of Life Committee, Inc., as *amici curiae* in support of Appellant, William Webster. Information about the *amici* is provided in an appendix. The Committee asks the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973), or to reconsider its application in light of current medical technology.

SUMMARY OF THE ARGUMENT

The majority in *Roe v. Wade* appraised the values implicated in the case on an extended discussion of the history of abortion laws. The majority reached erroneous conclusions about the status of abortion under the common law, sharply breaking with established traditions and values embodied in the common law and our Constitution.

Although convictions for abortion before common law courts were rare before the Eighteenth Century, abortion was condemned by respected authorities on the common law from the earliest times. Parliament and the courts took strong steps through the centuries to prohibit the killing of unwanted children. Before the Nineteenth Century, such killing usually involved infanticide rather than abortion. The laws respecting abortion and infanticide were applied with full rigor in the United States from the opening of the colonial era. The development of new techniques for aborting lessened the danger to the mother from abortion. As abortion became more common than infanticide, legal institutions turned their attention to abortion.

Abortion has always been socially controlled in the interest of both the child and the mother. At all times, continuing changes in medical technology have been central to a proper resolution of controversies over abortion. Changes in abortion technologies altered the interests of mothers in the procedure, and developing reproductive technologies have reinforced increasing certainty that a conceptus is a "person" from the earliest stages of gestation.

The moral and legal implications of such technical developments are not merely medical questions; such implications raise questions of social policy and values which legislatures are better placed to resolve than are courts. State legislatures are better able to explore appropriate regulatory responses to changing reproductive technologies because they are better able to obtain the information necessary to assess the import of the changing data that affect a balancing of the interests created or reinforced by rapidly changing medical technologies of human reproduction. Courts are ill-suited to sit as boards of review for the implications of changing medical technologies. In the present state of flux, the model of states as laboratories for social policies is especially appropriate. For these reasons, *Roe v. Wade* should be overruled.

If *Roe v. Wade* survives in some form, application of its criteria must be reexamined in the light of new medical technology. Viability is a function of the technologies available to preserve the life of ever more premature infants, and must be reevaluated continually as medical technology advances. Increasing technical means to preserve fetal life reveal that the asserted right of a mother to be rid of an unwanted pregnancy must now be distinguished from a right to kill the fetus.

ARGUMENT

I. *Roe v. Wade* Was Based Upon Erroneous Notions Of The Historical Status Of Abortion Under The Common Law, And Thus Represents A Sharp Break With Long Established Traditions And Values Embodied In The Common Law And Our Constitution

More than half of the majority opinion in *Roe v. Wade*, 410 U.S. 113, 129-152, 156-162 (1973), was given to a history of abortion, using the history of abortion to inform the values at stake in the controversy before the Court. This Court regularly determines whether a claim of right not based on an explicit constitutional text is fundamental by examining the historical treatment of the relevant behavior. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The point, expressed by Justice Powell in *Moore v. City of East Cleveland*, 431 U.S. 497, 503 (1977), is that fundamental rights are those "deeply rooted in this Nation's history and traditions."[1] The majority's historical errors, and the resulting flawed inferences they drew from those errors, thus seriously undermine the entire edifice built on *Roe v. Wade*.

The majority in *Roe v. Wade* concluded that "it now appear[s] doubtful that abortion was ever established as a common law crime", 410 U.S. at 136. The majority also concluded that abortion statutes in the United States were not generally adopted until after the Civil War (i.e., after the Fourteenth Amendment was adopted), *id.* at 139. Both conclusions are wrong.

While extensive research has not uncovered any common law record of actual punishment[2] for an abortion

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[1] Justice Powell wrote for a three-justice plurality, but his opinion has been frequently cited with approval. This precise language was quoted with approval in: *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

[2] Often the only records extant are terse notes of an indictment which do not indicate what happened at trial. Many of these rec-

before 1732 *if* the abortion was voluntarily undertaken by a woman without serious injury to herself *or* without a live birth before the death of the child, indictments and appeals of tresspass[3] have been found back at least to 1200 for abortion without either aggravating factor.[4] Later, a woman was indicted for self-abortion; apparently, she was saved from punishment only by a general

ords do note a finding of "not guilty" rather than a dismissal of the proceeding. *See* note 10 *infra*.

[3] Many of the indictments and appeals in this brief have not previously been brought to the attention of an American court; often they have not been published in the United States. The most important unpublished cases are *R. v. Webb* (Q.B. 1602), *infra*, and *R. v. Beare* (Q.B. 1732), *infra*. I am grateful to Dr. John Keown, of the University of Leicester, for providing me with the text of these and some other early cases. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). Two American attorneys, Philip Rafferty of Los Angeles, and Richard Schmude of Tomball, Texas, also made their research available.

[4] *See, e.g., R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414, 57-58 (no. 24) (E. Kimball ed. 1959); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306, 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978); *Maynard's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897); *Porte's Appeal* (1249), Just. 1/175, m.38; *Sauter's Appeal* (1221), Pleas of the Crown for Gloucester Cnty. 1221, 16 (no. 69) (F. Maitland ed. 1884); *R. v. le Petiprestre* (1244), The London Eyre of 1244, 48 (no. 116) (London Rec. Soc'y 1970); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes' Appeal* (1200), 1 Selden Soc'y 39 (no. 82) (1887). Abortion was covered by even earlier compilations of the common law, which required payment of a full *wergeld* (a money payment to relatives of a slain person to settle the claims for homicide) if the child were "living", and a half-*wergeld* if not "living". *Leges Henri Primi* c. LXX.14 (L.J. Downer ed. 1972). [This was a 12th Century compilation of sources on Anglo-Saxon law as modified by the early Norman kings.] Several of the cases noted here were settled by money payments, perhaps as *wergeld*. For the evolution of medieval trespass into both modern crimes and modern torts, *see* 2 W. Holdsworth, *A History of English Law* 364-365 (1938); 3 Holdsworth at 317-318, 609-611; 4 Holdsworth at 512-515; 2 F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I* 510-524 (2d ed. 1898).

pardon. *R. v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980).[5] Less than 12 months earlier, a court had held a man for murder when an abortus died after being born alive. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601). Secondary authorities on the common law and judicial dicta also nearly unanimously condemned abortion.

Against that background, beginning with "Lord Ellenborough's Act" in 1803, 43 Geo. III, c. 59, criminal statutes expressly prohibiting abortion spread rapidly throughout the common law world. In the United States, 70% of the states (with 85% of the American population) had such statutes by 1861. By 1895 abortion was clearly a serious crime in every state.[6]

The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means.[7] Means' history of abortion was neither objective nor accurate. Nor have these inadequacies been resolved by James Mohr's somewhat different history of abortion.[8]

[5] Whether the pardon came before or after conviction is unclear, although the editor of the records infers that Webb was convicted before the pardon, Keown, *supra* note 3 at 173 n.23.

[6] *See generally* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 389-407 (1979); Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

[7] Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (hereafter cited as Means II); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) (hereafter cited as Means I). The majority cited Means seven times during its depiction of the history of abortion—without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[8] J. Mohr, *Abortion in America* (1978).

A. *Abortion Was Never Approved By A Common Law Court, And Was Consistently Condemned By Respected Authorities On The Common Law From The Earliest Times*

Indictments of abortionists at common law were far more common than was thought in 1973.[9] Common law indictments, and appeals of trespass, for abortion are recorded as early as 1200. While the terse records do not indicate any punishment, the many clear records of judgments of "not guilty" demonstrate that the indictments and appeals were valid under the common law.[10]

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[9] Abortion was also punished by the ecclesiastical courts of the time, *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 3 at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-381 (1975). That a crime was punished in ecclesiastical courts does not establish that it was not punishable at the common law, Keown, *supra;* Helmholz, *supra* at 386. Nor does ecclesiastical interest indicate that such prosecutions must be seen as religiously based: many modern legal topics that today are unquestionably secular, such as wills, slander, and enforcement of simple contracts, originated in the ecclesiastical courts, 1 Holdsworth, *supra* note 4 at 65-77, 455-457, 580-632; 3 Holdsworth at 408-428, 441-454, 534-536; 5 Holdsworth at 167-169, 197-218, 291-299; 8 Holdsworth at 301-307, 324-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 6 at 382-387. Also, in English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England", 1 M. Hale, *History of the Pleas of the Crown*, preface (1685).

[10] *See R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422, 296 (no. 523) (1968); *Gras's Appeal* (1276?), The London Eyre of 1276, 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal* (1276?), Eyre of 1276, 61 (no. 222); *Serlo's Appeal*, Eyre of 1276, 62-64 (nos. 157-158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal* (1249), Just. 1/359, m.36; *Paiards's Appeal* (1249?), Just. 1/174, m.40d; *Orscherd's Appeal* (1249?), Just. 1/174, m.40d; *Gundewine's Appeal* (1247), Just. 1/274, m.14d; *Phina's Appeal* (1246), Just. 1/778, m. 57, summarised in Meekings, *supra* at 267; *Aubyn's Appeal*, The London Eyre of 1244, 50-51 (no. 124) (London Rec. Soc'y 1970); *Avener's Appeal* (1244), Eyre of 1244, 36 (no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-561 (no. 1336) (1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). At least once the proceeding was aborted by the ancient benefit of clergy, which precluded trial, *Philippa's Appeal* (1276?), Eyre of 1276, 51 (no. 187).

Means wrongly asserted that there were only two cases before 1600 dealing with abortion, and that both cases indicated doubt about whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [dubbed by Means as *the Twinslayers' Case*]; and *R. v. Anonymous*, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [Y.B. Mich. 22 Edw. 3 (K.B. 1348), dubbed by Means as *the Abortionist's Case*]. In both cases, the court declined the prosecution because of uncertainty over whether the case was properly before the court, but for reasons that did not to preclude the criminality of abortion.[11] In *R. v. de Bourton*, defendant was charged with beating a woman, causing one twin to be born dead and the other to die shortly after birth. Defendant was released on bail to answer for an unspecified different charge. In *R. v. Anonymous*, defendant was indicted for killing a child in the mother's womb; he escaped conviction because the indictment failed to state a baptismal name for the deceased,[12] and because it was impossible to know if he had killed the child. These are procedural and evidentiary, not substantive, grounds.

Before 1500, the most influential commentators on the common law also declared that abortion after quickening was a criminal homicide. 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta*

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[11] *See generally* Dellapenna, *supra* note 6 at 368-370; Keown, *supra* note 3 at 4.

[12] This ignores the fact "murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 Holdsworth, *supra* note 4 at 65-77, 580-632; 1 Pollock & Maitland, *supra* note 4 at 67-68, 545; 2 Pollock & Maitland at 480-486.

60-61 (Seldon Soc'y ed. 1955).[13] English courts confronted even more abortion cases after 1500.

In the first case of in the Sixteenth Century, a coroner's inquest ruled that death by abortion was "felonious suicide"; the man involved was released because an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505).[14] In another case, a man was indicted for giving a potion to a girl to induce an abortion; he died before trial. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m.11d (1531).[15] Later, a woman was convicted of abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581).[16] Accusing a woman of offering abortifacients to another supported an action for slander as such words were sufficient grounds for a court to require a bond for good behavior. *Cockaine v. Witnam*, Cro. Eliz. 49 (1586). Finally, a woman was "presented" by a coroner's jury for procuring her own abortion, but the outcome remains unclear. *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

Curiously, two Sixteenth Century authorities on common law criminal pleadings denied that abortion was a felony. 1 W. Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the*

[13] *Britton*, at 95-96 (F. Morgen ed. 1901), disagreed—because of the lack of a baptismal name for the victim.

[14] *See also R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12. Both proceedings are quoted in Keown, *supra* note 3 at 6.

[15] *See also* 2 *Reports of Sir John Spelman* 306 (J. Baker ed.), 94 Selden Soc'y 306 (1978).

[16] Some have said that Turnour was executed for abortion, but as she was convicted of several acts of witchcraft, only one of which was abortion, the record is unclear as to why she was executed; even if abortion were why she died, the crime was witchcraft, and not criminal abortion or homicide as such. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I 212 (no. 1225) (J. Cockburn ed. 1978).

Peace 217-218 (1st ed. 1581). Yet an early formbook, which went through four editions between 1506 and 1544, included a form indictment for abortion by physical assault on the mother, *Boke of the Justyces of the Peas* c. vi, fol. iii (1515).

Perhaps Staunford and Lambard only reflected the inconclusiveness of the better reported decisions; or perhaps they simply meant that abortion was a crime less than a felony; or perhaps they meant that abortion properly belonged before a court other than the Queen's Branch. Three centuries later Sir John Stephen concluded that they meant that abortion was properly brought only before ecclesiastical courts.[17] If so, they clearly were wrong.

Some part of the Sixteenth Century legal activity regarding abortion did represent a secularization of matters formerly left to the ecclesiastical domain. Activity by ecclesiastical courts directed at abortion declined during the Reformation,[18] and common law courts took full responsibility for abortion in a process[19] culminating in a series of decisions in the Seventeenth Century that clearly establish, if the cases already noted did not, that abortion was a serious crime.

In 1601 two Justices of the Queen's Bench held an abortion that kills a child after its live birth is murder. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601).[20] The Justices stated that the birth and subsequent death of the child permitted proof of the cause of death, eliminating

[17] 1 J. Stephen, *A History of the Criminal Law of England* 54 (1883).

[18] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979).

[19] Witchcraft became an indictable crime by the statute of 5 Eliz. I, c.15 (1573); within eight years we find *R. v. Turnour*, *supra*.

[20] There were a number of possible precedents for the decision, but *R. v. Sims* seems finally to have settled the matter.

the difficulty of proving the cause of death for a child delivered dead (which sometimes had been given as a reason for not prosecuting earlier indictments).[21] In 1602, in *R. v. Webb*, Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980), a woman apparently was convicted[22] and pardoned for self-abortion with rat poison. Finally, in 1670 Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous*, M. Hale, *History of Pleas of the Crown* 419-430 (1685).[23]

R. v. Sims was argued before the court by Sir Edward Coke as Attorney-General. He took up the case in E .Coke, *Third Institute* 50-51 (1644), generalizing from it a principle that abortion after quickening was "a great misprision [a serious misdemeanor], and no murder" if the child died in the womb, and a murder if the child were to die after its birth. The position of Coke (the "Father of the Common Law") was accepted virtually without question.[24]

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[21] For the primitive state of forensic medicine three centuries later, *see* Forbes, *Early Foreensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981).

[22] *See* note 5 *supra*.

[23] For other Seventeeth Century indictments without record of the outcome, *see Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615, 345 (1936).

[24] 1 W. Blackstone, *Commentaries* 129-130 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown* 227-230 (1803); M. Hale, *Pleas of the Crown* 53 (1682); 2 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-618, 796 (1819). Two books are attributed to Hale. The one cited here echoed Coke's views; a later book, Hale, *supra* note 9 at 433, denied that an abortion-induced death of a child born alive is a homicide. Which view truly represents Hale's opinion is not known. Courts cited Coke with approval in a variety of contexts, and did

Coke cited only the inconclusive precedents of *R. v. de Bourton, supra*, and *R. v. Anonymous, supra*, for his conclusions.[25] Hale cited no precedents at all for his holding. [26] Means dismissed Coke's statement on abortion as a "masterpiece of perversion." [27] Yet Means found Hale's decision on the death of the mother to be "an act of Restoration gallantry." [28] Means did not indicate how one is to recognize the difference.

By the early Eighteenth Century, the criminality of abortion under the common law was well established. Courts had given increasingly clear holdings that abortion was a crime; there was no decision indicating that any form of abortion was lawful. Secondary authorities, especially after 1600, equally supported the criminality of abortion. Yet, few cases recorded punishment for any abortion, and none recorded punishment for a voluntary abortion without *either* death for the mother *or* death subsequent to live birth for the child.

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not follow the second Hale dictum. *See Miller v. Turner*, 1 Vesey 86 (K.B. 1748); *Beale v. Beale*, 24 Eng. Rep. 373 (K.B. 1713); Keown, *supra* note 3 at 10-11. *See generally* Dellapenna, *supra* note 6 at 379-389.

[25] *Cf. R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414 57-58 (no. 24) (E. Kimball ed. 1959).

[26] At least three earlier cases could be cited in support of Hale's ruling, *R. v. Adkyns*, (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I 510 (no. 3054) (J. Cockburn ed. 1975); *R. v. Meadow* (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I 233 (no. 1212) (J. Cockburn ed. 1975); *R. v. Poope* (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I 289 (no. 1751) (J. Cockburn ed. 1975). *See also Philippa's Appeal* (1276?), London Eyre of 1276, 51 (no. 187) (London Rec. Soc'y 1976) (defendant excaped trial due to benefit of clergy); *Orscherd's Appeal* (1249?), Just. 1/174, m.40d (not guilty).

[27] Means II, *supra* note 7 at 359. His view apparently was accepted by the majority in *Roe v. Wade*, 410 U.S. at 135 n.26.

[28] Means II, *supra* note 7 at 363.

B. *Parliament And Courts In England Took Strong Steps, Gradually Strengthened Through The Centuries, To Prohibit The Killing Of Unwanted Children By Their Parents*

The great majority of the cases thus far noted involved crude physical batterings of the mother—often to her serious injury or death (injury techniques).[29] The remaining abortions were induced by "noxious potions"—potions that appear to have been nearly as deadly as the batterings (ingestion techniques).[30] From these facts, one might infer that the law was directed at protecting the mother's life or health—if one assumes, as Means and Mohr[31] do, that abortion was always freely available through relatively safe means.

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[29] Injury techniques ranged from ineffective simple bodily manoeuvers up to savage assaults, such as cutting her open and removing the infant.

[30] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion often was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among medically primitive cultures, anthropologists have found injury techniques to be most common, if only because of the likelihood of success, G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1985). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-108 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

[31] Mohr, *supra* note 8 at 6-19, lists various methods that he assumed were safe and effective, yet comparing his listed techniques with the research listed in this part of the brief shows that his assumption was unfounded. Even he acknowledged the poisonous nature of some of the his "abortifacients", *id.* at 71-73. For another historian who also assumed that workable techniques existed, although he recognized that his own catalogue included only the useless or the fatal, *see* E. Shorter, *A History of Women's Bodies* 177-191 (1982). Other historians have made the same assumption on even less evidence, A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); McLaren, *supra* note 30 at 5-7, 107, 111-112; G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979). Compare note 35 *infra*.

Both the ingestion and injury techniques found in the cases could be effective only with great pain and at the risk of death or permanent injury; undergoing either cannot have been popular.[32] In fact, voluntary abortions are almost absent from reported cases before 1732[33] for a simple reason: techniques of the time were tantamount to suicide.[34] Thus abortion which was not a crime against the mother was rare.[35]

That injury techniques were not popular with women hardly needs demonstration. On the other hand, while we have no way of knowing all potions available in medieval England, surveys of the medical literature there and in similar medically primitive societies demonstrate that the potions ingested for an abortion were either ineffective (except for any suggestive powers to which a woman might be susceptible) or highly dangerous.[36] Savin oil

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[32] Even Shorter, *supra* note 31 at 177, concluded that until after 1880 only women who were truly desparate would risk abortion. Quaife, *supra* note 31 at 26, describes injury techniques in connection with his analysis of violence, and not with abortion, while he concedes that girls were rarely anxious to use ingestion techniques, Quaife at 118.

[33] The only voluntary abortions reported were *R. v. Wynspere*, *supra* note 14, and *R. v. Webb*, *supra* note 22. In some cases, assertions that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely in the numerous cases of abortion by savage physical attack.

[34] Devereux, *supra* note 30 at 149-150. *See generally* Dellapenna, *supra* note 6 at 372-376, 393-395.

[35] One attempt at a study of the incidence of abortion in the early modern period, based on searching church records (which do not distinguish between spontaneous and induced abortions), P. Laslett, *The World We Have Lost* 123 (1966), found abortions in Seventeenth Century England to amount to 6-7% of total births. As in the Twentieth Century spontaneous abortions range from 7.5-11% with our more advanced medical technicology, *id.* at 266, the Seventeenth Century figures reveal few, if any, induced abortions.

[36] Bates & Zawadski, *supra* note 30 at 14-23, 85-91; Devereux, *supra* note 30 at 36-43, 249, 279; N. Himes, *Medical History of*

was the "arbortifacient" most widely reported in medieval English sources. Modern tests have demonstrated that it works by undermining the woman's health generally so she could not sustain the pregnancy, all too often to enfeebling her to the point of death.[37] The dangers of these "abortifacient potions" was so great that in early English slang the term "poisoned" meant pregnant![38]

One cannot entirely rule out the possibility of a safe and effective drug escaping notice in the legal, medical, and popular literature of the day. Yet the fact remains that the Arabic medical texts which, upon translation into Latin, were standard medical references in the later middle ages escribed nothing more safe and effective

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Contraception 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 31 at 179-188; Taussig, *supra* note 30 at 31-45, 352-357; Dellapenna, *supra* note 6 at 373-376. Examples of ineffective "abortifacients", available in England, include goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs the ingestion of which in massively dangerous quantities could bring on an abortion included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin oil (juniper), tansy tea, thyme, and yarrow. Finally, a sufficiently desperate woman could ingest (or be made to ingest) a substance that could be lethal even in small quantities, such as aloes, arsenic, "ratsbane" (rat poison), snake venom, and various metallic salts.

[37] One modern study found that savin oil did induce an abortion in 10 of 21 women who consumed it: nine of the 10 "successful" ones died, as did four of the "unsuccessful" ones, Taussig, *supra* note 30 at 353. In fact, most modern poisons were discovered through vain searches for a safe dosage of "abortifacients", Bates & Zawadski, *supra note* 30 at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 21. *See* generally Shorter, *supra* note 31 at 186-188.

[38] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785); McLaren, *supra* note 30 at 102. Yet another historian, who optimistically presumes that knowledge of safe and effective abortifacients was widespread, also notes that lead-poisoning was "epidemic" because of the use of the abortifacients, J. Weeks, *Sex, Politics and Society* 72 (1981). Even Mohr, *supra* note 8 at 71-73, notes that savin poisoning was widespread from abortion.

than the potions listed here.[39] Nor do later works in English add anything significant.[40] Nor, given the general lack of inventiveness of pre-scientific societies, should one wonder about the lack of variation in abortion techniques over six centuries.

Singularly lacking from the literature is any mention of "intrusion techniques"—various techniques using an intrusion through the cervix into the uterus to induce abortion.[41] Given only primitive knowledge of a woman's reproductive anatomy,[42] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are occasional mentions of a "pessary"—the insertion of a vaginal suppository, usually laced with "abortifacient drugs," that did not penetrate the cervix. Without such penetration, however, pessaries do not seem to have been effective.[43]

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[39] Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497). *See also* Himes, *supra* note 36 at 139-151.

[40] 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3rd ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). These and other texts describe "abortifacient" effects in language markedly different from their descriptions of other pharmacological effects. "Abortifacient" effects are always introduced with phrases such as "it is said", suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra note* 30 at 102-104, 123; Noonan, *supra* note 36 at 201-207, 217.

[41] Even Shorter, *supra note* 31 at 188-191, concedes that instrumental abortions were not a realistic possibility much before the Nineteenth Century. *See also* Devereux, *supra* note 30 at 28, 36-37.

[42] Consider contemporary views of how such portions functioned. Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but the potions were given to prevent the uterus from rising in a woman's body to her throat to choke her! Shorter, *supra* note 31 at 180, 286-287.

[43] Devereux, *supra note* 30 at 37; McLaren, *supra* note 30 at 101-102; Taussig, *supra* note 30 at 355-356. The ineffectiveness

Many still persist in believing that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe, effective, and perhaps even painless. If so, why did these presumed simple, safe, and effective folk medicines abruptly disappear in the Nineteenth Century to be replaced by the admittedly highly dangerous intrusion techniques that supposedly then made abortion so dangerous as to justify the widespread adoption of statutes proscribing abortion? The true explanation was expressed by Mary Kenny: before the Nineteenth Century, "[t]he traditional forms of abortion had been infanticide and abandonment." [44]

Infanticide was a crime under the early common law,[45] and Parliament reacted to its frequent occurence [46] by enacting ever stronger statutes prohibiting the practice. The royal courts were also actively engaged in punishing those found guilty of the crime.[47] All this occurred when

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of pessaries did not prevent doctors from swearing a Hippocratic Oath not to administer them, at least as the oath was before it was amended after *Roe v. Wade*, A. Castiglioni, *A History of Medicine* 148 (2d ed. 1947).

[44] M. Kenny, *Abortion: the Whole Story* 181 (1986).

[45] Infanticide was a crime in Anglo-Saxon law, J. Thrupp, *The Anglo-Saxon Home* 85 (1862). At least one early book (ca. 1300) states that infanticide within one year of birth was cognizable only by ecclesiastical courts, *Mirror of Justice* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra* note 4 at 478 n.1, dismissed this book as worthless. Staunford, *supra* at ch. 13, and Lambarde, *supra* at 217-218, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they denied that abortion was a common law felony).

[46] Dead babies were a common sight in London streets well into the Nineteenth Century, Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969). *See also* D. Bakan, *The Slaughter of the Innocents* (1971); M. Piers, *Infanticide; Past and Present* (1974); Dellapenna, *supra* note 6 at 395-400; Helmholz, *supra* note 9; Langer, *Infanticide: A Historical Survey* 2 Hist. Childhood Q. 353 (1974).

[47] P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984).

the incidence of true abortion and legal activity regarding it were both still rare.

The stringency of the law of infanticide is shown by *R. v. Parker*, 73 Eng. Rep. 410 (1580), where even benefit of clergy was denied and a clergyman was executed for the crime. The earliest regulations of midwives (1512) were designed to prevent the killing of infants.[48] The tightening of the law against infanticide culminated in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624), which conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

Only the emergence of abortion as a real alternative to infanticide brought a decline in the incidence of infanticide and in the legal attention to it. The intimate relationship between abortion and infanticide was demonstrated by the fact that the next section of Lord Ellenborough's Act after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. 3 c.58, secs. 2-4 (1803).[49]

C. *Early In The Colonial Period, These Laws Were Received With Full Rigor In The United States*

The colonists from England brought the common law here with their first arrival. In just one colony, no less than three prosecutions for criminal abortion arose before 1660: *Proprietary v. Lambrozo*, 53 Md. Achieves 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md.

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[48] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses could also have been characterized as a major population control device, J. Guillemeau, *The Nursing of Children*, preface (1612). *See generally* Dellapenna, *supra* note 6 at 396-397.

[49] For the legislative history, *see* Keown, *supra* note 3 at 12-21.

Archives 171-186 (1652).[50] While these cases did not result in conviction, in two cases it was because, before trial, the defendant married (and thereby disqualified) the principal witness against him. Mitchell was convicted of attempted murder, apparently because the prosecutor could not prove the cause of the death of the stillborn child.

Other colonial prosecutions for abortion arose at similar early dates. In Rhode Island, a woman was given 15 lashes for fornication and attempted abortion. *Colony v. Allen*, Newport Cnty, Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[51] Other charges of abortion through violent physical assaults are recorded without indication of the outcome. *In re the Stillbirth of Agnita Hendricks' Bastard Child* (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681, 274-275 (1904); *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954). Finally, a 1716 municipal ordinance in New York forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122.[52] Abortion simply was never accepted in American society, contrary to the bald assertions of Means and Mohr; nor is there any reason to believe that abortion was more readily available, or more frequently practiced, in the colonies than in England.

Infanticide in the colonies did have considerable legal activity against it.[53] The close empirical link of the concealment statutes and abortion was again demonstrated by 11 states which enacted a concealment statute contemporaneously with the state's first abortion statute. Ultimately, 20 states codified the two statutes together.[54] Thus, from earliest times, colonial society prohibited the murder of an unwanted child by its parents, whether by abortion or by infanticide.

[50] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658); *Robins v. Robins*, 41 Md. Archives 85 (1658).

[51] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n.132 (1980).

[52] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For reference to a similar ordinance in Virginia *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[53] Hoffer & Hull, *supra* note 47 at 33-113. Statutes were enacted to punish concealment—of either the birth or the death of a child—as murder in eight colonies or states before they adopted an abortion statute, beginning with Massachusetts in 1696, *Charters & Gen'l L. of the Colony & Prov. of Mass Bay* 293 (Dane, Prescott, & Story eds. 1814). There was at least one prosecution for concealment even before a colonial statute was adopted, 2 J. Winthrop, *History of New England 1630-1649* 317-318 (Hosmer ed. 1908). Even the Salem Withcraft Trials have been linked to infanticide. Hoffer & Hull, *supra* at 55-56.

D. *Abortion Became More Common Than Infanticide Only With The Development Of The Technical Means Of Aborting A Woman With A Lessened Danger To Her Life; English And American Law Thereafter Emphasized Abortion As The Primary Evil*

The dramatic introduction of abortion statutes throughout the English speaking world in the Nineteenth Century has been amply documented.[55] The majority in *Roe v. Wade* was content to view this development, and the similarly dramatic increase in prosecutions, as a result of Victorian sexual attitudes, fears for maternal health, and concern for the life of the unborn child. 410 U.S. at 147-152. The majority offered no explanation why these reasons became weighty only in the Nineteenth Century.[56]

Means insisted that only the second reason applied.[57] He also did not attempt to explain why fear for maternal

[51] Dellapenna, *supra* note 6 at 399.

[55] *See* note 6 *supra*. This process occurred throughout most of the world during the same time, Kenny, *supra* note 44 at 183.

[56] The *Roe* majority also seriously understated the speed with which abortion statutes were adopted and the speed with which the quickening distinction was elimiated, 410 U.S. at 138-141.

[57] Means I, *supra* note 7 at 511-515; Means II, *supra* note 7 at 382-392.

health should have come to the fore then and not earlier. Mohr, while recognizing distress over falling birthrates among the middle and upper classes and over a "moral prejudice" favoring the life of unborn children,[58] argued that the real reason was to assure the dominance of the newly organized American Medical Association over its less qualified competitors, especially midwives.[59] He did not explain why these concerns should be effective in winning public support, a glaring omission as he insisted that the public supported free availability of abortions. Such views simply beg the question of why abortion suddenly became a subject of significant legal and social concern in the Nineteenth Century, and seriously misconceive the legal, medical, and social import of the abortion statutes.

Voluntary surgery has nearly always been essentially a private matter between a patient and the attending physician. Until *Roe v. Wade*, voluntary abortion was never treated as a private matter between a patient and her physician. For example, in 1828 the New York legislature considered and rejected a proposal to ban all surgery unless "necessary for the preservation of life", but accepted another part of the same proposal that declared abortion to be a crime.[60] The different response is rooted in technological change.

Intrusion techniques first appeared in England sometime early in the Eighteenth Century.[61] The new technique turned up in a case in 1732: a woman was convicted and sentenced to be pilloried and to serve three

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[58] Mohr, *supra* note 8 at 35-36, 85-118, 128, 167-168, 175-176, 182-196.

[59] *Id.* at 32-37, 147-182. Mohr discounted concern for maternal health because he believed that abortion was safe, *id.* at 25-40.

[60] Means I, *supra* note 7 at 451.

[61] Shorter, *supra* note 31 at 188-208, places the invention of effective intrusion techniques as late in the Nineteenth Century. *See also* M. Potts, P. Diggory, & J. Peel, *Abortion* 170-188 (1977).

years in prison for aborting two women by inserting an iron rod into their wombs. *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732).[62] A similar case brought a conviction in 1781. *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806). A third case occurred in 1803. *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816).

Abortion remained highly dangerous, with the inserted object (the forerunner of the "coathangers" of the Twentieth Century) serving as a highway to infection that could cause loss of the uterus or death, and was sufficiently painful (especially if the uterine wall was pierced) as to induce life-threatening shock.[63] Dangerous and painful as these procedures were, death was not as certain as with the injury and ingestion techniques. The intrusion techniques quickly became the techniques of choice, setting the stage for the various surgical and other intrusion techniques that account most abortions performed today. Lord Ellenborough himself seemed to reflect the resulting sudden upsurge in abortions in the preamble to his famous Act: it concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, c. 58 At this time fears of a threat to the health of the mother from abortion also appear for the first time in the legal and medical literature.[64]

In the early Nineteenth Century all surgery was highly dangerous for the same reasons as intrusive abortions: infection and shock. Only for abortion were social and

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[62] The case is analyzed in Keown, *supra* note 3 at 8-9.

[63] Bates & Zawadski, *supra* note 30 at 85-87. Apparently abortions killed one-third of the women undergoing them early in the Nineteenth Century, Dellapenna, *note* 6 at 400, 412.

[64] O. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); J. Burns, *The Anatomy of the Gravid Uturus* 57-58 (1799); 1 East, *supra* note 25 at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See also State v. Murphy*, 27 N.J.L. 112, 114-115 (1858). *See generally* Keown, *supra* note 3 at 35-38.

other pressures likely to induce one to undergo the procedure without prior risk to life or limb. Thus the abortion statutes were a response to the premature application of a new medical technology.[65] The statutes served to indicate that intrusive abortions were as criminal as abortions by injury or ingestion techniques. The statutes also settled the somewhat uncertain law governing abortion, and solemnly reaffirmed social policy in the face of changing social behavior. Eventually the statutes also made all abortions criminal regardless of the stage of pregnancy.

This last concern brings forth the second major motivation behind the Nineteenth Century abortion statutes: the protection of the life of the foetus. Many courts expressed this as the major purpose of the abortion statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Moore*, 25 Iowa 128 (1868); *People v. Sessions*, 58 Mich. 594, 26 N.W. 291 (1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 16 Utah 212, 51 P. 1091 (1898); *State v. Howard*, 32 Vt. 380 (1859). Medical and religious leaders also supported this view.[66] Unless one is prepared to impugn the integrity of these social and professional leaders, one must concede that protection of unborn children from the rising numbers of abortions was at least as significant as the protecton of the life of the mother.

II. *Roe v. Wade* Should Be Overruled And The Authority To Resolve The Competing Claims Of Mothers And Their Offspring Should Be Returned To The Legislative Branches Of Government

That the historical nature of the abortion problem resulted from the intersection of the policies of protecting the mother and the child with changing medical technology argues that the balancing of the resulting claims of mother and child is best left to state legislative devel-

[65] *See generally* Keown, *supra* note 3 at 12-48.

[66] The majority in *Roe v. Wade*, 410 U.S. at 141-142, quoted representative samplings of such statements. *See also* Mohr, *supra* note 8 at 35-36, 175-176, 182-196.

opment[67] rather than by being dictated by courts. The argument was succinctly summed up by the late Professor Alexander Bickel, in commenting on the detailed trimester scheme of authority adopted by the majority in *Roe v. Wade*:

> "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?"[68]

A. *Continuing Changes In Medical Technology Are Central To The Proper Resolution Of The Controversy Over Abortion*

From the beginning, the evolving medical technologies of abortion and of recognition of, and care for, an individual unborn child, has shaped the interests that frame the controversy over abortion. Until the Twentieth Century, both resulting sets of interests converged to demand the criminalizing of abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.[69]

Technical progress did not end with a crude insertion device.[70] Modern techniques of abortion have further

[67] We do not argue for preclusion of Congressional legislation under its power granted in section 5 of the Fourteenth Amendment.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (JJ. Rehnquist & White dissenting).

[69] Even Margaret Sanger, founder of Planned Parenthood, originally found only evil in abortion, M. Sanger, *Motherhood in Bondage* 394-396 (1928).

[70] *See generally* Potts, Diggory, & Peal, *supra* note 61 at 170-188; Shorter, *supra* note 31 at 191-224; Dellapenna, *supra* note 6 at 411-414.

reduced the procedure's pain and the danger of injury to a uterus. General surgical advances have made abortion physically safe for the mother. Pain-killing drugs (beginning with morphine in 1806), anesthesia from the 1840's, antiseptics after 1867, and finally sulfa drugs in the 1930's and antibiotics (beginning with penicillin in 1940) have all dramatically reduced the risk of death or injury through shock or infection. Many women thus came to see abortion's prohibition, rather than its possibility, as the threat to their well-being.

Simultaneously, the perceived interests of society in unborn children were changed by new medical information and new medical technologies focused on human reproduction, illustrated by the demise of the antiquated distinction of "quickening". The distinction was found in English law at least as early as Bracton, *supra* at 341. With the application of cell theory to embryology at the opening of the Nineteenth Century, a revolution in our understanding human reproduction occurred.[71] Opinion leaders in all areas of society quickly, and by the end of the Nineteenth Century most people, had concluded that a new human life began at conception, and not at quickening.[72] Enactment or amendment of abortion statutes to remove any distinction based on quickening, beginning with The Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837),[73] underlined that the statutes were

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[71] *See generally* 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[72] *Roe v. Wade*, 410 at 141-142; D. Callahan, *Abortion: Law, Choice and Mortality* 410-461 (1970); Mohr, *supra* note 8 at 35-36, 175-176, 182-196.

[73] Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance", Ill. Rev. Code sec. 46 (1827), perhaps suggesting a concern to protect the mother and not the child. Maine adopted the first American statute to remove all distinctions based on quickening, Me. Rev. Stat., ch. 160, secs. 13, 14 (1840).

crafted to protect human life. An English court also interpreted the statutory term "quickening" to mean conception, rather than the felt movement of the child within the womb, reflecting again change in the understanding of when human life begins, and the function of the abortion statutes as protecting that life. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).

Today an embryologist or fetologist can diagnose and treat an unborn child independently of treating the mother, including removing the child from its mother's womb for surgery, and then returning it to the womb to complete gestation. Facing such developments, one can hardly consider the child a mere extension of its mother. This fact was strikingly demonstrated by the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist, largely through his experiences as a fetologist.[74] For those who are not impressed by the claims of fetal personhood, the continuing prohibition of abortion in the face of the increasing safety of the procedure for mothers can only seem a serious intrusion into the liberty of women because of a "moral prejudice".[75] This ignores the unbroken tradition of the common law of protecting an unwanted child from aggression by its parents.

Reproductive technology remains one of the most rapidly advancing areas of medical research. Clearly, the majority in *Roe v. Wade* and *Doe v. Bolton* was deeply concerned about preserving physician's autonomy.[76]

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[74] B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983). *See generally* Dellapenna, *supra* note 6 at 414-416.

[75] Thus, in *Doe v. Bolton*, 410 U.S. 179, 193-194, 197-198, 199 (1973), the majority repeatedly stressed the lack of "any reason" for treating abortion differently than other minor surgery.

[76] *See* particularly *Doe v. Bolton*, where the majority accorded doctors standing as a class, 410 U.S. at 188-189, and the majority repeatedly adverted to the doctors' privacy interest, *id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor

Without denying the unavoidable impact of professional opinion on these questions, and recognizing the virtue of professional autonomy if advances are to continue, the law still cannot be fashioned solely to protect the autonomy of the technicians.

Just as teachers are not allowed to determine the propriety of school prayer, the issues concerning abortion transcend mere technical competence. The controversy involves balancing the interests and values created or reinforced by changing medical technologies. In all areas of medical practice, except abortion, the state has broad authority to regulate the conduct of physicians. Even for abortion, the state, not the individual physician, should be the final arbiter of the propriety of conduct. *Simopolous v. Virginia*, 462 U.S. 506 (1983).

B. *State Legislatures Are Best Placed To Explore Appropriate Regulatory Responses To Changing Reproductive Technologies*

The central problem for this Court to resolve is which government institution is charged by the Constitution to balance the competing interests and values in the abortion controversy.[77] As Justice Stevens argued in his concurring opinion to *City of Richmond v. J.A. Croson Co.*, 57 L.W. 4132, 4144 (1989), legislatures are better suited to establishing policies for the future, leaving to the courts the primary responsibility for fashioning remedies for past wrongs. There is no reason why this conclusion should not apply to abortion. Ever since *Roe v. Wade* was decided, beginning with its companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), the Court has confronted a series of challenges to specific regulations of abortion that required the Court to resolve difficult ques-

in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother, *id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1985).

[77] *Cf.* A. Bickel, *The Least Dangerous Branch* 142 (1962).

tions of technical fitness and social acceptability.[78] Lacking the tools of inquiry available to a legislature, the Court is simply not suited to serve as a board of review for issues of medical technology. *City of Akron, infra* at 454-459 (J. O'Connor, dissenting).

The majority in *Roe v. Wade* itself recognized its inability to deal with the issues at stake when it was unable to decide when an individual human life (a "person") begins, 410 U.S. at 160. Yet such decisions of life and death are simply too important to be left to the technicians, especially when the one who makes the actual decision has an economic stake in deciding against life.

The government is called upon to answer difficult questions questions involves a balancing of interests rather than the application of neutral principles accepted by nearly all in our society.[79] Legislatures are best equipped to acquire, from time to time, the information necessary to assess the import of changing technologies that create or reinforce interests to be balanced in resolving the resulting controversies.

Legislatures are also better equipped to do the balancing because of their representative nature.[80] Women are not an insular minority whose interests are likely to be slighted by a legislature.[81] Nor need physicians fear such

[78] *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Collauti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

[79] *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1976); Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 949 (1973).

[80] *Cf.* R. Dworkin, *Taking Rights Seriously* 22-28 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-310 (1973).

[81] *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

a legislative process. Legislatures have been consistently sensitive to the interests of the organized medical profession in regulating abortion.[82] There is no reason to expect this to change.

Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), to define federalism in terms of the states as great laboratories for social experiment is one of the best models for approaching questions of whether to preempt state competence. This Court unanimously affirmed in *Addington v. Texas*, 441 U.S. 418, 431 (1979), that the right of states to develop a variety of solutions, consistent with constitutionally-mandated minimum standards, was "the essence of federalism". In an area where the facts change faster than judicial procedures can cope with the resulting issues,[83] courts should defer to the state legislatures as better able to explore regulatory responses to the ensuing problems.

III. Even If *Roe v. Wade* Survives In Some Form, Application Of Its Criteria Must Be Reexamined In The Light Of New Medical Technology

Justice O'Connor pointed out in her dissent to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983), that if *Roe v. Wade* is to continue as the basis of the law of abortion, it is a decision "on a collision course with itself", *id.* at 456. To avoid contradicting the values announced in *Roe v. Wade*, the Court must reconsider the rules laid down in, or inferred from, the decision.

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[82] The sway of the organized physicians over legislatures was the theme of such books as B. Brookes, *Abortion in England 1900-1967* (1988); Donnison, *supra* note 48; Keown, *supra* note 3; Mohr, *supra* note 8.

[83] Note the changes in the facts between the trial and its review by this Court in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (J. White dissenting, with C.J. Burger & J. Rehnquist), 101-102 (J. Stevens concurring) (1976).

A. *Application Of The Concept Of Viability Adopted In Roe v. Wade Is Technologically Based And Must Be Reevaluated As Medical Technology Advances*

The majority in *Roe v. Wade*, 410 U.S. at 163-164, found that a "compelling state interest" arose when the foetus became viable, an interest sufficient to justify banning abortions except where the life or health of the mother is at risk. The majority also concluded that viability began at 28 weeks of gestation even while recognizing that viability might begin as early as 24 weeks, *id.* at 160, 164-165.[84] The statute now before the Court presents an opportunity to reconsider whether the point of viability should correspond to the achievements of medical technology since *Roe v. Wade* was decided.[85]

B. *Increasing Technical Means To Preserve Fetal Life Reveal That The Asserted Right Of A Mother To Be Rid Of An Unwanted Pregnancy Must Now Be Distinguished From Any Implicit Right To Kill The Fetus*

Some have argued that the "freedom" protected by *Roe v. Wade* is not the freedom to be rid of an unwanted pregnancy, but the freedom to kill an unwanted child.[86] With the conviction of at least one physician for killing an aborted child after its birth alive, Philadelphia Inquirer, Sept. 29, 1983 at 14A, col. 2, we have come full circle to the early days when the desire to be rid of unwanted pregnancies was expressed as infanticide rather

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[84] The source cited in *Roe v. Wade* on this point already indicated that viability could be as early as 20 weeks, L. Hellman & J. Pritchard, *Williams Obstetrics* 493 (14th ed. 1971)!

[85] Mangel, *Legal Abortion: the Impending Obsolescence of the Trimester Framework*, 14 Am. J.L. & Med. 69 (1988).

[86] Glanville Williams, often credited with opening the debate on abortion with lectures at Columbia University, defines abortion thusly: "For legal purposes, abortion means feticide: the *intentional* destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus.", G. Williams, *Textbook of Criminal Law* 290 (2d ed. 1983) (emphasis in the original).

than abortion. Today, concern to be rid of an unwanted pregnancy already does not always mean killing the unborn child.[87] To translate unnecessarily, in effect if not in form, the asserted right to be rid of a pregnancy into the right to kill a child is indefensible. It makes a mockery of all efforts to deal with child abuse. It strikes at the heart of the values of our form of government.

CONCLUSION

We live in a world in which law and values are increasingly reshaped by science and technology. Nowhere has this process been more dramatic than regarding medical science and technology relating to human reproduction. This case presents a court with the opportunity to return the central questions posed by this developing technology to the political branches of government—branches that can acquire and assess the rapidly changing data to weigh its impact on societal needs and values. For the reasons advanced in this brief, *Roe v. Wade* should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered, and the Missouri statute upheld as consistent with the values and policies expressed in that decision.

Respectfully submitted,

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February 23, 1989

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[87] Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984 at B1, col. 1. This had actually become a problem before *Roe v. Wade* was decided, although the leaders of NARAL kept the fact from the Court, L. Lader, *Abortion II* 164-166 (1973).

APPENDIX

LISTING OF *AMICI*

The Association for Public Justice is a nationwide, non-profit, voluntary association of Christian citizens headquartered in Washington, D.C. From its earliest stages of development, even before formal organization in 1977, the Association's purpose has been to address questions of justice in the structure of political and legal institutions and in their processes and policy making.

The Association has been an *amicus curiae* before the Supreme Court, and before other courts, in seeking greater legal clarity and justice in relationships among families, schools, churches, and government. Its concern with what constitutes the structure of a just society reaches to many levels of national and international laws and policies.

The Association's concern with the identity and rights of the unborn and with the responsibility of parents and the medical profession toward the unborn began before 1977, and has continued to the present. Its interest in this case in particular has to do not only with the confusion about whether and when human life should be protected at each stage of its development, but also with the question of how different branches and levels of government ought properly to be related to establishing and enforcing justice in this context.

The Value of Life Committee, Inc., is a non-profit Massachusetts corporation organized in 1970 to affirm in the public domain the value of all human life from conception to natural death. The Committee is actively engaged in educational efforts relating to these issues, including both the collection and the dissemination of research and other information relevant to such issues. Its members include a broad spectrum of citizens from all walks of life, including numerous physicians.

As part of its educational effort, the Committee has sponsored public statements prepared by respected phy-

sicians (including past-Presidents of the American College of Obstetrics and Gynecology). These statements have been referred to by the President and other public figures on such questions as the humanity of the unborn, the ability of a fetus to feel pain, and the propriety of using fetal tissue in research.

This, the first *amicus curiae* brief by the Committee before the Supreme Court, is an extension of its educational efforts. The Committee seeks by this to affirm the value of unborn humans, and to guide the debate over this question into fora better able to resolve the debate.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE AMERICAN LIFE LEAGUE, INC. SUPPORTING APPELLANTS

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, American Life League, Inc., is a District of Columbia corporation, with offices in Stafford, Virginia, recognized under 26 USC §501(c)(3) as a tax-exempt organization. The *Amicus* is a social welfare and educational organization, incorporated in 1981, with more than 180 thousand active donors across the country.

The *Amicus* researches and publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and unborn; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, pertinent state and federal administrative, legislative and judicial developments; and otherwise seeks to fulfill the mandate of its Articles of Incorporation and the concerns of its donors. Its professional and volunteer staff includes scientists, theologians, public administrators, lawyers and other persons who are, or who have become, cognizant in areas of factual and interpretive knowledge as to biological, theological, philosophic, legal, political and economic aspects of the rights of persons born and unborn.

SUMMARY OF ARGUMENT

One of the Missouri statutes declared unconstitutional by the lower courts in this case is R.S. Mo. 1.205, which provides in part that:

> (1) The life of each human being begins at conception;

(2) Unborn children have protectable[1] interests in life, health and well-being.

In agreeing to review this provision and also the basic holding of *Roe v. Wade*, 410 U.S. 113 (1973), the Court will consider issues more fundamental than the aspects of the Missouri statutes addressed by the lower courts. Given the existence of *Roe*, the lower court opinions herein do not reconsider the basic questions about abortion. With so many additional issues presented in its Jurisdictional Statement, the State of Missouri is not likely to discuss all major questions raised by a reconsideration of *Roe*. Missouri will argue for overturning *Roe*, but probably will not address the matter of state criminal law because the state statute is not criminal. This Court naturally would want to consider the criminal law consequences posed by the possibility of overturning *Roe*.

The lower courts in this case erroneously take the position that the holding of *Roe* excludes any possibility of state affirmance of the view that the unborn or preborn are human beings. However, the operation of the criminal law of homicide in cases in which a pregnant woman has been battered demonstrates that the criminal law has since, as well as before, assumed the humanity of the unborn. If nothing else, this Court greatly would clarify the analysis of abortion law by conceding the humanity of the unborn even if *Roe* otherwise were to be validated. Reduced to its simplest, *Roe* merely provides a defense against state prosecution for an abortion by a licensed physician

[1] A search of four dictionaries and the Wang computer spelling verifier reveals no word "protectable". This Amicus takes the word to mean "entitled to protection".

performed on a consenting female. *Roe* does not otherwise prevent prosecutions for the death of the unborn, including abortions by persons other than licensed physicians.

If the case is dissected dispassionately, the *Roe* refusal to allow a state to protect the unborn by prohibiting abortion appears quite arbitrary. Nonetheless, any inclination to reverse *Roe* would meet objections about the consequences of reversal. The typical argument is that women would be prosecuted as murderers. It is important, therefore, to understand why reversal of *Roe* and recognition of the unborn as human beings do not imply that the states would or should punish abortion as murder.

ARGUMENT

THE MISSOURI STATUTE DEFINING THE BEGINNING OF HUMAN LIFE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

By agreeing for the first time the reconsider the basic *Roe* holding, the Court again will consider the mutually exclusive merits of the unborn's quest for life and the pregnant woman's freedom to abort. For sixteen years, since January 22, 1973, these conflicting basic issues have been much debated intellectually, politically and popularly. Probably no national focus has been so pervasive since slavery in the last century or civil rights in this century, notwithstanding the fact that some 18 million proponents of life cannot speak because they are dead from abortion. These arguments are well known and need not be repeated. This Amicus hopes to assist the Court by discussing some basic criminal law principles, as they bear upon

abortion, which have not been considered fully in *Roe* or generally in post-*Roe* literature.

I. Outside the Context of Fourteenth Amendment Privacy *Roe* Does Not Alter General Principles of Criminal Law Which Assume the Unborn to be Human Beings.

Despite *Roe*, prenatal life continues to have an independent existence in criminal law. One considers the pregnant woman who is beaten or shot and the resulting death of the fetus. According to the common-law view, accepted in *Roe*, the assailant is chargeable with criminal homicide, depending upon whether the child is stillborn or born alive and then dies. Perkins and Boyce, *Criminal Law* (3d Ed. 1982), 49-53. If the child is stillborn, the cases have held this is not homicide. If the child is born and *breathes but for an instant* or establishes independent circulation and then dies, the offense is homicide. Ibid, at 52. Based upon different results, courts conclude that the fetus is not a person or human being until born alive. *People v. Greer*, 79 Ill. 2d 103, 402 N.E. 2d 203, 209 (1980). *The difficulty with the conclusion is that it does not account for finding the defendant guilty of criminal homicide if the child is born alive and then dies.*

If the fetus is not a human being at the time it is wounded in the womb, upon what basis is an assailant who causes its live birth, as well as death, to be convicted of criminal homicide? Not only is it absurd to say that the assailant caused the fetus to become a human being by battering the mother, but convicting a defendant on that basis would violate the basic principles of criminal law. Criminal law requires that a defendant's criminal act and criminal intent concur in producing the criminal consequence. Hall, *General*

Principles of Criminal Law (2d Ed. 1960), 185-190. If at the time the defendant strikes the pregnant woman the unborn child is not a human being, the defendant should not be guilty of criminal homicide even if the child is born alive and dies. By definition, homicide is the killing of a human being. If the fetus does not become a human being until after the criminal act, the defendant has not harmed a human being insofar as he injured the fetus. (Note that charges of homicide in such cases are in addition to battery of the mother.) At the time of the criminal act, an essential element of the crime—i.e., the death of a human being—is lacking. It is not sufficient to say that the defendant caused the consequence of death which occurred after the fetus became a human being. The situation is similar to that of a defendant who does an act which is not a crime at the time he commits the act. The fact that some of the consequences of the act occur after the law makes an act criminal cannot have retroactive or ex-post-facto application.

This apparent anomaly between the two situations easily is explained if one further distinguishes between existence of a human being and *proof* of the cause of death. The common-law rules clearly reflect the inadequate medical knowledge concerning the basic facts of human fetal development which were not discovered until the last century.[2] Given the state

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[2] "Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized

of medical knowledge and a higher probability of the unborn child's being born dead, it would have been inappropriate to convict a defendant of homicide were the state unable to prove what *caused* the death. The requirement that the child be born alive and breathe for an instant or establish an independent circulation was a way of proving that the defendant, rather than natural causes, brought about the death of the child. The distinction between stillborns and those living for an instant does not represent a denial of the unborn's humanity; it represents a rational requirement consistent with the standard of proof beyond a reasonable doubt. Courts have insisted that the states not only prove that the defendant was guilty of some crime (battery on the mother) but that he was also guilty of the particular harm charged (death of a human being).

But for the abortion controversy, the trend of courts to acknowledge advances in medical knowledge, as is the trend in wrongful death actions, infra, likely would have eliminated altogether the common-law distinction between the two situations. In 1947, a California court modified the common-law view in the light of modern

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as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research finding which persuaded doctors that the old 'quickening' distinction embodied in the common and some statutory law was unscientific and indefensible." *The Human Life Bill: Hearings on S.158 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 97th Cong., 1st Session, 474 (1982) [statement of Victor G. Rosenblum, Esquire, Professor of Law, Northwestern University].

medical knowledge by holding in *People v. Chavez*, 77 Cal. App. 2d 621, 176 P. 2d 92 (1947):

> A viable child in the process of being born is a human being born within the meaning of the homicide statutes, whether or not the process is fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed. 176 P. 2d at 94.

By 1970, abortion was a political issue in California when *Keeler v. Superior Court of Amador County*, 2 Cal. 3d 619, 89 Cal. Rptr. 481, 470 P. 2d 617 (1970), was decided. In what became the leading case on the question of a killing where the child was stillborn, the California Supreme Court, over a strong dissent, declined to find the child a "human being". The majority relied on the pro-abortion, revisionist writing of Professor Cyril Means, later prominently cited in *Roe v. Wade*.

The attitude of *Keeler* and some other courts toward new medical data affecting the beginning of life contrasts sharply with the approach taken by some courts to the common-law rule involving the end of life. The common-law "year and a day" rule provides that the death of a victim must occur within a year and a day of the infliction of a wound in order to constitute a punishable homicide.

As a practical method of dealing with difficulties inherent in proving the cause of death after a lengthy period of time, this common-law rule has served well. A 1972 opinion by a California court which ignores

the rule states that the change "merely modifies an archaic common law impediment", reflecting "that modern medicine not only has made it possible to prolong the life of an intended murder victim but also has made it feasible to establish the cause of death even if the victim dies several years after the injury". *People v. Snipe*, 25 Cal. App. 3d 742, 747, 102 Cal. Rptr. 6 at 9 (1972). In other states, the trend has been for legislation to bring about the same result. See Perkins and Boyce, op cit, at 47.

As with the "year and a day" rule, some state legislatures have attempted to change the common-law rules regarding the battery-induced death of the unborn.

After *Keeler*, the California legislature included the killing of a fetus in its murder statute, and "fetus" was interpreted to mean a "viable unborn child". Ibid, at 51.

The Louisiana legislature in 1976 amended its criminal-law definition to provide that "person includes a human being from the moment of fertilization and implantation . . ." The legislature did so in response to *State v. Gyles*, 313 So. 2d 799 (La. 1975), which had followed *Keeler*. When the statute was challenged, a federal district judge, who had previously invalidated various Louisiana anti-abortion statutes, upheld the constitutionality of the statute in situations not governed by *Roe v. Wade*.[3] The American Civil Liberties Union filed an appeal challenging the judgment for sustaining the statute in part, but later dismissed the appeal—apparently preferring not to

[3] An unreported case, Civil Action 76-2392 "F", USDC, ED, La, Judgment September 29, 1976.

spotlight the unreported decision. Although a later Louisiana case declined on grounds of statutory interpretation to apply the new definition to homicide, *State v. Brown*, 378 So. 2d 916 (La. 1979), it was unquestioned that state legislatures constitutionally are permitted to define the killing of a fetus as homicide, i.e., the killing of a human being.

If a state chooses to criminalize as homicide the killing of an unborn child by an unconsented battery on the mother, the mother's privacy rights clearly are not at issue. Such a statute presents no conflict with the holding of *Roe*. Outside the context of abortion, therefore, *Roe* does not prevent a state from declaring the unborn to be human beings for purposes of criminal law.

II. Even If the Court Does Not Reverse *Roe*, It Would Clarify and Simplify Abortion Law to Concede that the Unborn Are Humans as Declared by Missouri and Simply Say that *Roe* Creates a Constitutional Defense to Criminal Prosecution.

Prevailing criminal jurisprudence determines the humanity of an unborn child without reference to the identification of the individual who causes injury or death to the unborn child. *Roe* introduces a single criterion of exception to such jurisprudence: if a licensed physician, acting with the mother's consent, injures or kills the unborn, the unborn, by virtue of the fact the act was performed by a licensed physician and consented to by the mother, thereby is relegated to an unprotected status other than that of a human being.

Doubtless the law sometimes treats the same thing differently for materially different purposes. However, this transmogrification is nonsensical.

An unborn child either is or is not a human being. The child's humanity cannot depend upon the identity of the perpetrator and the circumstances under which the child's life is terminated. It needs no argument to perceive the absurdity of saying that the unborn child is a human being if an attacker batters the mother and thereby injures the child, but not a human being if a licensed physician assaults the child with the mother's consent. It would be more candid, and consistent with the structure of criminal law, to admit that what *Roe* does is to provide a constitutional defense to abortion. In other words, *Roe* means that even if abortion involves the taking of a human life, the taking of that life is justified when done by a pregnant woman acting through a licensed physician.

It will not do to say that outside of the abortion context the federal courts are simply allowing states to indulge their fantasies by labeling the fetus a human being. As a consequence of this labeling, a defendant may be adjudged guilty of criminal homicide. A jury must find beyond a reasonable doubt that this unborn child was a human being. To punish someone for any crime, much less criminal homicide, clearly violates due process under the Fourteenth Amendment unless the state has proven all elements of the crime beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358 (1970).

1. *Roe*'s Statement about the Inability to Determine the Beginning of Human Life Should be Eliminated.

The most quoted *Roe* statement is the Court's refusal to determine the beginning of human life:

> When those trained in the respective disciplines of medicine, philosophy, and theology

> are unable to arrive at any consensus [when life begins] the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. 410 U.S. at 158.

At the minimum, this Court should repudiate the language in *Roe* about the inability to determine the beginning of human life because it unleashes unnecessary confusion. This language has been variously interpreted to be a statement of ignorance, a confession of judicial impotence or a determination of irrelevancy. This was evident in 1981 during hearings held by the Senate Judiciary Committee, Subcommittee on Separation of Powers, on S. 158, the "Human Life Bill". The widely publicized hearings revealed confusion over whether this Court meant to say that (1) the issue of when life begins cannot be resolved; (2) this Court is not the proper body to resolve the issue; or (3) resolution of the question is irrelevant to the ultimate constitutional issue. *See generally, Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, U.S. Senate, 97 Cong., 1st Sess. (1982).

Leading constitutional scholars generally took the position that the humanity of the unborn was unimportant because *Roe* had held the unborn not to be Fourteenth-Amendment persons. If the leading constitutional scholars are correct in interpreting *Roe*, it does not change *Roe* to recognize the unborn as human beings.

If recognizing the humanity of the unborn does not necessarily jeopardize *Roe*, then the district and appellate courts sweep much too broadly in invalidating

Missouri's declaration that human life begins at conception.

First, it is an unnecessary and dubious "holding". The finding on the beginning of human life, however offensive to the plaintiffs, had no legal consequences. As the State of Missouri argues in its Jurisdictional Statement, §1.205.1 presents no "case or controversy". Only the regulatory aspects of the statute affected the plaintiffs. More importantly, the lower courts failed to appreciate the limits of *Roe*. *Roe* declares only that states cannot adopt a particular theory of life as a way of overriding the woman's right to privacy. Where the right to privacy is not involved, the state not only may adopt a theory of life but, *indeed, under Roe a state may prohibit even some first-trimester abortions*. In *Connecticut v. Menillo*, 423 U.S. 9 (1975), this Court allowed a state abortion statute to be applied to nonphysician abortions—even with a woman's consent:

> Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution . . . As far as the Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by nonphysicians. Ibid, at 11.

2. The Essence of *Roe* Is the Constitutional Defense Against Prosecution.

Since *Roe* and *Menillo*, the implications of the "right to privacy" have not expanded as much as might have been expected, while the claims of the unborn have

expanded. It is significant that *Roe* does not accept as absolute the woman's right to control her body. *Bowers v. Hardwick*, 478 U.S. 186 (1986), goes further by rejecting the claim that consenting homosexual conduct is covered by the right to privacy. The idea that anyone—male or female—has complete control over his or her own body simply contradicts the basis of our law on crimes against the person. If so, people should be able to consent to aggravated forms of battery, which they cannot. Perkins and Boyce, op cit, at 155. Even though the state may choose not to punish suicide or attempted suicide, that does not mean one has a right to commit suicide. As Blackstone said, the common-law view is that suicide is "among the highest crimes".[4]

Despite *Roe*, outside the abortion context the private-law status of the unborn is more secure. *Roe* states:

> [i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. 410 U.S. at 161.

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[4] ". . . No man hath a power to destroy life, but by commission from God, the author of it: and as the suicide is guilty of double offense; one spiritual . . . the other temporal, against the King, who hath an interest in the preservation of all his subjects, the law has therefore ranked this among the highest crimes, making it a peculiar species of felony." Blackstone, *Commentaries on the Law of England*, Vol. 4, at 188 (St. George Tucker Ed. 1803).

Briefly touching on tort and property law, the Court concludes that "the unborn have never been recognized in the law as persons in the whole sense". Ibid, at 162. Although it has been argued that the Court's appreciation of the status of the unborn in private law was incorrect even at the time,[5] it has since developed that courts have increasingly recognized the unborn as persons for recovery of prenatal injuries.[6]

Indeed, as the humanity of the unborn has become self-evident through fiber-optic pictures on the covers of national news magazines, advocates for abortion have changed arguments. They rarely argue that when life begins cannot be proven. Rather, the argument has become one that, even if the unborn are human, they are not Fourteenth-Amendment "persons" because the Supreme Court so holds in Roe. Accordingly, this Court, if nothing else, would clarify constitutional analysis by explaining Roe simply as providing a constitutional defense to the aborting of a nonconstitutional "person" when done by a licensed doctor with the consent of a pregnant woman. The Court thereby would recognize the *Roe*-created reality that a class of human beings is denied Fourteenth Amendment personhood.

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[5] R. Byrn, "An American Tragedy: The Supreme Court on Abortion", 41 Fordham L. Rev. 807, 817-827 (1973).

[6] D. Kader, "*The Law of Tortious Prenatal Death Since Roe v. Wade*", 45 Mo.L.Rev. 639, 652-653 (1980). By 1985, thirty-one states allowed wrongful death recovery for injuries to a child who was stillborn. See Note, "Prenatal Wrongful Death—*Amadio v. Levin*," 59 Temple L.Q. 827 (1986).

III. If in Addition to Recognizing the Humanity of the Unborn this Court also Reverses Roe, Such Result Will Not Thereby Require States to Punish Abortion as Murder.

As discussed in §II, it is possible both to recognize the humanity of the unborn and also to leave Roe otherwise unchanged. At that point, however, it becomes very difficult to explain why a state is not acting rationally by attempting to prohibit abortion as a means of protecting human life. Furthermore, the rationality of the Missouri statute is well supported by the hearings on S. 158, supra. In deciding whether to reverse Roe and return to a rational basis test on the question of abortion, this Court may have other concerns about the consequences of reversal. Chief among these are likely to be the resulting criminal statutes that might be used to prohibit abortion. Thus, it is important to realize why the reversal of *Roe* need not, and probably would not, lead to the prosecution of abortion as criminal homicide.

Roe recognizes that if the Court were to hold the unborn persons under the Fourteenth Amendment, then states clearly would have the right, if not the duty, to prohibit abortions. *Roe* also discusses the question of whether the states would be required to prohibit abortion as murder if the unborn were indeed human. *Roe* considered the fact that the states had not punished abortion as murder as inconsistent with the view that the unborn were human. If *Roe* is to be reversed, Members of the Court undoubtedly will be considering the implications of such a decision (1) upon the question whether the unborn are Fourteenth-Amendment persons and (2) upon state statutes to criminalize abortion.

1. If *Roe* Is Reversed, Can Unborn Human Beings Be Treated Differently?

The issue of whether the unborn are "persons" under the Fourteenth Amendment is not before the Court in this case but looms in the background. Contrary to an indication in *Roe v. Wade*,[7] a finding that the unborn is a Fourteenth-Amendment person should not require the states to punish abortion as murder. Murder is only one form of homicide, indeed only one form of *criminal* homicide. "Homicide", which simply means the killing of a human being, includes the accidental, noncriminal killing of a human being as, for instance, in an automobile accident. Among *criminal* homicides, there are various types, depending upon the state criminal law scheme. Within the category

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[7] "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception, contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

"There are other inconsistencies between the Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?" 410 U.S. at 157 N. 54.

of criminal homicide, the seriousness (e.g., whether murder or manslaughter) and, therefore, the punishment, depend upon the defendant's *mens rea*, or guilty mind. In order to prove any form of criminal homicide, the state must prove a harm (death of a human being) caused by the defendant while acting with a certain criminal state of mind.

Absolute certainty concerning the precise moment when life begins ought not to be required for a state to protect what reasonably appears to be a human being. Nevertheless, without detracting from that notion, it is consistent to say that anyone charged in killing an unborn child must be shown "beyond a reasonable doubt" to have caused the death of a human being. Given advanced medical knowledge and technology, as previously discussed, some states have modified, and others may modify, the common-law rules to make the killing of the unborn child criminal homicide if done by nonphysicians. The same laws might be made to apply to physicians if *Roe v. Wade* were reversed. Nevertheless, the prosecution still would have to prove beyond a reasonable doubt that the defendant caused the death of a human being. Such proof in actual criminal cases might be difficult for the early stages of pregnancy when the child is not recognizable as a human being. One should not assume, therefore, that states would seek to punish such acts as homicide. This would not imply a lack of equal treatment for the unborn child. Rather, states rationally might conclude that the uncertainty of proof requires prosecution of such cases under the heading of abortion.

In *Roe*, this Court questions whether, if a fetus is a Fourteenth-Amendment person, the state could pro-

vide a penalty significantly less than the maximum penalty for murder. Such a disparity presents no problem. Under state laws, the punishment provided for murder (death or life imprisonment) is substantially more severe than for other homicides such as manslaughter or negligent homicide. Nevertheless, presumably no one doubts that the victim of a negligent homicide is less a human being because negligently, rather than willfully, killed.

2. If *Roe* Is Reversed, How Would Women Who Have Abortions Be Treated?

Proponents of abortion have pitted the protection of the unborn against the prosecution of women. What would recognition of the unborn as human beings and possibly persons under the Fourteenth Amendment mean in terms of prosecutions of women who have abortions?

As noted in *Roe*, Texas law did not make the woman subject to prosecution as a principal or as an accomplice. Although the Court considered this inconsistent with the Fourteenth Amendment, the failure to prosecute a person or to make a person liable to prosecute alone has not been considered a violation of the Fourteenth Amendment. See LaFave and Israel, *Criminal Procedure*, 571-577 (1985). Whether states generally would prosecute physicians who perform abortions or women who consent to abortions largely would be a matter of state policy. Nevertheless, two arguably troublesome instances require particular attention: (1) when the life of the mother is endangered; and (2) the occurrence of a miscarriage.

1. *Roe* notes that it was inconsistent for Texas to claim that the unborn was a person and then to make

an exception in the case of the life of the mother. The Court states that all states provided such an exception. Even in dissent, Justice Rehnquist states "[i]f the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . ." 410 U.S. at 173. It is not necessary, however, to be inconsistent regarding the status of the unborn child in order to exempt women from prosecution when the woman's life has been in danger. The exemption can be worded in terms which exempt the woman from prosecution but do not change the human status of the unborn child who dies.

2. Opponents of recognizing the unborn children as human beings also have raised the specter of prosecuting women for miscarriages. Readily available principles in criminal law, however, answer these arguments. Crime requires (1) a criminal act and (2) a criminal intent or criminal negligence. Perkins and Boyce, op cit, at 831. Except for a limited class of "strict liability" offenses, such as food and drug laws, the law "adhere[s] to the central thought that wrongdoing must be conscious to be criminal . . ." *Morissette v. U.S.*, 342 U.S. 246, 252 (1952). For a homicide to be criminal, the killing must fall into one of the following categories: (1) specific-intent-to-kill murder; (2) specific-intent-to-do-bodily-harm murder; (3) depraved-heart murder; (4) felony murder; (5) heat-of-passion voluntary manslaughter; (6) criminal negligence-involuntary manslaughter; (7) unlawful act-involuntary manslaughter. Even the shooting of another person is not criminal unless the assailant possesses one of these guilty states of mind.

A miscarriage, because involuntary, not only lacks anything approaching criminal intent but it also lacks the other requirement of all crime—some act or omission that is the equivalent of an act. Perkins and Boyce, op cit, at 605 and 658. Moreover, as a practical matter, it would be virtually impossible to know of, much less to prove, many deliberately, self-induced early stage abortions.

Thus, reversal of *Roe* would lead to neither consequence.

CONCLUSION

The judgments of the Court of Appeals herein and of this Court in *Roe v. Wade* should be reversed.

Respectfully submitted,

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February 23, 1989

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Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

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October Term, 1988.

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Beal v. *Doe*, 432 U. S. 438 (1977)	23
Belotti v. *Baird*, 428 U. S. 132 (1976)	23
Bowers v. Hardwick, 106 S.Ct. 2841 (1986)	3,7
Brown v. Board of Education 349 U. S. 294 (1955)	5,6,17
Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393 (1932)	6
City of Akron v. *Akron Center for Reproductive Health*, 462 U. S. 416 (1983)	5,18,20-23,25-26
Colautti v. *Franklin*, 439 U. S. 379 (1979)	24
Dandridge v. *Williams*, 397 U. S. 471 (1970)	17
Davis v. *Commonwealth*, 167 U. S. 43 (1897)	28
Eisenstadt v. *Baird*, 405 U. S. 438 (1972)	10,15
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985)	6
Griswold v. *Connecticut*, 381 U. S. 479 (1965)	7-8,11,27
H.L. v. *Matheson*, 450 U. S. 398 (1981)	21
Harris v. *McRae*, 448 U. S. 297 (1980)	23,26-27
Hylton v. *United States*, 3 Dall. (3 U. S.) 171 (1796)	6
Korematsu v. *United States*, 323 U. S. 283 (1944) . . .	29
Lochner v. *New York*, 198 U. S. 45 (1905)	17,19
Loving v. *Virginia*, 388 U. S. 1 (1967)	10

Maher v. *Roe*, 432 U. S. 464 (1977) 20,23-27
Margaret S. v. *Edwards*, 794 F.2d 994 (5th Cir. 1986)(Higginbotham, J.) 6
Meyer v. *Nebraska*, 262 U. S. 390 (1923) 10,22
Moore v. *City of East Cleveland*, 431 U. S. 494 (1977) 7-8
Palko v. *State of Connecticut*, 302 U. S. 319 (1937) 8
Parham v. *J.R.*, 442 U. S. 584 (1979) 22
Pierce v. *Society of Sisters*, 268 U. S. 510 (1925) 10,22,27
Plessy v. *Ferguson*, 163 U. S. 637 (1896) 17
Poelker v. *Doe*, 432 U. S. 519 (1977) 26
Pollack v. *Farmer's Loan & Trust Co.*, 158 U. S. 601 (1896) 6
Prince v. *Massachusetts*, 321 U. S. 158 (1944) 10,22
Reproductive Health Service v. *Webster*, 851 F.2d 1071 (8th Cir. 1988) 25
Roe v. *Wade*, 410 U. S. 113 (1973) . . . . . *passim*
Santa Clara County v. *Southern Pacific Railroad Co.*, 118 U. S. 394 (1886) 12
Scott v. *Sandford*, 60 U. S. (19 How.) 393 (1857) . . . 3,12,29
Skinner v. *Oklahoma*, 316 U. S. 535 (1942) 10
Snyder v. *Massachusetts*, 291 U. S. 97 (1934) 7
South Carolina v. *Baker*, 108 S.Ct. 1355 (1988) 6
Stanley v. *Illinois*, 405 U. S. 645 (1972) 22
Steinberg v. *Brown*, 321 F. Supp. 741 (Three Judge Court, W. D. Ohio 1970) 14
Thornburgh v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986) . . . . . *passim*
Thornburgh v. *American College of Obstetricians and Gynecologists*, 737 F.2d 283, 317 (Adams, J.) and

319 (Weis, J.) (3rd Cir. 1984) (on denial of pet. for rehearing) 6
United States ex rel. Standing Bear v. *Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) 29
United States v. *Darby*, 312 U. S. 100 (1941) 6
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379 (1937) 6,17
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624 (1943) 6
Williamson v. *Lee Optical Co.*, 348 U. S. 483 (1955) 17
Wisconsin v. *Yoder*, 406 U. S. 205 (1972) 22

Statutes and Constitutional Provisions

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Article 2, Paragraph 2, Sentence 1, Basic Law of the Federal Republic of Germany 14-15
Declaration of Independence 13
Fifth Amendment 13
Fourteenth Amendment 14

Other Authorities

3 State Referendums Give New Impetus to Anti-Abortion Efforts, The Washington Post, November 10, 1988, at B-1 4
250 Arrested at Jersey Anti-Abortion Protest, The New York Times, September 18, 1988, at 46 3
Abortion and the Constitution (D. Horan, E. Grant & P. Cunningham, ed. 1987) 6,9-10
Abramowitz, *153 Arrested in Abortion Protest at D. C. Clinic*, The Washington Post, January 24, 1989, B1 3

Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39-47 (July 4, 1949) 29

Arbagi, *Roe and the Hippocratic Oath*, in *Abortion and the Constitution* at 159-181 9

Blaustein and Field, *'Overruling' Opinions in the Supreme Court*, 57 Mich. L. Rev. 152-156 (1958) 7

Brief of the United States As Amicus Curiae in Support of Appellants in *Akron* 5,18-19

Briefs of the United States As Amicus Curiae in Support of Appellants in *Thornburgh* 5

Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 814-835 (1973) 10

Callahan, *How Technology is Reframing the Abortion Debate*, 16 Hastings Center Report 33 (1986) 21,26

Callahan, D., *Abortion: Law, Choice and Morality* 82 (1970) 13

Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *Abortion and the Constitution* at 123-135 9

Cox, A., *The Role of the Supreme Court in American Government* 103 (1976) 3,10,20

Dellapena, *The History of Abortion: Technology, Morality and Law*, 40 U. Pitt. L. Rev. 359, 365-416 (1979) 10

Destro, *Abortion and the Constitution: The Need for a Life- Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-1282 (1975) 10

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 949 (1973) 7,9,18,21

Freund, *Storms Over the Supreme Court*, 69 A.B.A.J. 1474, 1480 (1983) 7

Furlong & Black, *Pregnancy Termination for Genetic Indications: The Impact on Families*, 10 Social Work in Health Care 1 (1984) 21

Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 381, 385 (1985) 4

Glendon, Mary Ann *Abortion and Divorce in Western Law* 44 (1987) 5,14-16,18,23

Henshaw, Forrest & Van Vort, *Abortion Services in the United States*, 1984 and 1985, 19 Family Planning Perspectives 63 (1987) 12

Hentoff, *Civil Rights and Anti-Abortion Protests*, The Washington Post, February 6, 1989, A11 4,16

Hiskey, *Thousands Join "Rescue Movement" Around Nation*, 32 Christianity Today 52, December 9, 1988 4

Horan & Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *Abortion and the Constitution* at 57 10

Jonas and Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade —- With Commentaries*, 9 J. Mar. J. Prac. & Proc. 551 (1976) 3,14-15

Jurisdictional Statement 2,24

Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L. J. 267, 282 (1986) 5-6

Koop, *The Slide to Auschwitz*, in R. Reagan, *Abortion and the Conscience of the Nation*, 41, 45 (1984) 16

Letter to Medical Staff and *Roe v. Wade Revisited at North Memorial Medical Center*, 20 Medical Staff News, North Memorial Medical Center, Minneapolis, Minnesota, No. 1 at 4 and 5, January 1989 4

Mattinson, *The Effects of Abortion on a Marriage* in Abortion: Medical Progress and Social Implications, 1985 Ciba Foundation Symposium 165-177 21

McAll & Wilson, *Ritual Mourning for Unresolved Grief*, 80 Southern Medical Journal 817 (1987) 21

McCarthy, *The Real Anguish of Abortions*, The Washington Post, February 5, 1989, F2 22

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. Law Forum 335 (1971) 11-12

Milling, *The Men Who Wait*, Woman's Life, 48-49, 69-71, April 1975 21

Milton, John , *Paradise Lost* I:528-529 6

Mithers, *Abortion: Are Men There When Women Need Them Most*?, Mademoiselle at 231, April 1981 22

Noonan, *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668, 669, 675 (1984) 29

Noonan, J. T., *A Private Choice* 12 (1979) 11,16

Patterson, *Whose Freedom of Choice?*, 46 The Progressive 42, April 1982 21-22

Peirce, *BRI v. Leonard: The Role of the Courts in Preserving Family Integrity*, 23 N. Eng. L. Rev. 185 (1988) 21

Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 71 Nw. L. Rev. 417 (1976) 9

Pfeifer, *Abandoning Error: Self-Correction by the Supreme Court*, in *Abortion and the Constitution* at 3-22 6

Reagan, R., *Abortion and the Conscience of the Nation* (1984) 16

Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L. J. 639, 697 (1986) 21

Shostak, *Abortion As Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (1979) 21

Special Project: Survey of Abortion Law, 1980 Ariz. St. L. J. 67, 75-76, 79-88 10

Terry, R., *Operation Rescue* 283 (1988) 3-4

Thompson, *Atlanta Police Use Tougher Tactics As Abortion Foes Return to Streets*, The Washington Post, October 5, 1988, at A3 3

Torres and Forrest, *Why Do Women Have Abortions*, 20 Family Planning Perspectives 169 July - Aug., 1988 16

Blackstone, W., 4 Commentaries on the Laws of England 198 12-13

Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 252-254 26,29

Weidner & Griffitt, *Abortion as a Stigma: In the Eyes of the Beholder*, 18 Journal of Research and Personality 359 (1984) 22

Will, *Splitting Differences*, Newsweek, February 13, 1989, at 86 4,16

Wood and Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B.Y.U.L. Rev. 231,244 28-29

Woodward, *The Abortion Papers*, The Washington Post, January 22, 1989, at D1 3

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INTEREST OF AMICI CURIAE[1]

Amici Curiae —- The Rutherford Institute and its affiliated state chapters —- have as two of their purposes, strengthening the traditional family and fostering respect for the uniqueness and paramount worth of human life. These values are deeply rooted in America's common law and Constitutional tradition and its morality and values. Diminishing the value of family relationships and respect for life, even potential life, diminishes, in one form or another, the lives and the quality of life of all citizens. That is why The Rutherford Institute believes that this case, with issues concerning the power of states to regulate abortion, and ultimately, to sustain and protect the traditional American family, will be

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

important to our Constitutional jurisprudence and the growth and progress of the Nation.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. The Rutherford Institute and its affiliated state chapters undertake to assist litigants and to participate in significant cases relating to the protection and safeguarding of human life and family values. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

The facts of this case have been stated in the Jurisdictional Statement, pages 2-8, and are incorporated herein by this reference.

SUMMARY OF ARGUMENT

Roe v. *Wade*[2] stands as an unnecessary source of division and conflict in American life. If left to stand, it threatens to undermine the institutional stature of this Court and the rule of law in American society. The legitimacy of *Roe* has been disputed not only by doctrinaire pro-life advocates, but by the Executive Branch of the United States Government, by distinguished legal scholars, by the legislative branches of the Federal and several state governments, by the people in referenda in several states and by significant segments of American society. Indeed, in the Court's last decision on the subject, three justices of this Court questioned the legitimacy of *Roe*, with a fourth calling for its reexamination.[3]

Roe has failed because its premises were not rooted in the tradition of the Nation. Its reading of history was flawed, its reliance on precedent, misplaced, and its Constitutionalization of

[2] 410 U.S. 113 (1973) (hereinafter cited alternatively as "*Roe*" and "*Roe v. Wade*").

[3] Justices White and O'Connor, both joined by then Justice Rehnquist, disputed the legitmacy of *Roe*. *Thornburgh* v. *American College of Obsteticians and Gynecologists*, 476 U.S. 747, 791 (White, J., dissenting) and 829 (O'Connor, J., dissenting). Then Chief Justice Burger called for re-examination of *Roe*. *Id.* at 785 (Burger, C. J., dissenting).

an essentially legislative issue, mistaken. Even more egregious was its transposition of Constitutional values, namely, the arbitrary elevation of "liberty" over "life" —- the latter being the compelling basis of the dignity of man and the prerequisite for all basic constitutional rights.[4] This failure of jurisprudence rivals this Court's decision in the *Dred Scott Case*.[5]

It is time for the Court to recognize its error in *Roe* v. *Wade*, as it has over 100 times in other cases, and to reverse *Roe* or, at the very least, confine it to its narrow holding. Accordingly, this Court should uphold the Missouri statutory provisions based on a standard of review that requires legislation to bear a rational relationship to a legitimate state objective.

ARGUMENT

I. ROE V. WADE SHOULD IN THE INTEREST OF JUSTICE BE EXPRESSLY OVERRULED OR CONFINED TO ITS NARROW HOLDING.

This Court has recognized that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 106 S.Ct. 2841, 2846 (1986). Legitimacy is essential because the judiciary "is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication."[6] Absent legitimacy, respect for law is greatly diminished,[7] legal institutions are undermined,[8] law

[4] Decision of The Federal Constitutional Court of the Federal Republic of Germany (West Germany), translated in Jonas & Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade —- With Commentaries*, 9 J. Mar. J. Prac. & Proc. 551, 642 (1976).

[5] *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857).

[6] A. Cox, *The Role of the Supreme Court in American Government* 103 (1976).

[7] *250 Arrested at Jersey Anti-Abortion Protest*, The New York Times, September 18, 1988, at 46; Thompson, *Atlanta Police Use Tougher Tactics As Abortion Foes Return to Streets*, The Washington Post, October 5, 1988, at A3; Abramowitz, *153 Arrested in Abortion Protest at D. C. Clinic*, The Washington Post, January 24, 1989, B1.

[8] Woodward, *The Abortion Papers*, The Washington Post, January 22, 1989, at D1. *See also*, R. Terry, *Operation Rescue* 283 (1988) ("We hereby declare *Roe* v. *Wade* and all subsequent court decisions and legislation which permit, support,

enforcement is jeopardized,[9] and the gap between the law and the moral order produces increasing conflict and social turmoil.[10] The judiciary is otherwise left to the embarrassing and defensive position of justifying its misadventures under increasingly indiscriminate standards.[11]

Unfortunately, the plight of the Federal courts since the landmark decision of *Roe* v. *Wade* has been repeatedly to defend it. After fifteen years, and even more revisits to the subject by this Court,[12] the people through their elected representatives continue to seek guidance in determining what, if any, regulation may be imposed on abortion. But with each new decision, it becomes increasingly obvious that any "limits" *Roe* purports to impose on

---

or protect wanton child killing to be unjust, illegitimate, non-binding and unlawful").

[9] *See* Hentoff, *Civil Rights and Anti-Abortion Protests*, The Washington Post, February 6, 1989, A11 ("The only actual violence connected with Operation Rescue has been inflicted by the police, most viciously, in Atlanta where one of the Planned Parenthood's 13 civil rights leaders is mayor"); Hiskey, *Thousands Join "Rescue Movement" Around Nation*, 32 Christianity Today 52, December 9, 1988 (Some law enforcement officials torn between moral beliefs and duties).

[10] Judge Ruth Bader Ginsburg, a supporter of the abortion right, has suggested that "....*Roe* ventured too far in the change it ordered....Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 381, 385 (1985). *See also, e.g.*, the articles cited in note 7, *supra*; *3 State Referendums Give New Impetus to Anti-Abortion Efforts*, The Washington Post, November 10, 1988, at B-1; and *Letter to Medical Staff* and *Roe v. Wade Revisited at North Memorial Medical Center*, 20 Medical Staff News, North Memorial Medical Center, Minneapolis, Minnesota, No. 1 at 4 and 5, January 1989 (*Roe* v. *Wade* is at the center of a dispute among physicians, requiring a vote of hospital staff on whether to do abortions).

[11] *See* Will, *Splitting Differences*, Newsweek, February 13, 1989, at 86, and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 814, 829 (O'Connor, J., dissenting): "[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion....[T]he Court strains to discover 'the anti-abortion character of the statute'...and invents an unprecedented canon of construction under which 'in cases involving abortion, a permissible reading of the statute is to be avoided at all costs.'"

[12] The Court has decided 18 abortion decisions since *Roe* v. *Wade* and *Doe* v. *Bolton*.

abortion are, in reality, shallow rhetoric for "abortion on demand," *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 782-784 (1986) (Burger, C. J., dissenting) (hereinafter "*Thornburgh*"). Even more obvious is the fact that *Roe* is "clearly on a collision course with itself," *City of Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416, 458 (1983) (O'Connor, J. dissenting) (hereinafter "*Akron*"). "As time passes, not only does the *Roe* decision appear to be collapsing from within, but the opinions of leading constitutional law writers, many of them not opposed to abortion in principle, have been marshaled against it. Archibald Cox, Alexander Bickel, John Hart Ely, Harry Wellington, Richard Epstein and Paul Freund have all been highly critical." Mary Ann Glendon, *Abortion and Divorce in Western Law* 44 (1987) (hereinafter "Glendon"). Finally, the repeated solicitations of the Executive Branch of the United States Government, through its successive Solicitor Generals, imploring this Court to confine *Roe* v. *Wade* to its narrow holding or to overrule it, has reflected increased public sentiment questioning the validity of *Roe*. *See Briefs of the United States As Amicus Curiae in Support of Appellants* in *Akron* and *Thornburgh*.

It is imperative that this national undercurrent of doubt and skepticism about the Nation's highest court and abortion be rectified. Unfortunately, the Court's unequivocal affirmances of *Roe* in the *Akron* case, where it appealed to *stare decisis*, and its more forceful affirmance in *Thornburgh*, where its resolution was intimated to be as strong as in *Brown* v. *Board of Education*,[13] have done little to calm the unrest and dissent. *Stare decisis* is a very slender reed upon which to justify a decision as wanting in precedent as *Roe* v. *Wade*. And *Brown v. Board of Education*, unlike *Roe*, was secure because it had Constitutional warrant as well as being morally correct: "the fourteenth amendment provided an explicit and settled constitutional mandate to justify that decision, apart from the moral force of the decision's reasoning."[14] The "undesired and uncomfortable straightjacket" that *Roe* and its more recent progeny have "tailored for the 50 states" has, instead,

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[13] 349 U. S. 294 (1955).

[14] Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L. J. 267, 282 (1986).

sparked "a significant and important judicial debate,...not only about the legitimacy of *Roe* and its effect upon the Court as an institution, but also about the nature of the right granted in *Roe* and the state interest in protecting the fetus as a living entity."[15]

Despite the importance of *stare decisis* to our legal system, this Court has not in the past hesitated to correct Constitutional error.

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right....But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406-407 (1932).[16] No matter how valuable a consistent course of constitutional adjudication, blind adherence to *stare decisis* can transform it—- like any other formal rule—- into so many "high words, that [bear] semblance of worth, [but] not substance."[17] Formal rules and good intentions do not suffice when the underlying decision they

[15] *Id.* at 321-322. *See* the discourse between Justices White and Stevens in the *Thornburgh* case, 476 U. S. at 772-782 (Stevens, J., concurring), and 785-814 (White, J., dissenting), and the dissenting opinions of Chief Justice Burger, and Justice O'Connor in the same case, 476 U. S. at 782-785 (Burger, C. J., dissenting) and at 814-833 (O'Connor, J., dissenting). There have also been rumblings in the Circuit Courts of Appeal. *See, e.g.*, *Margaret S.* v. *Edwards*, 794 F.2d 994, 995-996, 996,n.3 (5th Cir. 1986)(Higginbotham, J.); and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 737 F.2d 283, 317 (Adams, J.) and 319 (Weis, J.) (3rd Cir. 1984)(on denial of pet. for rehearing).

[16] Prominent examples of reversal in the last fifty years are *South Carolina* v. *Baker*, 108 S.Ct. 1355 (1988) [where the Court expressly overruled *Pollack* v. *Farmer's Loan & Trust Co.*, 158 U. S. 601 (1896), which itself expressly overruled *Hylton* v. *United States*, 3 Dall. (3 U. S.) 171 (1796); these multiple reversals spanned almost our entire Constitutional history]; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 557 (1985); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); *United States* v. *Darby*, 312 U. S. 100 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

For a complete review of the history of the Court's reversals, *see*, Pfeifer, *Abandoning Error: Self-Correction by the Supreme Court*, in *Abortion and the Constitution* 3–22 (D. Horan, E. Grant & P. Cunningham, ed. 1987).

[17] John Milton, *Paradise Lost* I: 528-529.

seek to justify fails "to trace its premises to the charter from which it derives its authority"[18] and deprives the people of power to explore and shape a societal response to a controversial subject involving important, but conflicting social values.[19] As Justice Frankfurter has written:

> The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.

American Federation of Labor v. *American Sash Co.*, 335 U. S. 538, 557 (1949) (Frankfurter, J. concurring).

The long and short of the matter is that it is past time for this Court to acknowledge and correct error in *Roe* v. *Wade*. It has abandoned error over 100 times in its history, [20] and it should now overrule it outright or, at the very least, confine *Roe* v. *Wade* to its narrow holding.

II. IT WAS ERROR TO CLASSIFY A WOMAN'S DECISION TO TERMINATE HER PREGNANCY AS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT'S CONCEPT OF PERSONAL LIBERTY.

This Court has recognized certain fundamental rights that are protected by the Due Process Clause of the Fourteenth Amendment. These rights have been held to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934),[21] and

[18] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 949 (1973).

[19] Freund, *Storms Over the Supreme Court*, 69 A.B.A.J. 1474, 1480 (1983). *See also*, *Thornburgh*, 476 U. S. at 786-794, 796-797 (White, J. dissenting), and *Bowers*, 106 S.Ct. at 2844-46.

[20] Blaustein and Field, *'Overruling' Opinions in the Supreme Court*, 57 Mich. L. Rev. 152-156 (1958); and Pfeifer, *supra* note 16, at 5-10.

[21] *See also*, *Moore* v. *City of East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of Powell, J.) and *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J.

so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [they] were sacrificed." *Palko* v. *State of Connecticut*, 302 U. S. 319, 325 (1937).[22] Because of the value placed on such rights, the Court has required a necessary relationship between any state action restricting them and a compelling state interest in order for the action to be upheld. *Griswold* v. *Connecticut*, 381 U. S. 479, 497 (1965).

"Fundamental liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance." *Thornburgh*, 476 U. S. at 790 (White J., dissenting). Thus, rights expressly granted in the Bill of Rights have been applied by this Court against the states through the Due Process Clause of the Fourteenth Amendment. In *Roe* v. *Wade*, where a woman's decision to terminate a pregnancy was recognized as a "fundamental" right encompassed in the right to privacy, this Court found no explicit textual mandate to justify the right, but, instead, relied on the "Fourteenth Amendment's concept of personal liberty and restrictions on state action" and "the Ninth Amendment's reservation of rights to the people." *Roe* at 153.

In support of its decision, the Court relied on an historical, sociological and medical analysis to determine why the decision to terminate pregnancy was fundamental and therefore protected by the right of privacy. In its extensive survey of the socio-medical and legal history of abortion, this Court concluded that restrictive criminal abortion laws were "of relatively recent vintage" (*id.* at 129), and that ancient and Anglo-American law had generally treated abortion with less severity than the state statutes then in force. The Court summarized: "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th Century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140, 157-158, 165. These findings provided an essential premise for the Court's ultimate legal conclusion.

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concurring) (Fundamental liberties are those that "are deeply rooted in this Nation's history and tradition.").

[22] *See also*, *Roe* v. *Wade*, 410 U. S. at 152; *Moore* v. *City of East Cleveland*, 431 U. S. at 537 (Stewart, J. dissenting).

Even though governing standards may permit the Court to identify "fundamental" liberty interests in historical tradition or concepts of ordered liberty, it cannot be gainsaid that the Court is most vulnerable if such interests are not *in fact* so rooted. For if "the roots of substantive due process decisions are not already in the nation, the decisions [of this Court] will lack 'power' or 'authority'." Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 71 Nw. L. Rev. 417 (1976). Unfortunately, the central problem with *Roe v. Wade* is that it fails to establish the necessary link between bedrock values inherent in our Constitutional tradition and a woman's decision to terminate potential life within her. As Dean Ely has eloquently written, "[a] neutral and durable principle may be a thing of beauty and joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." Ely, *supra* note 18 at 949.

The failures of *Roe* lie in three specific areas: the Court's historical analysis of the socio-medical-legal tradition of abortion, the Court's treatment of applicable precedent and the Court's removal of abortion policy from the legislative agenda in our Constitutional system.

a. *Historical Exegesis*. The historical exegesis undertaken in *Roe* is distinctly problematical. Justice Rehnquist's dissent in *Roe* presaged what has now become a more considered and well-documented view that the Court had misread history. At the time his dissent concluded that "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 174 (Rehnquist J., dissenting).[23]

The historical difficulties in *Roe* arise from the Court's cursory and incomplete treatment of the ancient history of abortion,[24] its skewed view of the ancient Greek Hippocratic Oath (which forbade abortion),[25] its blinking at over 1000 years of Judeo-Christian ethics and law (where opposition to abortion was

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[23] Justice White has since elaborated extensively upon this subject in his dissent in *Thornburgh*, 476 U. S. at 788-794.

[24] Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *Abortion and the Constitution*, *supra* note 16, at 123-135.

[25] Arbagi, *Roe and the Hippocratic Oath*, in *id.* at 159-181.

predominantly constant)[26] and, perhaps most importantly, its distortion of the common law and statutory tradition.[27] These deficiencies have been itemized extensively elsewhere[28] and will not be repeated here. Suffice it to say, in the words of Archibald Cox, that "[n]either historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either natural law or the Constitution."[29] A more deliberate consideration of the record raises substantial doubt about the Court's rendition of the socio-medical-legal tradition of abortion and, therefore, casts a long shadow over its consequent legal conclusion that a woman's decision to terminate pregnancy is traditionally rooted in the right to privacy.

b. *Misplaced Reliance on Precedent*. The extension of the "guarantee of personal privacy" to abortion was justified in *Roe* by reliance on precedents "relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U. S. at 453-454; *id*., at 460, 463-465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, [262 U. S. 390, 399 (1923)]." *Roe* v. *Wade*, 410 U.S. at 152-153. The Court recognized at the same time, however, that the privacy of the abortion decision was significantly different from the privacy of its precursors. Unlike them:

> [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently

[26] *Special Project: Survey of Abortion Law*, 1980 Ariz. St. L. J. 67, 75-76, 79-88.

[27] Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 814-835 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-1282 (1975); Dellapena, *The History of Abortion: Technology, Morality and Law*, 40 U. Pitt. L. Rev. 359, 365-416 (1979).

[28] *See* the opinion and articles cited in notes 23-26, *supra*; *see also* Horan & Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *Abortion and the Constitution*, *supra* note 16 at 57.

[29] A. Cox, *supra* note 6, at 114.

> different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. [citation omitted].

Roe v. *Wade*, 410 U. S. at 159. The doctrinal outworking of this distinction is that the woman's privacy right was subjected to the state's compelling interests in preserving maternal health and protecting "potential life" as the pregnancy progressed, trimester by trimester, to term.[30]

The very same distinction between *Roe* and its predecessors has provided fruitful ground for argument that the privacy right should have never been extended to abortion in the first place. This is because the existence of developing life in the pregnant woman presents a significant social dimension that is missing from other personal or family autonomy cases.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development —- that is to say, the life[31] —- of such an entity are so directly at stake in

[30] As a practical matter, "[t]he restriction on the [abortion] liberty appeared to be illusory. For the nine months of life within the womb the child was at the gravida's disposal —- with two restrictions: she must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion." J. T. Noonan, *A Private Choice* 12 (1979).

[31] Even Cyril Means, the legal counsel for the National Association for the Repeal of Abortion Laws, upon whose historical work the Court relied extensively in *Roe*, has recognized that abortion involves a "human being":

> It is "human," since it was produced by human parents, and it is a "being" since it exists. And it is "autonomous," if nothing else is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human

> the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

Thornburgh, 476 U. S. at 792 (White, J., dissenting). Because the privacy freedom removes societal restraints on the destruction of the developing life, the abortion decision is literally a matter of life and death for the unborn, with the state being essentially powerless to protect it.[32] The stakes are far less in the cases involving marriage, contraception, procreation, education and family relationships, which are either victimless or encourage normative conduct that has been historically and traditionally recognized as contributing to the social and moral order.

"Specifying what individual freedom is for makes it possible to begin to work out distinctions between liberty and license, by referring to the purpose for which the freedom is claimed." Glendon at 37. Abortion is, and always has been, a destructive and aggressive action, *i.e.* the killing of "unwanted" natural life. As Blackstone said, "[t]o *kill* a *child* in it's mother's womb, is now no murder, but a great misprison...."[33] Abortion is thus more in the

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> parents is a human *person*. Only persons are the subjects of legal rights, whether constitutional or other.

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. Law Forum 335 (1971).

What or who is a "person" in the positivistic legal sense is, of course, dependent upon recognition of that status by this Court. It failed to recognize blacks as "citizens" in *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857), although it conferred "personhood" status on corporations in *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394 (1886) without the apparent difficulty it had in *Roe* deciding whether the unborn would have the same status within the meaning of the Fourteenth Amendment.

[32] The number of abortions in the United States in recent years has averaged 1.5 million per year. The total number of abortions from the month *Roe* was decided through 1985 is 17,526,600 million. Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Perspectives 63 (1987).

[33] W. Blackstone, 4 Commentaries on the Laws of England 198 (emphasis added). In Blackstone's time, murder was a capital offense, whereas a misprison

nature of assault, conduct which has normally been subject to state regulation and control.

Marriage, contraception, procreation, child rearing and family relationships, on the other hand, involve non-destructive acts that foster longstanding and well accepted societal traditions. Deserving of greater individual freedom, they nevertheless strengthen generally desirable social bonds. In fact, procreation —- the perpetuation of life —- is antithetical to abortion. The decision not to conceive is different in kind from the destruction of life that has commenced. And marriage, child rearing and family life, which promote interdependence and commitment, are primary relationships, the foundation of community in society, whereas abortion represents isolation —- a pushing away that is frequently the product of relationships lacking permanent commitment.

Weighed against precedent, therefore, the decision in *Roe* to extend the zone of personal privacy to include termination of pregnancy represented a transposition of values. In the name of liberty, an essentially destructive, anti-social act was elevated above the power of the state to protect life. This, despite a strong common law tradition permitting the state to proscribe abortion, and an equally, if not more, important Constitutional tradition that accorded as great a value to "life" as to "liberty,"[34] be it in the text of our Founding documents, the Declaration of Independence and the Fifth Amendment to the Constitution, as well as later, in the

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was a high public offense deserving of public disapprobation and punishment. *Id.* at 119.

[34] Even taking into account the mother's "liberty" interest as a countervailing factor, abortion cannot be viewed as *necessary* to the "concept of ordered liberty." Ordered liberty is presumably liberty exercised within a societal context, taking into account important societal interests. Whatever "liberty" interest the mother may have, the American Constitutional tradition and experience bespeak an equally important and compelling societal interest in protecting "life." Never before *Roe* has this "life" interest been, nor should it hereafter be, subordinate to any license that, in the name of "liberty," permits the destruction of inchoate citizens without requiring some justification to society. "It is one thing to emancipate women from discrimination and tyranny; it is quite another to emancipate them from all human claims and obligations toward the rights of others." D. Callahan, *Abortion: Law, Choice and Morality* 82 (1970)

Fourteenth Amendment and in Article 1, Section 2 of the Missouri Constitution.[35]

The value judgments implicit in *Roe* have been studied comparatively with the abortion experience in 20 Western countries by Harvard Law Professor Mary Ann Glendon in her recent book *Abortion and Divorce in Western Law*. The comparison of *Roe* with a similar case decided differently by the Constitutional Court of the Federal Republic of Germany in 1975 on different value premises illustrates what is generally viewed to be the "singular status" of American abortion law.[36] In Professor Glendon's words, "both [the *Roe* and Western German] courts substituted a set of values for those promoted by the respective legislatures [but] the content of those values differs markedly." [37] The West German court was called upon to interpret the application of a provision of their Basic Law which provided that "Everyone has the right to life." Article 2, Paragraph 2, Sentence 1, Basic Law.[38] Interpreting this provision in the context of legislation permitting abortion, the court ruled:

> [T]he protection...of [the Basic Law] cannot be limited either to the 'completed' human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who 'lives', and *no distinction can be made here between various stages of life developing itself before*

[35] Art. 1, Sec. 2 of the Missouri Constitution states, in part, that "all persons have a natural right to life" and that "all persons are created equal." Before *Roe*, it was recognized by more than one Federal court that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Steinberg* v. *Brown*, 321 F. Supp. 741 (Three Judge Court, W. D. Ohio 1970). And there remains the simple, but eloquent conclusion of another great judge in another difficult case: "I determined to act on the side of life." *Application of the President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, 1010 (D. C. Cir. 1964) (Wright, J., In Chambers).

[36] Glendon at 24-25.

[37] *Id.* at 35.

[38] The provision was included in the Basic Law "as a reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were carried out by the National Socialist Regime as measures of state." Jonas & Gorby, *supra* note 4, at 637.

> *birth, or between unborn or born life. Everyone in the sense of [the law] is everyone living; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being.* (emphasis added).

Jonas and Gorby, *supra* note 4 at 638.

Professor Glendon comments on the values reflected in the two opinions:

> *Roe* v. *Wade*, like its predecessor, *Eisenstadt* v. *Baird*, embodies a view of society as a condition of separate autonomous individuals. The West German decision emphasizes the connections among the woman, developing life, and the larger community. Donald Kommers has therefore characterized the difference between the two decisions as one between individualistic and communitarian values. He points to *Roe*'s emphasis on the individual woman, her privacy and autonomy (not to mention Justice Douglas's equating privacy with "preferred life style"), and contrasts it with *the West German court's emphasis on the interest that society as a whole has, not only in the abortion decision itself, but in the long-range formation of beliefs and attitudes about human life*. (emphasis added).

Glendon at 35. The consequences of these value choices for the respective societies are dramatic: "Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally and economically, and where concern about population expansion overrides *both* women's liberty and fetal life [viz. China[39]]....From the comparative point of view abortion policy in the United States appears singular, not only because it requires no protection of unborn life at any stage of pregnancy, in contrast to all the other countries with which we customarily compare ourselves, but also

[39] In the People's Republic of China, abortion is encouraged as part of a population control policy which authorizes only one child per family. Glendon at 24.

because our abortion policy was not worked out in the give-and-take of the legislative process....Nowhere have the courts gone so far as has the United States Supreme Court in precluding further statutory development." *Id.* at 24-25.

The reality of *Roe* and its progeny, despite pronouncements to the contrary, is that the American woman *is* completely isolated in her privacy. As a matter of practice, she may terminate the unborn life at any time[40] for virtually any reason.[41] Not only does this not even comport with *Roe*, it is also a departure from precedent and from the values explicitly reflected in the Due Process Clause, as well as our history and tradition. It is time for this Court to reexamine *Roe* afresh in light of the standards this Court has long established for recognizing what rights are "fundamental" in the liberty protected by the Due Process Clause.

c. *Constitutionalization of an Essentially Legislative Issue*. A third problem with *Roe* is its Constitutionalization of an essentially legislative issue. The Constitution and Bill of Rights apportion powers and responsibilities to the coordinate branches of government. They also reserve powers to the states and grant rights to the people. Frequently explicit, these powers, reservations and grants often reflect values, some explicit, some implicit. However, much of the Constitutional language is nevertheless broadly worded. The Framers thus left to this Court, and also to the coordinate branches, the states and the people, through the practice and life of the Nation, the task of determining much of its meaning and reach.

The Federal courts have been particularly active in providing guidance concerning the interstices of the Due Process Clause of

[40] Koop, *The Slide to Auschwitz*, in R. Reagan, *Abortion and the Conscience of the Nation*, 41, 45 (1984); Noonan, *supra* note 30 at 12; Hentoff, *supra* note 9; Will, *supra* note 11; *Thornburgh*, 476 U. S. at 783-784 (Burger, C. J., dissenting).

[41] According to a recent survey commissioned by the Alan Guttmacher Institute of 1900 women who obtained an abortion, the reasons for abortion were variously financial (21%); relationship problems (12%); not ready for responsibility (32%); already enough children (8%); would involve change in life style (16%); fetus has health problem (3%); mother has health problem (3%); rape or incest (1%); threat to life of the mother (none listed); other (3%). Torres and Forrest, *Why Do Women Have Abortions*, 20 Family Planning Perspectives 169 July - Aug. 1988 .

the Fourteenth Amendment. Principled standards of adjudication, however, have not prevented this Court from ranging far afield, even in our recent past. *See Plessy* v. *Ferguson*, 163 U. S. 637 (1896), and *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or *Lochner* v. *New York*, 198 U. S. 45 (1905), and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). These cases make clear that the recognition of immutable and neutral principles does not immunize the judiciary from changing perceptions over time. The resulting changes in Constitutional doctrine reflect, no doubt, broad social and political currents. Notwithstanding the forces of change, the basic social contract between the people and their government —-reflected in the Constitutional arrangement —- is essentially democratic, with the judiciary exercising limited powers of interpretation of broad Constitutional mandates.

In recognition of Constitutional restraints on its decision-making function, this Court has imposed its own self-constraints on its power to "constitutionalize" issues. As previously mentioned, it has adopted a rule of lenity in Due Process litigation, approving most governmental action that is rationally related to a legitimate governmental interest.[42] State action affecting "fundamental" rights is subjected to strict scrutiny, but only in certain limited classes of cases involving "fundamental" rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *See* discussion at pages 7-8, *supra*.

> [The] utility [of these standards] lies in their effort to identify some source of constitutional value that reflects not the philosophical predictions of individual judges, but basic choices made by the people themselves in constituting their system of government —- *the balance struck by this country* —- and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both liberty and democratic order.

Thornburgh, 476 U. S. at 791-792 (White, J., dissenting).

[42] *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

The problem with *Roe* is that the balance struck by the Court on abortion departs from the balance struck by the country. As Dean Ely has written, "[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem at issue, any general value derivable from the provisions they included, or the nation's governmental structure."[43] And it is clear that "[t]he problem of abortion regulation in the United States is immeasurably aggravated...by the fact that the extreme position of the Supreme Court in abortion cases represents the views of only a minority of Americans." Glendon at 47.

Roe displayed an extraordinary insensitivity to commonly understood institutional and decisional constraints. Its departure from these constraints was brought out in the *Akron* case where the United States argued that institutional factors required a standard of greater deference to the legislative judgment in matters of abortion. *Brief of the United States As Amicus Curiae in Support of Appellants*. The argument was that legislatures possess "superior fact-finding capability" and freedom of inquiry, factors important for complex, controversial issues. *Id*. at 12. Moreover, legislatures "must periodically account to the people," thereby rendering government more accountable on such issues. *Id*. Finally, "the quality of the lawmaking product is enhanced by leaving the issued exposed for a time to the legislative process and the public pressures that are brought to bear on the process." *Id*. at 13.[44] Thus, it was argued, "in those cases where the issue might be fairly characterized as involving either a choice among competing policy alternatives, or a pronouncement of constitutional principle, the presumption should favor treating the issue as one of policy choice." *Id*. at 15.

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[43] Ely, *supra* note 18, at 936.

[44] Solicitor General Rex E. Lee went on to point out the dangers and problems that arise when the legislative process is short-circuited:

> To whatever extent the issues are constitutionalized, they are thereby removed from this refining process —- the process by which lawmakers learn through experimentation and correction. Constitutionalization eliminates all but one of the competing points of view as acceptable alternatives; the issue is removed from the realm of public debate and decisionmaking.

Id. at 14-15.

In addition to the problem posed by the Court's removing abortion from the legislative agenda, the balance of the national debate on abortion is characterized largely by legislative, rather than constitutional considerations, i.e., the Who, What, When, Where, and Why of abortion. The debate centers on these issues because abortion has never been intertwined with Constitutional values and principles. To quote General Lee, abortion regulation "is an unfair burden to impose upon any Constitution. It is especially unfair to impose it on a Constitution that contains no mention of the words 'privacy' or 'abortion' and that can be extended to those matters only by piecing together a combination of shadows from a variety of explicit guarantees contained in the document." *Brief*, at 19.

d. *Summary*. To summarize, the Court's extension of the privacy right to abortion was extreme. It declared a right not clearly rooted in any constitutional text, history or tradition. It subordinated the value of unborn life to "preferred life styles" and other short-range values characteristic of the consumption society [convenience, family planning, economics, dislike of children, embarrassment of illegitimacy, etc.[45]] and provided little or no societal protection to unborn life. And, it removed the authority of the people to govern, preventing society through its elected representatives from determining what mix of interdependent and individualistic value preferences should be brought to bear on the subject. *Roe* v. *Wade* was, therefore, an imprudent departure from the mainstream of our Constitutional tradition and an unwarranted usurpation of power in the Constitutional system on the issue of abortion. Like *Lochner* v. *New York*, 198 U. S. 40 (1905), *Roe* v. *Wade* was a judicial misadventure that should now be "allowed a deserved repose." *Adkins* v. *Children's Hospital*, 261 U. S. 525, 570 (1923) (Holmes, J., dissenting).

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[45] *Roe*, 410 U. S. at 221 (White, J., dissenting).

III. ASSUMING FOR PURPOSES OF ARGUMENT THAT THE ABORTION DECISION INVOLVES A FUNDAMENTAL RIGHT, THE STATE'S INTEREST IN PROTECTING POTENTIAL LIFE IS COMPELLING THROUGHOUT PREGNANCY AND SHOULD BE BALANCED AGAINST THAT RIGHT UNDER A TWO-TIERED STRICT SCRUTINY/RATIONAL RELATIONSHIP TEST, DEPENDING UPON THE NATURE OF THE STATE ACTION.

Even if the decision of a woman to terminate pregnancy were to remain recognized as a fundamental right, the right is nevertheless clearly a limited one and not absolute. *Roe*, 410 U. S. at 159. "[T]he right in *Roe* v. *Wade* can be understood only by considering *both* the woman's interest and the nature of the State's interference with it." *Maher* v. *Roe*, 432 U. S. 464, 473 (1977) (emphasis added). *Roe* attempted to structure a sort of balance of these interests by segmenting the state's regulatory power into trimesters, coincidental with the then prevailing medical technology. The state's interests in "maternal health" and "potential life," thus, became more compelling as the unborn child reached viability.

In the most recent abortion cases, *Akron* and *Thornburgh*, the Court has adhered to the *Roe* trimester/viability approach. It has also continued to show extraordinary sensitivity to protecting the sanctity of the doctor-patient relationship in abortion and has routinely invalidated regulatory statutes that purportedly depart from "accepted medical practice." The combined effect of these factors has made it very difficult for states to exercise any regulation of abortion or abortion procedures.

The Court's strict and highly structured approach has been criticized on two grounds. First, it subjects legal standards to everchanging medical technology and statistics "whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus."[46] Second, logic

[46] A. Cox, *supra* note 6, at 113-114. The problems of basing Constitutional doctrine on rapidly changing medical technology may be seen in the shifting medical standards discussed in Justice Powell's majority opinion, and in Justice O'Connor's penetrating dissent, in the *Akron* case. 462 U. S. 416, 434-439,

and reason dictate that "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Akron*, 462 U. S. at 461 (O'Connor, J. dissenting). The state has a compelling governmental interest in "protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent upon the probability that the fetus may be capable of surviving outside the womb at any given point of its development.... *Thornburgh*, 476 U. S. at 795 (White, J. dissenting). Thus, to condition the weight of the state interest on trimesters and viability "mistakes a definition for a syllogism."[47] And though trimesters and viability may provide the appearance of rationality, why this particular regime and set of rules, as opposed to some other, is mandated by the Constitution is not readily discernable. Nor is it clear why it could not be supplanted by different findings of state or national legislatures.

The problems endemic with *Roe* suggest that the process of balancing the limited "fundamental" right to abortion with the compelling state interest in potential life is in need of reassessment and adjustment. This should include consideration of other state interests that have received little attention from this Court, but which are implicit in the state's "strong and legitimate interest in encouraging normal childbirth,"[48] — namely, family integrity[49]

454-461. *See also*, Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L. J. 639, 697 (1986); Callahan, *How Technology is Reframing the Abortion Debate*, 16 Hastings Center Report 33 (1986).

[47] Ely, *supra* note 18, at 924, *cited in Thornburgh*, 476 U. S. at 795 (White, J. dissenting).

[48] *Maher* v. *Doe*, 432, U. S. 464, 478 (1977).

[49] *H.L.* v. *Matheson*, 450 U. S. 398, 411 (1981) (familial integrity); *see also* Peirce, *BRI v. Leonard: The Role of the Courts in Preserving Family Integrity*, 23 N. Eng. L. Rev. 185 (1988); Mattinson, *The Effects of Abortion on a Marriage* in Abortion: Medical Progress and Social Implications, 1985 Ciba Foundation Symposium 165-177; McAll & Wilson, *Ritual Mourning for Unresolved Grief*, 80 Southern Medical Journal 817 (1987); Furlong & Black, *Pregnancy Termination for Genetic Indications: The Impact on Families*, 10 Social Work in Health Care 1 (1984).

Several studies show that abortion may destroy or stigmatize male-female relationships. Shostak, *Abortion As Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (1979); Milling, *The Men Who Wait*, Woman's Life, 48-49, 69-71, April 1975 (70% failure); Patterson, *Whose Freedom of Choice?*,

and parental rights.[50] There is also much speculation, but apparently no definitive research, about "post abortion syndrome" and other psychological problems associated with abortion.[51] These problems appear to have credence and may, after due investigation, provide yet another perspective on "maternal health" requiring restriction of the abortion right.

Justice O'Connor's suggested alternative to the *Roe* standard, first expressed in the *Akron* case and further elaborated upon in her dissent in the *Thornburgh* case, would hold that in cases where particular state action poses an "absolute obstacle" or a "severe limitation" on the abortion right, the Court must determine whether the state's compelling interest "unduly burdens" the

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46 The Progressive 42, April 1982; Mithers, *Abortion: Are Men There When Women Need Them Most?*, Mademoiselle at 231, April 1981; Weidner & Griffitt, *Abortion as a Stigma: In the Eyes of the Beholder*, 18 Journal of Research and Personality 359 (1984).

[50] RSMo. 1.205.1(3) (1986), which was not challenged by appellees below, provides that "[t]he natural parents of unborn children have protectable interests in the life, health and well-being of their unborn children." *See also*, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1926); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Parham* v. *J.R.*, 442 U. S. 584 (1979).

[51] Surgeon General C. Everett Koop has recently indicated that scientific research is not definitive as to the existence of clinically proven psychological harm to women having abortions.

Notwithstanding the Surgeon General's failure to discern empirically based harm, it appears likely that clinical studies will demonstrate psychological after-affects. In a Februarty 5, 1989, article in The Washington Post, Colman McCarthy writes that scientific studies abroad indicate that "[t]he incidence of serious, permanent psychiatric aftermath [from abortion] is variously reported as between 9 and 59 percent." He also quotes one Washington, D. C., abortionist, Dr. Julius Fogel, a psychiatrist who has performed and observed the effects of 20,000 abortions, as saying:

> There is no question about the emotional grief and mourning following an abortion....[A] psychological price is paid. I can't say exactly what. It may be alienation, it may be a pushing away from human warmth, perhaps a hardening of the maternal instinct. Something happens on the deeper levels of a woman's consciousness when she destroys a pregnancy. I know that as a psychiatrist.

McCarthy, *The Real Anguish of Abortions*, The Washington Post, February 5, 1989, F2.

abortion right. *Harris* v. *McRae*, 448 U. S. 297, 314 (1980); *Maher* v. *Roe*, 432 U. S. 464, 473 (1977); *Beal* v. *Doe*, 432 U. S. 438, 446 (1977); and *Belotti* v. *Baird*, 428 U. S. 132, 147 (1976); *see also*, *Akron*, 462 U. S. at 461-466 (O'Connor, J., dissenting) and *Thornburgh*, 476 U. S. at 828-830 (O'Connor, J. dissenting). In other cases, where less restrictive state regulation of abortion does not impose an absolute obstacle to abortion, the particular state action must only manifest a rational relationship to a legitimate state objective. This more traditional two-tiered analysis limits strict judicial scrutiny of legislative action affecting abortion only to those cases which, in effect, put an absolute ban on a woman's ability to exercise her limited right. It is a more balanced approach than the Court's current standards and recognizes a significant and appropriate role for the legislative branch in the promulgation of societal standards on this issue.

This slight shift of analytical method is not only grounded in precedent and sound as a matter of logic, it also reinforces important values. As Professor Glendon urges in her study of the abortion laws of 20 Western countries,

> [p]erhaps it is fitting that abortion law at present should mirror our wonder as well as our ignorance about the mystery of life, our compassion for women who may be frightened and lonely in the face of a major crisis, and our instinctive uneasiness at terminating a form of innocent human life, whether we call it a fetus, an embryo, a baby or an unborn child.

Glendon at 46. Removing a significant amount of abortion regulation from strict constitutional scrutiny comports far more with American history and tradition and acknowledges far better than the present jurisprudence the proper role that the courts, the legislatures, the people and the affected parties all have to contribute in resolving this issue.

IV. THE MISSOURI STATUTE DOES NOT POSE ANY ABSOLUTE OBSTACLE OR SEVERE RESTRICTION ON ABORTION AND SHOULD THEREFORE BE UPHELD AS RATIONALLY RELATED TO THE STATE'S INTEREST IN PROTECTING THE UNBORN.

In the context of the present case, it is respectfully submitted that none of the statutes promulgated by the State of Missouri poses an "absolute obstacle" or "severe limitation" on the abortion right. There are no criminal or coercive sanctions.[52] There is no "absolute veto" of any woman's abortion decision. And the state regulation does not "frustrate" or "heavily burden" the exercise of any constitutional rights. Absent such intrusive or proscriptive measures, the State of Missouri's statutory requirements need not be subjected to strict scrutiny, but must nevertheless demonstrate a rational relationship to legitimate state objectives.

a. *Viability Testing*. The State of Missouri requires a viability assessment for 20+ week pregnancies. Physicians are required to assess viability of the unborn child "using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar conditions." This viability assessment was upheld by the Court of Appeals below; however, the Court invalidated a related testing requirement requiring the physician to perform, in connection with the viability assessment, "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child."

This testing requirement does not pose an "absolute obstacle" to abortion. The burden of testing is on the physician, not the woman. Any burden of cost, of course, rests with the woman, but neither the burden of testing or cost can be said to pose an absolute obstacle to abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977).

Missouri is also *not* proclaiming *any single factor* as a measure of viability, or forcing any particular test, or requiring any particular findings. *Colautti* v. *Franklin*, 439 U. S. 379, 389 (1979).

[52] *See Jurisdictional Statement* at 25.

Nor is it infringing upon the medical discretion of the physician. *Id*. The physician is charged, instead, with using his normal standard of professional care and skill to assess viability and is required to undertake only such tests as are *necessary* concerning gestational age, weight and lung maturity. Given the medical uncertainty of determining how long toward term a pregnancy is, and given rapidly changing technological capabilities whereby viability has moved from 28 weeks to 24 weeks, and in some reported instances, 22 weeks,[53] it is not unreasonable for a state to require physicians, in connection with an assessment of viability, to undertake necessary tests to provide findings as to gestational age, weight and lung maturity.

b. *Missouri's Declaration of State Policy Concerning the Unborn*. This may be the first time in history for this Court to invalidate legislative findings which have virtually no direct substantive impact on the facts or law of the case. It is difficult to see why the Court of Appeals found the declaration constitutionally damning. The findings merely declare the State of Missouri's interest in encouraging normal childbirth, protecting potential life and protecting the common law interests of natural parents of the unborn. These findings, as well as the laws of Missouri, are made expressly subject to the United States Constitution *and* the decisional interpretations of this Court.

Legislation has been previously upheld by this Court if it furthers a state's interest in making childbirth "a more attractive alternative, thereby influencing the woman's decision," provided it "places no obstacles —- absolute or otherwise —- in the pregnant woman's path to an abortion." *Maher* v. *Roe*, 432 U. S. 464, 474 (1977). Instead of applying this analysis, the Court of Appeals read the Missouri findings to violate *Roe*'s admonition, repeated in *Akron*, that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[54] The *Akron* statement, however, was in the context of a mandatory requirement that information be furnished to a woman prior to her abortion. That is not the case here. The State's theory of life is not being foisted

[53] *See Akron*, 462 U. S. at 457, n.5 and related text. (O'Connor, J. dissenting).
[54] *Akron*, 462 U. S. at 444, *cited* by the Court of Appeals, 851 F.2d at 1075.

upon anyone. Here, the less restrictive *Maher* rule should govern since the legislative findings are not linked to any affirmative *action* by the State that poses an obstacle to abortion. For that reason, even under the stringent *Akron* and *Thornburgh* precedents, the Missouri findings should not have been struck down, if only because of the obviously valid arguments that they are intended to and do affect substantively the common and statutory law of Missouri in the areas of tort, criminal and property law.[55]

c. *Public Funds, Employees and Facilities*. The State of Missouri has also decided that it will not permit funds to be expended to encourage or counsel persons desiring to have abortions, except those where the life of the mother is at risk. It also does not permit public employees to perform abortions, or permit abortions to be performed in public facilities.

In *Maher* v. *Doe*, 432 U. S. 464, 474 (1977), this Court held that the freedom of a woman to terminate her pregnancy "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Accordingly, the State of Connecticut was not required to pay for "nontherapeutic" abortions even though it subsidized pregnancy and childbirth benefits under its state welfare program. The Court explained that there is "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id*. at 475. Likewise, in *Harris* v. *McRae*, 448 U. S. 297 (1980), the Federal government was permitted to engage in "unequal subsidization of abortion and other medical services in order to encourage alternate activity deemed in the public interest." *Id*. at 315. Finally, in *Poelker* v. *Doe*, 432 U. S. 519, 521 (1977), this Court ruled that the *prohibition* of abortions in the city-owned hospitals of St. Louis was "identical in principle" to the refusal to provide subsidies for abortion, while providing subsidies for childbirth.

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[55] Unborn life is commonly afforded protection by the States in other areas of the law, including inheritance, insurance, welfare, civil rights, public health and child abuse. *See* Callahan, *How Technology is Reframing the Abortion Debate*, 16 *Hastings Center Report* 33, 40 (1986); Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 252-254.

It is difficult to see how and why *state subsidization* of abortions would be Constitutionally different from *state prohibitions* on funding encouragement or counseling of abortions or on the performance of abortions by state employees in state facilities. When a state withdraws a subsidy, it is denying the *means* for abortions by refusing to pay for them. When it prohibits state performed abortions in state facilities, it is simply denying abortion services *in kind* by refusing to provide doctors or facilities to do them. How can it be that a state *can* refuse to fund abortions, but *cannot* prohibit state employees (whom it funds) from performing abortions on state property (which it funds)?

The Court of Appeals attempted to describe the difference as one between *refusing to pay* for abortions, as opposed to *denying access* to abortion. However, if the state employee/facility abortion ban were effective, there would be only slightly fewer places to obtain abortions, but that does not significantly burden a woman's choice to have the abortion or cause her any more harm than failing to provide her a subsidy to obtain her abortion. As the Court said in the *Maher* case, "The indigency that may make it difficult —- and in some cases, perhaps, impossible —- for some women to have abortions is neither created nor in any way affected by the... regulation." *Maher* v. *Roe*, 432 U. S. at 474. And to require the state to use its facilities for abortions, or its employees to perform them or fund activities that encourage or counsel with respect to them, is nothing short of an abuse of judicial power. This is just the type of reasoning that *Harris* rejected:

> It cannot be that because government may not prohibit the use of contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479, or prevent parents from sending their child to a private school, *Pierce* v. *Society of Sisters*, 268 U. S. 510, government, therefore, has an *affirmative* constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools....Nothing in the Due Process Clause supports such an extraordinary result. (emphasis added).

Harris, 448 U. S. at 318. It is likewise preposterous to declare, in effect, an affirmative Constitutional mandate requiring states to

fund activities that encourage or counsel abortion or to require state employees to perform abortions in state facilities.

In the present case, women who, but for the Missouri statute, would have otherwise received counseling or abortions from state employees in state facilities, are not precluded from obtaining an abortion or otherwise "unduly burdened" in exercising choice in the matter. Abortions and counseling may readily be obtained in the private sector or from other governmental agencies with the assistance of persons other than employees of the State of Missouri. As for the so-called "state-imposed blackout" on abortion information, this rhetorical flourish of the Court of Appeals mistakenly assumes that the State of Missouri is the fount of all information and wisdom on abortion, when in reality, a woman can just as easily, or perhaps more easily, obtain information in the private sector on how and where to abort.

Justice Oliver Wendell Holmes wrote that the sovereign's "right to absolutely exclude all right to use [public property] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Davis* v. *Commonwealth*, 167 U. S. 43, 48 (1897), *affirming Commonwealth* v. *Davis*, 162 Mass. 510 (1895). Hopefully, this maxim, as with so many other conventions which have been reinterpreted and given new meaning in an abortion context, will not now also be given a modern interpretation, in effect, to prevent heretofore sovereign governments from directing their employees and controlling the use of their properties and funds. There is no constitutional requirement, nor should there be, for states to pay state-employed physicians in state-owned facilities to counsel, encourage or perform abortions. To suggest otherwise is nothing short of "nonsensical"[56] and yet another

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[56] The word is Justice White's employed in a similar a context criticizing the stereotypical, but untenable, premise of *Roe* and its progeny, of the physician as fatherly counselor. *Thornburgh*, 476 U. S. at 802 (White, J. dissenting). The reality is that "[a]t least six out of ten abortions performed in the United States are performed in freestanding clinics. Doctors in such clinics typically have a direct financial interest in seeing that abortions are performed as rapidly and efficiently as possible. Frequently, the only time a doctor sees the patient is when she is on the operating table awaiting the procedure." Wood and Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978

indication of the inherent distortion that *Roe*, if left to its logical outcome, would otherwise work in American jurisprudence.

CONCLUSION

On more than one occasion in the recent past, law has been the medium, and lawyers the agents, responsible for masking one class of humanity and preventing it from being visible.[57] Not only has *Roe* made its own contribution in this area, it has brought an unprecedented "distortion in the Court's constitutional jurisprudence"[58] and has had "an institutionally debilitating effect,"[59] on the business of the Court. It has also been a source of much social instability and conflict.

Even now, in homes, churches, police stations, schools, universities, law schools, legislatures, newspapers, magazines, on radio and television, and on the streets in front of abortion clinics, the legitimacy of *Roe* v. *Wade* is widely questioned and challenged. Sadly, with all due respect to this great Court, it is now starting to be heard across the land in disrespect for the law generally. It is important that the questioning stop. That can best be accomplished by admitting this Court's error in *Roe*, and taking action to overrule it or, at the very least, to confine *Roe* v. *Wade* to its narrow holding.

The judgment of the Court of Appeals should be reversed, and the case remanded with instructions to vacate the judgment

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B.Y.U.L. Rev. 231,244. Abortion practice is "fast-track, quick-fix [and] volume-for-profit." Wardle, *supra* note 55, at 244.

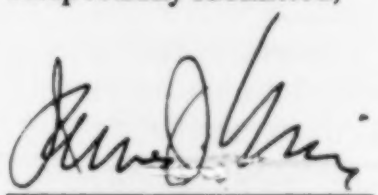
[57] This is a paraphrase of then Professor, now Circuit Judge John T. Noonan. *See* Noonan, *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668, 669, 675 (1984). *See also*, *Scott* v. *Sanford*, 60 U. S. (19 How.) 393 (1857) (blacks are not citizens); *United States ex rel. Standing Bear* v. *Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (Indians are not persons); *Cf. Korematsu* v. *United States*, 323 U. S. 283 (1944) (loss of citizenship and exclusion of Japanese citizens from West Coast war area); and Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39-47 (July 4, 1949) (Describing how the Nazi Holocaust began with physicians and their concept of "life not worthy to be lived" and expanded to reach the chronically sick, the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans.)

[58] *Thornburgh*, 476 U. S. at 814 (O'Connor, J., dissenting).

[59] *Id.*

and injunction as to those portions of the statute that were the subject of the appeal.
February 23, 1989.

Respectfully submitted,



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BRIEF

No. 88-605

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND THE NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether, under the United States Constitution, the Missouri State Legislature may determine the point at which human life begins and enact legislation protecting human life from that point.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND THE NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It is composed of approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod

holds as a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that compassionate alternatives to abortion should be offered to all persons confronted with unwanted pregnancies.

The Lutheran Church-Missouri Synod initiated this brief and is its principal proponent. It is joined by The Christian Life Commission of The Southern Baptist Convention and The National Association of Evangelicals.

The Christian Life Commission of The Southern Baptist Convention is the agency of the Convention charged by the Convention with assisting Southern Baptists in understanding the moral demands of the Christian faith and helping Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention, the nation's largest Protestant denomination, with 37,000 member churches and 14.8 million church members, has assigned the Christian Life Commission of The Southern Baptist Convention the specific task of addressing issues such as abortion.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, including 50,000 churches and forty-seven member denominations. It serves a constituency of 10 to 15 million people. The National Association of Evangelicals' profound interest in this case stems from its position that, based upon Scripture, human life begins at conception and deserves protection against destruction from its earliest stage.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Appellants.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents to the Court a state statute regulating abortion, expressly predicated upon a legislative intent of protecting the state's interest in life from the moment of conception. The statute includes a provision stating when life begins. Accordingly, it is a significant opportunity for the Court to review *Roe v. Wade*, 410 U.S. 113 (1973), as it affects a state legislature's right to determine when life begins and to enact statutes prohibiting or limiting abortions. In this manner it distinguishes itself from state statutes motivated principally by the protection of maternal health.

This case, by focusing on a state statute that is predicated upon the state's interest in protecting unborn life, should allow reconsideration of the holding in *Roe v. Wade* that a state does not have a compelling interest in protecting prenatal life until the fetus attains the point of viability. The approximately 30 million Americans represented by the *amici* believe it is time for that holding to be reconsidered.

Section A. of this brief discusses the past decisions of this Court establishing principles that certain matters of law involving deeply divided views of the people, and matters of fact that are not easily proven, should be deferred to the legislatures. The critical question of when life begins, such that it should be protected by state law, should be decided by the legislatures.

Section B. argues that *Roe v. Wade*, in holding that the state's interest in protecting unborn life does not become compelling until the fetus attains viability, should be reexamined. Pregnancies that reach viability show only a slightly greater likelihood of reaching full term and live childbirth than pregnancies at any other stage. The state's compelling interest in protecting prenatal human life arises if it is reasonably likely that the prenatal life will come to full term and reach childbirth.

Section C. discusses the various alternatives to abortion available to women with unwanted pregnancies. Weighed against the reasonableness and availability of such alternatives, the termination of human life, even at its earliest stages, is unjustified.

Section D. of the brief states that deeply held religious beliefs in the sanctity of human life from the moment of conception may coincide with state laws prohibiting abortion. Such laws do not violate the First Amendment prohibition upon the establishment of religion.

ARGUMENT

THE STATE LEGISLATIVELY MAY DETERMINE THAT ITS PROTECTABLE INTEREST IN HUMAN LIFE BEGINS AT CONCEPTION AND FROM THAT POINT MAY PROHIBIT ABORTION.

This case squarely presents this Court with the question of whether, under the United States Constitution, a state legislatively may determine when its protectable interest in human life begins, and, predicated upon that interest in human life, thereafter regulate abortion. Missouri, in prefacing its abortion law with a statement of the will of its people that human life begins at conception, reveals its intent to enact a statute, Mo. Rev. Stat. §§ 1.205; 188.010-.220 (1986), to protect the interest of the state in human life before birth, as distinguished from a statute predicated principally upon protection of the health and welfare of the mother.

The U.S. District Court decision in this case, *Reproductive Health Services v. Webster*, 662 F. Supp. 407 (W.D. Mo. 1987), and Court of Appeals decision, *Reproductive Health Service v. Webster*, 851 F.2d 1071 (8th Cir. 1988), have held that the expressions of legislative intent in the Missouri statute that "the life of each human being begins at conception" and that "unborn children have a protectable interest in life, health and

well-being" are unconstitutional. These holdings should be reversed. The holdings of the U.S. District Court and Court of Appeals are, of course, ultimately based upon *Roe v. Wade*, 410 U.S. 113 (1973). Much of this brief, therefore, addresses that case and the need for this Court to re-address certain of its holdings.

A. A State Legislature, and Not This Court, Is the Proper Body to Determine Whether the State Has a Protectable Interest in the Life of an Unborn Human Being and to Create Legislation Protecting That Interest.

The legislature of each state, rather than the United States Supreme Court, is the proper body to determine whether each state has a protectable interest in the life of an unborn human being and to weigh that interest against the rights of the mother. The police power is broad enough to encompass the abortion issue and is reserved to the states and vested in the state legislatures. The state legislature is a superior body to weigh the competing interests of the mother and unborn child, find facts relative to when life begins, and promulgate legislation that protects the rights of all persons. While the acts of the legislature are subject to judicial review, this Court should recognize the ultimate constitutional authority of the legislature in factually determining when life begins and when it should be protected against abortion. If a legislature reasonably determines that human life exists, no judicial or constitutional prohibition of that determination is appropriate, unless the lives of other persons are placed in jeopardy.

The police power gives the states broad powers to regulate the relative rights and duties of their citizens, to protect the public health, morals, and safety of their citizens, and to promote the common good. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954); *House v. Mayes*, 219 U.S. 270, 282 (1911); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1904). The scope of police powers

is broad, allowing state legislatures to do everything essential for the public safety, health, and morals. *Lawton v. Steele*, 152 U.S. 133, 136 (1894). The legislature may exercise its police power whenever the public interests demand it. *Id.*

The state legislature is vested with the discretion to determine what the interests of the public require and what measures are necessary for the protection of those interests. *Id.* (*citing Barbier v. Connolly*, 113 U.S. 27 (1884)). Therefore, not only does the Constitution reserve the police power to the states, but the Supreme Court concedes that only the state legislatures are vested with the authority to regulate in the police power area.

Supreme Court precedent establishes that permissible state interests include public morals, health, and life. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (Upholding a Georgia statute that enjoined the showing of two obscene films, based on the state's right to maintain a decent society); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (Upholding a New York statute that denied licenses to doctors convicted of a crime, based on the plenary power of states to establish standards for the practice of health); *Maher v. Roe*, 432 U.S. 464, 478 (1977) (Upholding a Connecticut statute that denied abortion funding to indigent women based on the state's unquestionably "strong and legitimate interest in encouraging normal child birth," which exists throughout the pregnancy). Any one of these three permissible state interests may be the basis for an anti-abortion statute, so the state has the *power* to legislate in this area.

The Missouri legislature acted within the scope of its police power in enacting a statute stating that life begins at conception. Nothing in the Constitution prohibits the state from reaching the factual conclusion that life begins at conception and codifying it. The Supreme

Court generally does not require legislatures to prove their assumptions or that the means which the legislature chooses will achieve only the ends which the legislature hopes to obtain. Reviewing courts "do not demand of legislatures 'scientifically certain criteria of legislation.'" *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968) (*citing Noble State Bank v. Haskel*, 219 U.S. 104, 110 (1911)). Legislatures properly may rely on scientifically unprovable assumptions when protecting the broad social interest in order and morality. *Paris Adult Treatre I v. Slaton*, 413 U.S. at 60.

The difficult determination of when human life begins depends upon the adequate collection and analysis of facts. Legislatures are better suited than courts to investigate factual matters because they "ha[ve] superior fact-finding capabilit[ies]." Brief for the United States as Amicus Curiae in Support of Petitioners at 12, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). A legislator "is not limited either by the case or controversy requirement or by the decision of legal counsel in a particular case to construct the record in a particular way. The legislator is not only free to inquire into any relevant facts, but can carry that inquiry wherever the general public interest, rather than the interest of private litigants, might indicate." *Id.* Overall, "legislatures are better suited to make the necessary factual judgments in this area." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at 458 (O'Connor, J., dissenting).

When the Supreme Court declared the Texas statute unconstitutional in *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court violated its own precedent defining its role relative to the sovereignty of the state legislature when reviewing an exercise of police power. The cardinal rule of the Supreme Court when reviewing state statutes is that the judges on the Court "do not sit as a super-legislature to determine the wisdom, need, and pro-

priety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The Supreme Court failed to observe this standard in *Roe v. Wade*, and, in essence, violated the federal separation of powers, when the Court created a federal abortion "statute" after, in effect, declaring all state anti-abortion statutes unconstitutional.

The regulation of abortion demands the resolution of conflicts of value, and assessments of the competing worth of the lives of the unborn human being and of the mother, all very sensitive issues that involve differences of feeling. As Mr. Justice Frankfurter wrote, "Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for these persons by the people," the legislature. *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 557 (1949). In further support of this principle, Justice White has stated: "Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 796 (1986) (White, J., dissenting).

The majority in *Roe v. Wade* ignored other precedent that guides the Court in its limited review of the police power. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court held that Maryland's method of administering a public welfare program was a valid exercise of the police power. Rather than intrude on the province of the legislature, the Court stated that it is not the Court's role to determine whether a state statute is wise, whether it best fulfills the relevant social and economic objectives that a state might ideally espouse, or whether a more

just and humane system could be devised. *Id.* at 487. The Supreme Court acted impermissibly under its own guidelines when, in *Roe v. Wade*, it determined that the Texas abortion statute was unwise, that states must permit abortions, and that the Court could devise a better system.

When the Supreme Court concluded that the state abortion statute in *Roe v. Wade* was unconstitutional, it intruded not only on the sovereignty of the state legislature to determine state interests, but also upon the power and right of citizens to voice their opinions by electing state officials who respond to their needs. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.). "We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch" *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

Chief Justice Waite said, in *Munn v. Illinois*, 94 U.S. 113, 134 (1877), "For protection against abuses by legislatures the people must resort to the polls, not to the courts." If a state legislature passes an abortion statute that is based on state interests not held by a majority of the people, it is the province of the citizens to elect new representatives. The Supreme Court is to permit the regulation to stand until legislatively repealed, rather than to determine that the state interest is not proper. As Mr. Justice Stewart said in his dissent in *Griswold*, "That is the constitutional way to take this law off the books." *Griswold v. Connecticut*, 381 U.S. 479, 531 (1965) (Stewart, J., dissenting).

The Supreme Court should not second-guess state officials charged with the responsibility of exercising the police power. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). As the Court has said: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). The Court also stated that it should resist the temptation "to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* at 195.

The Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), justified its ruling on the Texas statute by stating that the statute implicated a fundamental right. However, contrary to the conclusions on which the Court relied in *Roe v. Wade*, no fundamental right to an abortion or to choose an abortion exists in the Constitution, expressly or in the due process clause of the Fourteenth Amendment. The *Roe* court based the right to an abortion on the right of privacy established in its prior opinions. While we acknowledge the right of privacy, we submit that no "privacy" right supports the abortion of an unborn human being, unless the lives of other persons are endangered.

The Supreme Court's analysis in *Roe* of the right to an abortion is inconsistent with the Court's most recent opinion dealing with a fundamental right of privacy. The Supreme Court, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), upheld a Georgia statute prohibiting sodomy, based on the Court's test that any fundamental right, including the right of privacy, must be a right "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194. Applying this test, the Court held that the right of privacy does not protect homosexual sodomy. It is doubtful that the *Bowers* definition would extend the right of privacy to include abortion for the same reason this Court held that it did not extend to sodomy: because aborting an unborn human being at *any* stage in a pregnancy is not "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty." For the Court to hold otherwise creates an incongruity unsupported by this most recent Supreme Court precedent regarding the right of privacy.

Based on the foregoing discussion, we believe that under correct constitutional standards the state legislature is the body constitutionally empowered to decide when life begins and thereafter to act to protect that life.

B. *Roe v. Wade* Is in Error in Holding That a State's Interest in Protecting Human Life Does Not Become Compelling Until a Fetus Attains Viability.

This section of the brief focuses on that portion of the *Roe* opinion that addresses the issue of whether the state has a compelling interest in regulating abortion from conception as a result of its interest in protecting prenatal human life. It does not address those portions of the *Roe* opinion that deal with whether a fetus has a right to life under the Fourteenth Amendment, or whether the interest of the state in protecting the health and well-being of the mother is sufficiently compelling to permit it to prohibit abortion. Instead we address, in the setting of the Missouri statute at issue in this case, the issue of whether the state's interest in preserving prenatal human life permits it to prohibit abortion from the earliest stages of life.

The majority opinion in *Roe*, without analytic support and reason, concludes that a compelling state interest in prenatal human life does not arise until the fetus attains

viability. 410 U.S. at 163. The opinion, as it applies to the question of the interest of the state in protecting human life prior to birth, proceeds along the following line of thought:

> 1. Every woman has a right of privacy derived from the Fourteenth Amendment concept of personal liberty and restrictions upon state action. *Id.* at 153.
>
> 2. The right of privacy of the pregnant mother is a "fundamental" right that includes the abortion decision. *Id.*
>
> 3. State regulation limiting the pregnant mother's decision to abort the fetus is a limitation on a "fundamental" constitutional right and, therefore, is justified only by a "compelling interest" of the state. *Id.* at 155.
>
> 4. The state has an interest in protecting the "potential" of human life during pregnancy. That interest grows in "substantiality" during the term of the pregnancy and, "at a point during pregnancy, . . . becomes 'compelling.'" *Id.* at 162-163.
>
> 5. The compelling point of interest of the state is at viability of the fetus, because, "the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Id.* at 163.

The point must be made, when discussing the portion of the *Roe* opinion that deals with the state's interest in the "potential" for human life, that the Court could not reach an opinion based upon precedent, or analogy to precedent, from other areas of the law. *Roe* was a case that could not be decided by such traditional methods and necessarily depended upon an analysis of the issue by reasoning through the difficult facts surrounding the question of state protection of human life prior to birth. This difficulty is acknowledged in the opinion itself. *Id.* at 159-161.

The *Roe* opinion states at several points that the state has an interest not only in protecting human life after

birth but in protecting prenatal human life, referred to by the Court as "potential" human life. *Id.* at 150, 154, 159, 162. The Court then concludes that the state's interest does not rise to the constitutionally "compelling" point until the prenatal life it seeks to protect has attained viability. *Id.* at 162-163.

The conclusion reached by the opinion unfortunately is reached without logical analysis and support other than to state that at viability "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. The conclusion is not tied to any logical premise that capability for meaningful life outside the womb is the point during the pregnancy at which the state's interest becomes "compelling." The lack of reasoning on the critical point of when the state's interest becomes compelling means that the conclusion is arbitrary, without reasonable support and, therefore, in error.

Why the point of viability is determined in *Roe* as the point of compelling interest of the state may only be inferred from one other statement rendered in the opinion: that the state's interest in protecting the "potentiality" of human life "grows" to a point at which it becomes "compelling" during the pregnancy. *Id.* at 162-163.

Thus, it appears that viability of the fetus was held to be the point at which the state's interest in protecting human life becomes compelling, because the opinion assumes without question that the state's interest "grows" to a point of compelling interest during the pregnancy. No answer is related in the opinion to the question of why it is assumed that the state's interest in protecting human life could not be "compelling" at the very earliest point of pregnancy, i.e. fertilization of the human egg.

No reasonable foundation exists for the *Roe* majority's sole stated reason—capability of life outside the womb—for choosing viability of a fetus as the earliest point of compelling state interest. By using viability as the ear-

liest point of compelling state interest, the Court implies that the state's interest in prenatal life first must have attained a certain degree of probability of actually reaching live birth. Such an inference must be drawn, because the only measurement of the degree of "potentiality" of human life must be the likelihood of prenatal life attaining childbirth. Accordingly, the difference in degree between the "potential" for human life represented by the fetus at viability and the "potential" for human life represented by the fertilized human egg may be expressed only in terms of the likelihood that either will result in a childbirth.

If we are to assume, as the majority in *Roe* apparently did, that the interest of the state becomes compelling as a certain degree of likelihood of live birth is reached, a well-reasoned approach, not taken by the majority in *Roe*, cannot avoid the following statistical data: out of every 1000 pregnancies verified following the first missed menses, 885, or 88.5%, normally (if not terminated by abortion) will come to full term and reach childbirth.[1] Out of every 1000 pregnancies that reach the point of fetal viability, 985, or 98.5% will come to full term and result in actual childbirth.[2] From these

[1] Total "pregnancy wastage" per 1,000 known conceptions in the United States is derived from data reported in D. Danforth & J. Scott, *Obstetrics & Gynecology* 291-292 (5th ed. 1986), which reported a known spontaneous abortion rate of 10 percent of all pregnancies, a neonatal death ratio of 6.9 per 1000 live births, a stillbirth ratio of 8.9 per 1000 live births, and a ratio of 358 legal abortions per 1000 live births.

[2] This statistic was based on a stillbirth ratio of 8.9 per 1000 live births and a neonatal mortality ratio of 6.9 per 1000 live births, the source and support for which are described in footnote 1, above. We have used the beginning of the 21st week as the point of viability in deriving these rates. Support for this point in the pregnancy as the point of viability may be found in Brief of The American Association of Pro-Life Obstetricians and Gynecologists in Support of Appellants, *passim*, *Webster v. Reproductive Health Services*, No. 88-605.

statistics one concludes that the Court's judgment in *Roe* is that the state does not have a compelling interest in protecting the lives of 885 out of every 1,000 "potential" individuals, but does have a compelling interest in protecting the lives of 985 out of every 1000 "potential" individuals. Stated another way, a state may not constitutionally pass a law prohibiting the abortion of a prenatal human life that has an 88.5% chance of realizing childbirth, but may constitutionally prohibit the abortion of prenatal life that has a 98.5% chance of reaching childbirth. Such a holding, based upon a difference of a 10% likelihood of childbirth, is without basis in reason or common sense.

The probability, or likelihood of a human birth, based upon known medical or scientific data, resulting from a typical pregnancy or human egg fertilization should form the basis for a state determining that it has a protectable interest in that pregnancy or fertilization and for it to be able to act constitutionally to prohibit the termination of the pregnancy or fertilization. That is, state protection, or preservation, of a single human life from its earliest stages is justified if it can be shown it is likely that a human being will develop from that stage and be born in the normal course of events. The test should be whether a postnatal human life reasonably may be expected to be preserved by a state enactment of a law preventing termination of prenatal human life at *any* given stage of development.

The basic logic of showing the state's interest in protecting human life to be compelling at the earliest stages of human life is as follows:

> 1. The state has a compelling interest in protecting human life at its earliest stage if it can be shown that such protection is reasonably likely to result in the birth of a human being.

2. Pregnancies, including those at the earliest stages, are reasonably likely to result in human birth.

3. Therefore, the state has a compelling interest in protecting and preserving human life from its earliest stages.

We believe this logic should be considered by the Court as the basis for reconsidering the holding in *Roe v. Wade* that the state does not have a compelling interest in protecting prenatal human life until the point in time that a fetus attains viability. This Court should reverse the Eighth Circuit Court of Appeals holding that the Missouri legislature may not legislate when human life begins.

C. The State's Interest in Protecting Human Life from Its Earliest Stages Does Not Unconstitutionally Infringe Upon the Mother's Right of Privacy.

The state's interest in protecting human life from its earliest stages is not absolute and must be balanced against the rights of the pregnant woman. However, because the state's interest is in the preservation or protection of a human life, only the protection of another human life, i.e. the mother's, may outbalance the interest of the state in prohibiting abortion. The right of privacy of the mother should not be considered sufficient, absent the need to save the life of the mother, to outweigh the state's interest in protecting life from its early stages through laws prohibiting abortion.

The termination of human life, even in its earliest stages, is unnecessary and unfair when balanced against reasonable alternatives available to the mother who chooses abortion for reasons other than the preservation of her own life. Such reasons under the present status of the law can, for example, include the inconvenience of pregnancy, financial incapability of supporting a child, or lack of financial means to provide for the prenatal care

or safe delivery of the baby. Reasonable alternatives presently existing for meeting those needs, on balance, render such reasons for abortion insufficient to outweigh the interest of the state in protecting human life.

The interest of the state is emphasized further as outweighing the mother's right of privacy when the defenseless nature of the fetus and the complete lack of choice available to it are considered. The fetus has no choice: it either reaches birth as a human being or does not, depending upon the decision of the mother. The mother, on the other hand, has alternatives to abortion which, if utilized, can eliminate all negative consequences of her unwanted pregnancy except the inconvenience and discomfort of carrying a baby to term and delivering that baby.

No level of inconvenience or discomfort of a human being should be a justification for terminating human life, even at its earliest stages, as is now permitted in the first and second trimesters of pregnancy. However, as church organizations, we are fully aware, through our own agencies established to counsel and assist pregnant women currently facing the abortion decision, of the burden it places upon them and society in general to decide not to abort their pregnancies. Many women cannot afford to support themselves during their pregnancies. Some may be unable, because of age or emotional maturity, to be adequate mothers. Many are without financial support and are too poor to pay for proper prenatal and postnatal care and to support a family. It has been asserted that some women, out of a sense of resentment for the child following birth, may even engage in physical abuse of the child.

Reasonable alternatives are presently available to deal with the severe societal problems that might be expected to increase if a state is constitutionally permitted to prohibit abortion in the first and second trimesters of preg-

nancy. It is our position that through private and public funding such alternatives can be expanded to alleviate the burdens placed upon all of society as a result of prohibiting abortions.

A multitude of organizations, agencies, and facilities are presently available, and could be expanded, to meet the need for services and facilities for women facing unwanted pregnancies. These services and facilities generally fall into the categories of counseling, housing, financial support during pregnancy, financial support for prenatal care, and for hospital delivery and recovery, providing maternity clothing, baby furnishings, child care, temporary foster care, adoption, legal services, programs for the completion of high school, vocational training, and job placement for those in need of employment either during or after pregnancy. While the exact number of such agencies and facilities is not known, one association of such organizations presently lists over two thousand agencies providing such services and facilities nationwide. ALTERNATIVES TO ABORTION INTERNATIONAL, 1988/89 WORLD-WIDE DIRECTORY OF PRO-LIFE EMERGENCY PREGNANCY SERVICES (1988). Some of the more common types of such organizations are as follows:

1. *Counseling Services.* These services range from telephone hotlines (usually the first link a woman has to advice on her pregnancy) that are immediate sources of information for alternatives to abortion, to agencies providing financial and other assistance to pregnant women who need help. Counseling services provide assistance to single pregnant women who do not have the support of the fathers of their children and who feel they cannot go through their pregnancies alone. Such programs provide female volunteers who serve as partners to single pregnant women in need of assistance and guide them through their pregnancies. They assist them in arranging for doctors' visits, for childbirth classes, delivery room assistance and assistance in the weeks immediately following delivery.

2. *Housing Services.* Organizations, including church organizations throughout the country, provide housing for pregnant women, particularly single pregnant women who need a safe and clean environment in which to live during and immediately following their pregnancies. Often these services are tied to organizations that arrange for the foster care or adoption of the infant following delivery.

3. *Foster Care and Adoption Services.* Many public and private organizations presently arrange for foster care and adoption of babies whose mothers, for any reason, cannot, or do not want to, keep their children.

4. *Financial Assistance.* Organizations are available to meet the costs and burdens of prenatal care, hospital deliveries and hospitalization before delivery and during recovery following delivery. Many agencies provide free or low-cost maternity clothes, infant clothing and baby furnishings.

The state's interest in prohibiting abortion may be outweighed when confronted with an actual threat to the life of the mother. The state's interest must be balanced, on a case by case basis, against the need to save the mother's life. The mother's medical condition and risk to her life without an abortion must be considered and balanced against the likelihood of survival of the fetus without the abortion. Under most such situations an abortion becomes necessary, on balance, and must be regarded as a tragically unavoidable consequence, if medical procedures necessary to prevent the death of the mother include or result in an abortion.

D. State Laws Prohibiting Abortions Are Not Unconstitutional Establishments of Religion Under the First Amendment to the Constitution.

It has been argued that state laws prohibiting abortion unconstitutionally impose the religious beliefs and views of one religion upon persons not adhering to those views,

thereby constituting an "establishment" of religion prohibited by the First Amendment.

The sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod, The Southern Baptist Convention, and of the other forty-seven church denominations represented in this brief. The Lutheran Church-Missouri Synod has, throughout its history, opposed abortion and has adopted official positions in its conventions since 1971 condemning willful abortion as contrary to the will of God. Its convention resolution "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception;" that "as persons, the unborn stand under the full protection of God's own prohibition against murder;" and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother. *See* 1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion," Appendix 1a.

The Southern Baptist Convention has passed numerous resolutions opposing abortion in its annual meetings in the last two decades. Such resolutions are the principal means of expressing collectively the Convention's convictions about moral issues. Both the 1982 and 1984 annual meetings of The Southern Baptist Convention adopted resolutions specifically opposing abortion except as necessary to save the physical life of the mother. *See* 1984 Southern Baptist Convention Resolution No. 8, "On Abortion," and 1982 Southern Baptist Convention, Resolution No. 11, "On Abortion and Infanticide," Appendix 3a.

The foregoing statements opposing abortion except as necessary to save the life of the mother indicate that the positions of the Synod and other churches represented in this brief and the aforementioned resolutions of The

Southern Baptist Convention express profoundly held religious beliefs. However, we do not advocate the imposition of our religious views by law in order to impose upon others our religious beliefs. Rather, those religious beliefs are also deeply seated in the moral and ethical system that forms the basis of much of the civil and criminal law of this nation and, therefore, if the state legislatures so decide, may coincidentally be expressed in legislation.

The fact that a state's law coincides with a deeply held religious belief does not render that law unconstitutional under the First Amendment. The Judeo-Christian ethic continues to be the foundation for many criminal statutes in every state in the United States. Criminal statutes against homidice and larceny coincide with the Fifth and Seventh Commandments, and probably are, in fact, based upon them as a result of the ethical heritage of this nation. It is not reasonable to suggest that such laws violate the establishment clause. Equally unfounded is the suggestion that the coincidence of the religious beliefs of The Lutheran Church-Missouri Synod and the other church organizations who have joined in this brief are imposed upon the general public of a state by its passage of a law prohibiting abortion.

The principle that abortion legislation does not violate the First Amendment establishment clause was squarely addressed in the case of *Harris v. McRae*, 448 U.S. 297 (1980). In that case this Court held that a statute that coincides with the tenets of some or all religions does not violate the establishment clause. *Id.* at 319-320. It held that legislative funding restrictions upon abortions did not contravene the establishment clause of the First Amendment simply because the legislation coincided with the religious tenets of the Roman Catholic Church. *Id.* at 320. Based upon the holding in *Harris* and for the reasons above set forth, it is submitted that while the views stated herein relative to the right and interest of

the state in prohibiting abortion are motivated by deeply-held religious beliefs, such laws do not violate the First Amendment prohibitions on the establishment of religion.

CONCLUSION

The Eighth Circuit Court of Appeals should be reversed in its holding that a state legislatively may not determine when its interest in prenatal human life begins. This Court should defer to the legislatures that question and, to the extent necessary to permit the states legislatively to determine when their protectable interests in human life begin and to protect that life accordingly, overturn the decision of *Roe v. Wade*.

Respectfully submitted,

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APPENDIX

TO STATE POSITION ON ABORTION

RESOLUTION 3-02A

Overtures 3-20A—3-23 (*CW*, pp. 97-99)

WHEREAS, The Lutheran Church—Missouri Synod throughout its history has opposed abortion and since 1971 has spoken in convention to condemn "willful abortion as contrary to the will of God"; and

WHEREAS, We as members of Christian congregations have the obligation to protest this heinous crime against the will of God legally sanctioned in the United States and other lands; and

WHEREAS, The practice of abortion, its promotion, and legal acceptance are destructive of the moral consciousness and character of the people of any nation; therefore be it

Resolved, That The Lutheran Church—Missouri Synod in convention urgently call upon Christians—

1. To hold firmly to the clear Biblical truths that (a) the living but unborn are persons in the sight of God from the time of conception (Job 10:9-11; Ps. 51:5; 139:13-17; Jer. 1:5; Luke 1:41-44); (b) as persons the unborn stand under the full protection of God's own prohibition against murder (Gen. 9:6; Ex. 20:13; Num. 35:33; Acts 7:19; I John 3:15); and (c) since abortion takes a human life, abortion is not a moral option, except as a tragically unavoidable byproduct of medical procedures necessary to prevent the death of another human being, viz., the mother; and

2. To speak and act as responsible citizens on behalf of the living but unborn in the civic and political arena to secure for these defenseless persons due protection under the law; and

3. To offer as an alternative to abortion supportive understanding, compassion, and help to the expectant parent(s) and family, and to foster concern for unwanted babies, encouraging Lutheran agencies and families to open hearts and homes to their need for life in a family; and be it further

Resolved, That the Synod earnestly encourage its pastors, teachers, officers, and boards—

1. To warn publicly and privately (Prov. 31:8-9) against the sin of abortion;

2. To instruct the community of God that abortion is not in the realm of Christian liberty, private choice, personal opinion, or political preference;

3. To nurture a deep reverence and gratitude for God's gracious gift of human life;

4. To oppose in a responsible way attitudes and policies in congregations, schools, hospitals, Lutheran social service agencies, and other institutions within their sphere of influence and work which suggest that abortion is a matter of personal choice;

5. To support the efforts of responsible pro-life groups in their communities, e.g., "Lutherans for Life" (CTCR Report, *CW*, p. 74);

6. To promote clear instruction of Christian morality in homes, schools, and churches of the Synod, showing the blessings and safeguards inherent in God's will for sexual chastity before marriage and faithfulness in marriage;

7. To teach within our Lutheran schools and churches the biological, social, and parental functions of childbearing; and

8. To support the efforts to secure the human life amendments to the United States Constitution.

RESOLUTION NO. 8—ON ABORTION

WHEREAS, The Southern Baptist Convention, meeting in New Orleans in June 1982, clearly stated its opposition to abortion and called upon Southern Baptists to work for appropriate legislation and/or constitutional amendment which will prohibit abortions except to save the physical life of the mother; and

WHEREAS, In addition to legislative remedies for this national sin, it is incumbent that we encourage the woman who is considering abortion to think seriously about the grave significance of such action by presenting information to her about the unborn child in her womb, who is a living individual human being, and encourage her to consider alternatives to abortion; and

WHEREAS, Christlike love requires that such alternatives be made available.

Therefore be it *Resolved*, That the Southern Baptist Convention meeting in Kansas City, Missouri, June 12-14, 1984, encourage all of its institutions, cooperating churches, and members to work diligently to provide counseling, housing, and adoption placement services for unwed mothers with the specific intent of bringing them into a relationship with Jesus Christ and/or a sense of Christian responsibility; and

Be it further *Resolved*, That we deplore the practice of performing abortions, as well as dispensing to minors without parental consent or even notification, contraceptive medications which have potentially dangerous side effects, and deplore also the use of tax funds for such activities; and

Be it further *Resolved*, That we call upon all Southern Baptists to renew their commitment to support and work for legislation and/or constitutional amendment which will prohibit abortion except to save the physical life of the mother; and

Be it further *Resolved*, That we encourage Southern Baptists to inquire whether or not their physicians perform abortions on demand or give referrals for abortions, and that we commend those of the medical profession who abstain from performing abortions or making abortion referrals; and

Be it finally *Resolved*, That we urge our agencies and institutions to provide leadership for our cooperating churches and members, by preparing literature to take a clear and strong stand against abortion, and to inform and motivate our members to action to eliminate abortion on demand.

RESOLUTION NO. 11—ON ABORTION AND INFANTICIDE

WHEREAS, Both medical science and biblical references indicate that human life begins at conception, and

WHEREAS, Southern Baptists have traditionally upheld the sanctity and worth of all human life, both born and pre-born, as being created in the image of God, and

WHEREAS, Current judicial opinion gives no guarantee of protection of pre-born persons, thus permitting the widespread practice of abortion on demand, which has led to the killing of an estimated four thousand developing human beings daily in the United States, and

WHEREAS, Social acceptance of abortion has begun to dull society's respect for all human life, leading to growing occurrences of infanticide, child abuse, and active euthanasia.

Therefore, be it *Resolved*, That the messengers to the 1982 Southern Baptist Convention affirm that all human life, both born and pre-born, is sacred, bearing the image of God, and is not subject to personal judgments as to "quality of life" based on such subjective criteria as stage of development, abnormality, intelligence level, degree of dependency, cost of medical treatment, or inconvenience to parents.

Be it further *Resolved*, That we abhor the use of federal, state, or local tax money; public, tax-supported medical facilities; or Southern Baptist supported medical facilities for the practice of selfish, medically unnecessary abortions and/or the practice of withholding treatment from unwanted or defective newly born infants.

Be it finally *Resolved*, That we support and will work for appropriate legislation and/or constitutional amendment which will prohibit abortions except to save the physical life of the mother, and that we also support and will work for legislation which will prohibit the practice of infanticide.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR BIRTHRIGHT, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether the tri-mester approach for selecting the test by which state regulation of abortion services is reviewed should be reconsidered and discarded, returning to the states the right to make their own laws regarding abortion, describing when and under what circumstances abortion would be allowed; or whether a more complete reversal should take place granting to unborn children the recognition of their humanity and right to life.

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BRIEF FOR BIRTHRIGHT, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF BIRTHRIGHT, INC.

Birthright was founded in Toronto, Canada by Louise Summerhill in 1968. Four years later in 1972, Denise F. Cocciolone, presently the National Executive Director in this country, founded Birthright, Inc. (U.S.A.) with the help and support of Louise Summerhill. Since 1968, this emergency pregnancy services organization has established 550 different centers in the United States. In addition, there are 98 centers in Canada, four in South Africa, one in Nigeria, one in Ghana, one in Hong Kong and others being presently formed in other countries.

Birthright is a non-profit, interdenominational corporation, staffed by volunteers and funded by the private

sector. Birthright receives no governmental funding nor are they supported on a regular basis by any particular church or denomination.

Birthright does not engage in political or legislative activity of any kind, but rather offers medical, legal and psychological help to pregnant women from all parts of the country, from all walks of life. Some are rich, others are poor, but most feel abandoned by a family or a society which has no or little patience for a problem unique to women—an unplanned pregnancy. These women, rather than receiving the love and support they need to cope with this challenge are offered the easy way out, the "quick fix" cover-up—abortion. It is to these women that Birthright holds out an alternative of bringing their pregnancy to full term by providing them with shelter facilities where needed, clothing, food, furnishings, as well as the medical, legal and psychological assistance referred to.

Birthright volunteers give of themselves and their time freely and lovingly. Birthright services are offered free of charge and in complete confidence.

The Birthright office in the United States and Canada staffs 2800 telephone lines through which girls and women from the United States and Canada can call for help for any pregnancy-related problem at any time, night or day.

Prior to this case, Birthright has not participated in any other judicial determination, but because of the nature of its organization and the concern for its clients, Birthright has always viewed abortion on demand not as an act of "choice", but as an act of despair on the part of a woman. Based on an average of approximately 300,000 telephone calls for help received each year by Birthright, it is Birthright's opinion that the law has played a major role in a pregnant woman's moral perception of abortion, the thinking going as follows:

"If it is legal, it must be right."

Birthright offers at least a microcosm of an alternate solution to a woman in need, and represents but one of many such agencies growing in size and number throughout these United States. *Roe v. Wade*, 410 U.S. 113 (1973), on the other hand, in addition to ignoring the very existance of personhood within the child being carried by our clients, and the cases following in Roe's wake, provide an abortion on demand situation as the seeming *only* alternative. This case destroys and erodes the very fabric of values in our society. A review of this decision, more specifically the trimester approach for selecting the test by which state regulation of abortion services is reviewed, is a matter in which this organization, Birthright, and its clients have an immediate and continuing interest.

STATEMENT OF THE CASE

On June 26, 1986, the State of Missouri passed a statute, signed by the governor, regulating abortion in that state. The first section of that statute contains a general finding by the state legislature that "the life of each human being begins at conception" and the requirement that all state laws be interpreted to provide unborn children with all the rights of other persons 'subject only to the constitution of the United States and decisional interpretations thereof by the United States Supreme Court." (Mo. Stat. Ann Section 1.205.1-2) A full description of the statute is set forth in the jurisdictional statement of the Attorney General of the State of Missouri and among other provisions the statute provides that no public funds, employees or facilities are to be used for the purpose of performing or assisting in abortion or for encouraging or counselling a woman to have an abortion. Further, the statute requires that prior to performing an abortion on any woman whom the doctor has reason to believe is 20 or more weeks pregnant (noting that any such prognosis is generally accepted to be as much as four weeks off in either direction) the doctor

must determine whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight and lung maturity of the unborn child" (Section 188.029).

Appellees, Reproductive Health Services, five publicly employed doctors and nurses and one other non-profit corporation brought a class action challenging the constitutionality of these and other provisions of the Missouri statute. The District Court struck down the provisions (J.S. App. A1-A55) and the Court of Appeals affirmed (*id.* at A56-A84). The Court of Appeals concluded that the requirement that doctors perform viability tests is an unconstitutional legislative intrusion on a matter of medical skill and judgment. The Appellate Court additionally struck down Missouri's declaration that life begins at conception, not based on any determination of empirical fact or facts, but rather that the statute was an impermissable adoption of a theory disallowed by this very Court in *Roe v. Wade, supra.* The Eighth Circuit Court of Appeals likewise turned down and rejected Missouri's reliance on the statutes caveat requiring compatability with the Constitution and Supreme Court precedent on the grounds that such a clause "cannot validate state laws that are in fact incompatible with the Constitution." [1]

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[1] Judge Arnold desented (J.A. App. A83-A84) from this part of the decision showing the confusion, even in the judicial mind, and contending that Missouri's declaration of when life begins should be upheld when it relates to a subject other than abortions, such as a wrongful death action or bringing the unborn within the protection of the criminal law. Obviously, Judge Arnold recognizes, at least in part, the "Emperor's Clothes" approach of *this* Court in calling the unborn a non-person. Judge Arnold agrees with that determination only insofar as this Court has ruled. In other words, he recognizes the personhood of unborn children for all other purposes other than abortion, most probably feeling bound by this Court's determination in *Roe v. Wade, supra.*

The State of Missouri appeals from the final judgment of the Court of Appeals striking down these and other sections. The Eighth Circuit Court of Appeals has issued a final judgment holding these portions of the Missouri statute to be invalid as repugnant to the Constitution of the United States. The case thus falls within this Court's appellate jurisdiction and certiorari was granted.

Question seven of the State of Missouri's jurisdictional statement asks this Court to reconsider, as does this brief, and upon reconsideration, to overrule, its decision in *Roe v. Wade, supra.* The United States of America intervened in this case and its views on the issue are described in the Amicus Curiae brief of the United States. As indicated in the brief filed by the United States considering the jurisdictional question here, this case is free of procedural defects and implicates a number of legislative choices foreclosed by *Roe v. Wade.* It is very strongly suggested, as the Solicitor General states, that if the Court is prepared to reconsider *Roe v. Wade,* this case presents an appropriate opportunity for doing so.

In light of the underlying destruction of the moral fabric of this nation, it is most strongly suggested that at a minimum, *Roe v. Wade, supra,* and the cases following in its wake, both in the State and Federal Courts, as well as in this Court, be reviewed and be at the very least, cut back substantially, if not overruled entirely.

ARGUMENT

ROE v. WADE, 410 U.S. 113 (1973) WITH ITS TRIMESTER APPROACH FOR SELECTING THE TEST BY WHICH STATE REGULATION OF ABORTION SERVICES ARE REVIEWED SHOULD BE RECONSIDERED AND REVERSED, RETURNING TO THE STATES THE RIGHT TO MAKE THEIR OWN LAWS REGARDING ABORTION, DESCRIBING WHEN AND UNDER WHAT CIRCUMSTANCES ABORTION WOULD BE ALLOWED; FURTHER, THE HUMANITY OF THE UNBORN SHOULD RESULT IN THIS COURT'S RECOGNITION OF THEIR PERSONHOOD, ENTITLING SUCH UNBORN HUMAN BEINGS TO EQUAL PROTECTION UNDER THE LAW, INCLUDING THE RIGHT TO LIFE.

In its conclusion, Mr. Justice Blackmun, delivering the opinion of the Supreme Court in *Roe v. Wade* summarizes its decision as follows:

"To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe,

abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Missouri, in the statute under review (J.S. A60) states:

"The general assembly of this state finds that:

1. The life of each human being begins at conception;

2. Unborn children have protectable interests in life, health and wellbeing;

3. The natural parents of unborn children have protectable interests in the life, health and wellbeing of their unborn child."

Rather than get into the semantics of whether or not saving language in the statute allows such language by the Missouri legislature constitutionality, the real question that exists is: WHO IS RIGHT?

If the issue was not such a terribly serious one, an issue that literally splits this nation in half, the responsive language of Justice Blackmun on page 159 of the Court's opinion in *Roe v. Wade, supra,* would be humerous when the ultimate issue of life is presented to the Court:

> ". . . we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answers."[2]

Strong issue is taken with the contention that this Court is *not* in a position to define when life begins. For reasons hereinafter stated, obviously life begins at con-

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[2] Justice Blackmun, prior to this conclusion, admits that a determination of personhood on the part of the unborn child would result in a totally opposite opinion than that arrived at by the Court: ". . . If this suggestion of personhood is established . . . the fetus' right to life would be guaranteed specifically by the Amendment." *Roe v. Wade, supra,* at pp. 156-157.

ception and everyone knows that. We play word games and definition games rather than come out and say: "the taking of human life is justifiable at the convenience of one's mother." In reality, that is the state of the law in the United States in 1989, representing a "new morality" for our progeny.

If one were to be in a field hunting and see in the distance what appeared to be a wild turkey and lifted one's rifle to shoot and kill that prey and another were to come along saying, "don't shoot, that's my baby", the hunter could argue that distance and the red scarf around the child's neck created the *perception* that this were a turkey, and perhaps, despite the woman's protestation, the hunter may still *believe* that *her* perception was incorrect and this was indeed a turkey. No one on this Court would suggest other than that the hunter's later act of shooting and killing (if in fact the turkey turned out to be a child) would be reckless and wanton conduct at best, murder at worst. Is abortion any different as practiced in these United States?

Judge Arnold of the Eighth Circuit Court of Appeals dissents from the decision below and his dissent is worthy of some consideration. He states (J.S. 83):

> ". . . of course a governmental declaration about when human life begins insofar as it is used to justify regulation of abortion is unconstitutional. *Roe v. Wade* (*Supra.*) But I do not see why Mo. Ann. Stat. Section 1.205 should not be upheld insofar as it relates to subjects other than abortion. The statute, for example, may mean that the negligent killing of a fetus gives rise to a state law tort action for wrongful death. Neither the District Court nor this Court suggests that such a change in the common law, if limited to non-abortion situations, would violate the Federal Constitution. Just such a purpose was apparently part of what the state legislature had in mind when it passed this law. Section 1.205.4, which the Court does not quote reads as follows:

> Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.
>
> The implication is that the section may properly be interpreted as creating causes of action against persons other than the mother."

The undersigned would request that the Court very carefully consider the language of Judge Arnold here. What Judge Arnold is saying is that he recognizes that this Court allows this senseless taking of human life by the mother. Why? Because this Court said it is o.k. Otherwise, says Judge Arnold, the child is a human being. Justice Blackman may find it difficult to make such a determination. Judge Arnold does not.

I one time had a discussion with my then five year old daughter. She asked me how the tooth fairy got into her room at night so as to leave the quarter under her pillow after taking away the tooth that had been pulled by the dentist. Recognizing a degree of maturity in my daughter that I had not seen before, I shared with her the fact that her mother had put the quarter there and the tooth fairy was basically a fantasy. My daughter lost another tooth approximately two months later and she placed that tooth under her pillow as well. When she woke the next morning, the tooth was still there and no quarter. She came crying to me telling me "daddy, the tooth fairy didn't come last night." She preferred her own version and chose to ignore the real facts in favor of her own fantasy. We as adults are some times as juvenile. Many tall buildings have no thirteenth floor. What happens to the thirteenth floor? Well, in reality, the thirteenth floor is the fourteenth floor. We can change the number, but if you count the number of floors, the fourteenth is still the thirteenth. Thirteen is an unlucky number. Hotels know that people don't like to sleep on floors with unlucky numbers. Therefore, in order to avoid the reality

of the existence of that floor, they simply change the number of the floor.

In the issue before this Court, such distortion of reality also exists. Unborn child becomes "tissue," "product of conception," "blob," "uterine contents." Regardless of what we call it, it is still an unborn child.

One or Abraham Lincoln's favorite stories was this one:

> "How many legs would a sheep have if you called a tail a leg?" "Five" they answered. "You are mistaken," said the President. "The sheep would still have but four legs, for calling something a leg doesn't make it so."

This Court, for instance, rather than refer to poisoning, mutilating or shredding preborn babies, chooses to use the words "termination of pregnancy." Why? The reality of abortion brutalizes our senses and emotions. That is precisely the purpose of the euphemism to substitute language whereby we can name things without calling up mental pictures of their reality. The reality of abortion is that it kills an innocent human being. "Termination of pregnancy" anesthetizes us to the pain of the action for clearly it is the life of the unborn child which is terminated.

The use of the words "uterine contents," "products of conception," or "birth matter," even the correct clinical term of "embryo" or "fetus" depersonalizes the process so that the destruction of the unborn does not sound like killing. As a father of teen age children, I can assure you that adolescents are indeed human, as human as you or I. Is the adolescent less human than the adult because he is younger and less experienced in life? Hardly. Conversely, could not your death or mine be justified as one writer has said, on linguistic grounds by simply calling us "household contents" rather than "uterine contents."

"The enslaved African race," wrote the United States Supreme Court in its Dred Scott Decision of 1857, "are beings of an inferior order and so far inferior that they have no rights which the white man is bound to respect." Is that commentary and that designation sufficient to justify slavery today? Obviously, it is not. No one today denies the fact that the Dred Scott Decision represents one of the saddest moments in this Court's history.

I would very strongly suggest to this Court that *Roe v. Wade, supra,* falls into the same category. Ultimately, if not in this case, *Roe v. Wade, supra,* will be overturned and reversed. The reason I say that is simple. Justice ultimately will rule out and the taking of innocent human life is unjust, just as unjust as the enslavement of an entire race. Our individual biological system begins at conception and ends at death, a continum. The science of genetics clearly has always stated that our humanity does not depend on our size, our stage of development or our place of residence. Even if this Court contrarily decides it does by calling the unborn "potentially human." Is a human being a person, as defined by the Constitution of the United States? One would think so, but from 1973 to date, this Court has ruled otherwise. A corporation is a person under the law, for certain purposes, but an unborn child is not.

Professor A. W. Liley, a research professor in Fetal Physiology in Auckland, New Zealand, is known as the "Father of Feteology," *the* internationally recognized researcher and authority on life before birth. It was Dr. Liley who pioneered the first successful treatment of the unborn child: the intra-uterine blood transfusion. He is an outspoken opponent of abortion and states the following:

> "In a world in which adults control power and purse, the fetus is at a disadvantage being small, naked, nameless and voiceless. He has no one except sym-

pathetic adults to speak up for him and defend him.

Biologically, at no stage can we subscribe to the view that the fetus is a mere appendage of the mother. Genetically, the mother and baby are separate individuals from conception. Physiologically, we must accept that the conceptus is, in a very large measure, in charge of the pregnancy.

It is the embryo who stops his mother's periods and makes her womb habitable by developing a placenta and a protective capsule of fluid for himself. It is he (or she) that regulates his own amniotic fluid volume and although women speak of *their* water breaking or *their* membranes rupturing, these structures belong to the fetus and finally it is the fetus, not the mother, who decides when labor should be initiated.

> This, then, is the fetus we know and in deed once were. This is also the fetus whose existence and identity must be callously ignored or energetically denied by advocates of abortion." [3]

We can call an unborn human being a "blob," a "fetus," "tissue" and we can label his violent premeditated death "termination of pregnancy," or we can call a sheep's tail a leg. Calling it something else doesn't make it so, and there are no tooth fairies.

A woman, therefore, is not controlling her own body when she has an abortion. She is indeed ending someone else's right to have a body, to have life. There are circumstances when the law may respect the taking of such preborn life, but should we not call it so. I suspect that, in reality, everyone recognizes that abortion is basically the final step of contraception. No one

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[3] Professor A. W. Liley excerpted from a speech delivered on November 18, 1970, entitled *"The Termination of Pregnancy or the Extermination of the Fetus."*

truely cares about the philosophies involved or even the theology involved. It is convenience that rules.

In the *Roe v. Wade* and *Doe v. Bolton* decisions, 410 U.S. 179 (1973) the Supreme Court provided examples of factors which would guide women in concluding that a child was unwanted and, therefore, "abortable": if the child might "force upon the woman a distressful life or future," if she may be "taxed by child care," if she would experience "embarrassment as a result of being unwed," or if the birth of the child would "deprive a woman of her preferred life style." With such criteria, *Roe v. Wade* and *Doe v. Bolton* become the supreme law of the land.

It would indeed be magnificent if there were no unwanted children of any age. It would likewise be indeed gratifying if there were no unwanted wives by husbands or no unwanted aged parents by children. What a wonderful world it would be if there were no handicapped, mentally retarded, no minorities. Indeed it would be heaven on earth if there was no unwanted anybody, but the measure of our humanity is not that there are not unwanted ones among us. Rather, the measure of our humanity is what we do with those who are unwanted. It is suggested that we should care for them, accept them, and recognize our oneness with them. Certainly, the wanted vs. unwanted child syndrome reduces the child to an object. We usually want *things*, such as a vacation, a raise, a new suit, a new house. To "want" or "not to want" children is to dehumanize them, to take persons and make them things. In this "throw away" society of ours, this consumer oriented world that we live in, we have created an economic system with no room for children. They are no longer necessary for production on the family farm or as insurance for our old age. They, in fact, have become a costly luxury from which men and women seek satisfaction and gratification as the other objects of our so-called "good life."

The Court in *Roe v. Wade, supra* (page 130 and following), goes back over the years to determine the position taken in other generations toward abortion going back to even ancient times. On page 131 of the Court's review, the Hippocratic Oath, named after the great Greek physician 400 years before Christ, is discussed. Hippocrates is described as the father of medicine, the wisest and greatest practitioner of his art, and the most important and most complete medical personality of antiquity who dominated the medical schools of his time, and who typified the sum of medical knowledge of the past. Justice Blackmun quotes the oath correctly in its conclusionary sentences:

> " . . . I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."

Noting that the oath is not even mentioned in any of the principal briefs in the *Roe v. Wade, supra,* case nor the *Doe v. Bolton, supra,* case, the Court on its own states as follows:

> ". . . it (the oath) represents the *apex* of the development of strict ethical concepts in medicine, and its influence endures to this day . . . ." (Emphasis added by undersigned).

In times past, American indians were not legal "persons" because we did not grant them the protection of our Constitution. We were, therefore, able to take by force and arms anything which belonged to Indians. This Court, even recently, has reviewed cases dealing with the absolute theft of Indian land by the government of the United States. Why were we able to steal their land? We were able to steal their land because they were not "persons" entitled to the protection of the Constitution. As indicated previously, our list of non-persons also included black slaves who were declared to be chattel and personal property of their masters as a

result of this Court's decision in 1857 (Dred Scott decision). We at that time wanted their labor, so we denied them "personhood." Needing their labor, we took their liberty. Slavery was highly profitable as is the abortion industry today; slavery was socially accepted as is abortion, as a result of this Court's decision in 1973; slavery was condoned by many churches of the day, if not most, and held as legal by the United States Supreme Court, as is abortion today. We do not seek the unborn's land, nor their labor. No, what we desire is their space in this world, their portion of food, their share of resources and the added convenience of being rid of them. Our Constitution states in both the Fifth and Fourteenth Amendment that no one should be deprived of life, liberty or property without due process of law.[4] Yet this Court has historically deprived the unborn of life, the Blacks of liberty and the Indians of property. History has proven this Court wrong about Indians; history has proven this Court wrong about blacks; and history *will* prove this Court wrong about the unborn.

Birthright is an organization that has recognized one other final factor. Abortion has become an excuse for not offering *real* aid to pregnant women. *Roe v. Wade, supra,* and the cases following it ignore the fact that abortion is simply a financially cheap way for society to brush troubled women out of the way while claiming to have done them a service. Abortion is indeed a woman's issue, but it is an issue not of women's rights, but of women's oppression. For most women, existing law and customs are the most important criteria for deciding what is right or wrong. Unquestionably, most women look to law for moral guidance. Right now the law is teaching these women that abortion is a moral and presumably effective solution to their unplanned pregnancy. In calling for an overrule of *Roe v. Wade, supra,* Birthright recognizes that

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[4] U.S. Constitution, Amendment V and Amendment XIV, Sec. 1.

this society must provide love and support to pregnant women, both before and after giving birth, because of the added pressures and difficulties they face, especially in cases of great economic necessity and physical distress. It was suggested in the comments concerning Birthright's interest in the case, that this organization, and ones like it, represent a microcosm of what *could* be done on a national scale. The following suggestions are made as to a proposed policy following *Roe v. Wade* reversal:

1. Financial aid from both the private and public sector must be available to help pregnant women carry their children to term and meet the special medical expenses associated with childbirth; further legislative steps must be taken to eliminate insurance clauses refusing medical payments to unwed mothers.[5]

2. The medical community, in some part profiting from abortion on demand, should accept at least a small role by directing women towards crisis counseling centers where trained professionals can help them through problem pregnancies, such as Birthright and other similar organizations. Medical, legal, psychiatric and other such counseling should be available at no cost to women who find pregnancy distressful.

3. The entire field of adoption should be up-graded perhaps by Federal legislation sc as to allow women and families unable to support a child to have choices about how such child is placed.[6]

4. Housing for women with such pregnancies should be expanded.

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[5] *See* Adolescent Life Act of 1981, 42 U.S.C. 3002 *et seq.* This piece of legislation authorizes federal funding and financial assistance to pregnant adolescents.

[6] President George Bush in his most recent address to Congress requested tax relief by way of tax credits for adopting parents to alleviate the financial costs of adoption.

5. Support programs such as post-natal care, medical and nutritional programs and day care centers and general support of young parents and single parents should be encouraged, supported and expanded.

6. Counselling centers for women should be expanded and receive support from private and public funding.

7. Less tangible of all, but perhaps more important than all, unplanned children deserve our unconditional acceptance and women with unplanned pregnancies our love and support.

CONCLUSION

Roe v. Wade, supra, is now 16 years old. The cases that have followed *Roe v. Wade, supra,* are not cited at length herein for there is no need to. In fact, despite literally hundreds of hours of study in the preparation of this brief, very little legal precedent is cited in support of the argument made. The reason is simple. The argument made cries out for logic, common sense, reasoning, intelligence and conclusions in accord with what is best for all the people of this nation. Whether this Court wishes to be such or not, it is the provider of moral leadership, or should be. There are no cases that support the argument herein since prior to 1973 or at least 1967, the date of the English Abortion Enactment (Abortion Act of 1967, 15 and 16 Elizabeth 2 c. 87), no one would have suggested that the protection of the unborn was something that needed to be considered by this Court or any other Court. Briefs will be considered by this Court which cite innumerable sections of the statute under consideration. This brief concerns itself with but one section of that statute. Other briefs will quote 40 or 50 Supreme Court cases that have dealt with *Roe v. Wade* and its progeny. That is fine, but unnecessary here. It is suggested that *Roe v. Wade* is a horrible decision, judicial legislation at best, legal condonation of homicide at worst, a case worthy of review, reconsideration and reversal. The only dent in *Roe v. Wade*

since its publication is *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). That case reviewed a Missouri statute requiring a second doctor in the operating room for all post-viability abortions performed in the State of Missouri so that such second doctor would make an attempt to save the life of the aborted viable fetus. The Court rightly held, but by the narrowest of margins, that such statute was not unconstitutional as infringing on the mother's welfare despite the dissent of four members of this Court.

One final reflection as I close: In September, 1970, three years before *Roe v. Wade*, *supra.*, an editorial appeared under the title "A New Ethic For Medicine And Society" in the official journal of the California Medical Association, California Medicine, Volume 113, Number 3. This was the message:

> "The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition. This ethic . . . has been the basis for most of our laws and much of our social policy. The reverence for each and every human life has also been a keystone of Western medicine."
>
> ". . . (The New Ethic) is quite distinctly at variance with the Judeo-Christian ethic and carries serious philosophical, social, economic and political implications for Western society and perhaps for the world society.
>
> It will become necessary and acceptable to place relative rather than absolute values on such things as human lives . . .
>
> The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long-held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming

> accepted by society as morally right and even necessary.
>
> One may anticipate further developments . . . as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society.
>
> Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent.
>
> The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra-uterine or extra-uterine until death.
>
> The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life whould be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old has not yet been rejected."

Before the "old" is completely rejected, may this Court strongly consider the rationality, the morality and the rightness of the argument herein. Birthright should be the right of every American, born or unborn.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(31)

No. 88-605

Supreme Court, U.S.
FILED
FEB 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM L. WEBSTER, et al., - - Appellants,

versus

REPRODUCTIVE HEALTH SERVICES, et al., - - - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF FREE SPEECH ADVOCATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Byrn v. New York City Health & Hospital Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 33 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973) 21
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 2, 13
Cleveland v. Chamberlain, 66 U.S. (1 Black) 419 (1862) ... 5-6
Doe v. Bolton, 410 U.S. 179 (1973) ..... 1, passim
Dred Scott v. Sandford, 61 U.S. 1, 19 How. 393 (1857) ..... 13, passim
Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) 7
Harris v. McRae, 448 U.S. 297 (1980) 17
Heckler v. Chaney, 470 U.S. 821 (1985) 2-3
In re A.C., 533 A.2d 611 (D.C. 1987), *vacated and reh'g en banc granted*, 539 A.2d 203 (D.C. 1988) 23
In re John or Mary Doe, A Thirty-Nine Week Old Unborn Child, 247 Ga. 86, 274 S.E.2d 457 (1981) 23
Korematsu v. United States, 323 U.S. 214 (1944) 23
Liverpool, New York & Philadelphia S.S. Co. v. Commissioner of Immigration, 113 U.S. 33 (1885) 16
Lochner v. New York, 198 U.S. 45 (1905) 3-4, 16, 19, 20
Lord v. Veazie, 49 U.S. 585, 8 How. 251 (1850) 5
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 11
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 3, 8
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Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964) 22-23
Reproductive Health Services v. Webster, 662 F. Supp. 407 (W.D. Mo. 1987) (*Webster I*), *aff'd in part, rev'd in part*, 851 F.2d 1071 (8th Cir. 1988) (*Webster II*), *prob. juris. noted*, 109 S. Ct. 480 (1989) 8, 11, 17
Roe v. Wade, 410 U.S. 113 (1973) ..... 1, passim
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... 3, passim
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Statutes and Constitutions:

The Declaration of Independence (U.S. 1776) 2, 20, 23, 24
U.S. Const. art III, § 2 17

Other Authorities:

A. Bickel, *The Morality of Consent* (1975) 15
W. Blackstone, *Commentaries on the Laws of England* (1765) 2
Charlie Brown's 'Cyclopedia, Super Questions and Answers and Amazing Facts, Featuring Your Body (1980) 22
A. Cox, *The Role of the Supreme Court in American Government* (1976) 15
Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution* 137 (1987) 13
Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 13
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 15
Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 15
D. Fehrenbacker, *The Dred Scott Case, Its Significance in American Law and Politics* (1978) 14
The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 15
Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639 (1980) 13
Key Abortion Plaintiff Now Denies She Was Raped, N.Y. Times, Sept. 9, 1987, at A23 4
A. Lincoln, *The Collected Works of Abraham Lincoln* (R. Basler ed. 1953) 14, 24, 25
Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173 14
W. Prosser, *Law of Torts* (1964) 2
J. Swift, *Gulliver's Travels* (1962) 22
This Week, Nat'l Rev., Feb. 24, 1989, at 11 14
Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) 15
Wollner, *I Am Mary Doe*, Fulton County Daily Report, Feb. 9, 1989, at 1 5
B. Woodward, *The Brethren: Inside the Supreme Court* (1979) 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-605

WILLIAM L. WEBSTER, ET AL., - - - *Appellants,*
v.
REPRODUCTIVE HEALTH SERVICES, ET AL., - *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

INTEREST OF AMICUS

Free Speech Advocates is a legal defense group dedicated to protecting, preserving, and defending the right of public witness and speech on behalf of the unborn child.

SUMMARY OF ARGUMENT

The *Abortion Cases* have not presented a case or controversy, may have been frauds and raise problems of standing such that *Roe v. Wade* and *Doe v. Bolton* should never have been before the Court. Further, the abortion cases have not followed proper substantive and procedural rules by avoiding true adversarial clash and repeatedly becoming vehicles for overbroad policy statements and expansive incursions by the Court into legislative matters.

The United States Supreme Court is ill-equipped to legislate and should overrule *Roe v. Wade* and *Doe v. Bolton* in order to allow responsible state action in this area.

ARGUMENT

Introduction

Roe v. Wade, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S 179 (1973), should be overruled.

The most obvious reason to overrule the *Abortion Cases* is that unborn children from the moment of conception are persons and have been "persons" in the law entitled to constitutional protection. Declaration of Independence (U.S. 1776); 1 W. Blackstone, *Commentaries* *125-26 (1765); 4 W. Blackstone, *Commentaries* ch. 14; W. Prosser, *Law of Torts* 355-56 (1964).

The focus of the present brief, however, is an examination of systematic procedural distortions reflecting the invalidity *ab initio* of the United States Supreme Court's *Abortion Cases*. The *Roe* and *Doe* abortion decisions, themselves, have aborted this Court's longstanding constitutional law jurisprudence. This problem has been noticed previously by members of the Court.

> This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. *See Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting). Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but — except when it comes to abortion — the Court has generally refused to let such disagreements, however long standing or deeply felt, prevent it from even-handedly applying uncontroversial legal doctrines to cases that come before it. *See Heckler v. Chaney*, 470 U.S. 821, 838-40, n.2 (1985) (Brennan, J., concurring) (differences over the validity of the death penalty under the Eighth Amendment should not influence the Court's consideration of a question of statutory administrative law). That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*, 410 U.S. 113 (1973).

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814-15 (1986) (O'Connor, J., dissenting).

In a similar vein, Justice White urges a restoration of previously recognized principles of adjudication:

> I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 98 (1976) (White, J., dissenting).

However, in this brief, amicus examines specific areas in which the procedural irregularities of the abortion cases are particularly pernicious. Such an examination will underscore the compelling need for abortion cases to be governed by the same rules of constitutional litigation that apply to other cases and consequently for this Court to withdraw the imposition of *Roe* and *Doe* upon this moral and political confrontation in our society.

Roe's creation of a constitutional right to abortion on demand represents a return to the discredited *Loch-*

ner doctrine.[1] This is apparent from the source of the abortion liberty, flowing as it does from strained interpretations of the due process clause of the fourteenth amendment. *Lochner*, of course, is the watchword for the view that the justices are free to read personal concepts of public policy into the Constitution.

I. NEITHER ROE V. WADE, DOE V. BOLTON, NOR MOST SUBSEQUENT ABORTION CASES PRESENT A "CASE OR CONTROVERSY" FOR ADJUDICATION.

A. The Roe and Doe Cases May Have Been Frauds Upon the Court.

It has been reported that "Jane Roe" of *Roe v. Wade* fame, the only plaintiff in *Roe* found to have standing,[2] was a woman named Norma Jean McCorvey. Norma Jean McCorvey, in an admission against her interests, now says she lied in asserting that her pregnancy — the basis of the suit in *Roe* — was the result of rape, assertions during the pendency of *Roe* notwithstanding. She did not have the abortion. *Key Abortion Plaintiff Now Denies She Was Raped*, N.Y. Times, Sept. 9, 1987, at A23.

Doe v. Bolton has been shown to suffer from the same defect. In December, 1988, Mary Kay Race Bensing, a woman claiming to be the plaintiff, Mary Doe, in *Doe v. Bolton*, came forward. Ms. Bensing said that she never had an abortion, never wanted an abortion, and never would have had an abortion. In essence, she claimed that her lawyer had used her as a passive vehicle, seeking her cooperation in return for assistance in regaining custody of her children.

[1] *Lochner v. New York*, 198 U.S. 45 (1905)

[2] 410 U.S. at 123-29.

Wollner, *I Am Mary Doe*, Fulton County Daily Report, Feb. 9, 1989, at 1.

Courts retain inherent power to reopen and vacate judgments that were procured by fraud. The apparently uncontradicted press reports of the *Roe* and *Doe* deceit should cause this Court, in the interest of truth or out of some concern for its integrity, to reopen the cases for a full evidentiary disclosure. When this Court has been confronted with manipulation of the sort that underlies *Roe* and *Doe*, it has responded with the censure such fraud deserves. *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850), was a proceeding in which the plaintiff and defendant were attempting to procure the opinion of this Court upon a question of law. Plaintiff and defendant had a common interest opposed to that of other persons, who were not parties to this suit.

The Court responded:

> [a]ny attempt, by a mere colorable dispute, to obtain the opinion of the Court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

Id. at 255.

Cleveland v. Chamberlain, 66 U.S. (1 Black) 419 (1862) involved a case that differed from *Lord*

> in this alone that there both parties colluded to get up an agreed case for the opinion of this Court; here Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy.

Id. at 426. Quoting the above cited language from *Lord v. Veazie*, the Court summarily rejected the effort.

In *Roe v. Wade*, the Court's majority opinion attempted to finesse the standing problem by holding that this was one of a number of cases "capable of repetition, yet evading review." 410 U.S. at 125. Perhaps this can be accepted as an answer to the problem of "mootness" inhering in pregnancies, which, in the healthy course of things, end normally, before the process of modern litigation can be completed. However, it in no way answers the apparent fact that there never was a case or controversy between Doe and Bolton, or between Roe and Wade. Insofar as the named plaintiffs were concerned, according to their public statements, these cases were shams from the beginning and should be treated as such. But then again, if the Court wishes to legislate abortion policy and perpetuate a fraud itself, sham cases are better than legitimate ones.

B. Roe and Doe Lacked Standing.

Neither Jane Roe nor Mary Doe could credibly maintain that she was subject to any real threat of prosecution. This Court recognized in *Roe* that this was the situation in Texas, 410 U.S. at 151, and the Georgia statute at issue in *Doe* by its terms affected only the abortionist. 410 U.S. at 202. The *Roe* Court asserted that Roe was "thwarted by the Texas criminal abortion laws," 410 U.S. at 124, but those laws were not directed against her. Moreover, she conspicuously did not plead that it was the "medical judgment of [her]. . . attending physician," *id.* at 120, 164, that she should have an abortion. Norma Jean McCorvey, a.k.a. Jane Roe, simply did not present for review the question the Court purported to decide.

In these circumstances *Poe v. Ullman*, 367 U.S. 497 (1961), should have controlled the result. Mr. Justice Frankfurter's plurality opinion is instructive:

> This Court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

Id. at 504 (quoting *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 75 (1867).

Justice Brennan, concurring, pointed out that

> the true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again . . . .

Poe, 367 U.S. at 509.

In his dissent in *Poe*, Justice Harlan set forth standards that he would apply to determine standing. Among the minimum standards Justice Harlan would have applied are that:

> [T]he controversy must be one which is in truth and fact the litigant's own, so that the clash of adversary contest which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely . . . .

Id. at 525.

Given the fact and circumstances about *Roe* and *Doe*, their anonymity, and the lack of any serious attempt to develop an "adversary contest" involving their personal situations, even Justice Harlan's less strin-

gent standing requirement was not satisfied in the *Abortion Cases*.

C. The Present Case at the Court of Appeals Exemplifies the Same "Standing" Defects.

The complaints of Justices White and O'Connor in their dissents from *Danforth* and *Thornburgh,* that the abortion cases have run roughshod over accepted rules of constitutional jurisprudence, find ironic confirmation in the court of appeals decision in this case. Rather than answer Missouri's arguments on this issue by applying established principles of general application, the Eighth Circuit answered by citing authority that "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases." *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1075 (8th Cir. 1988), *prob. juris noted,* 109 S. Ct. 780 (1989). Is abortion now such a sacred right that its proponents should be exempt from the rules that apply to First Amendment cases, questions of search and seizure, or any other constitutional dispute?

The district court in this case also made some comments about standing that bear reflection. It argued that the amorphous "class" it certified "provides a fluid membership which guarantees a case or controversy." *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 412 (W.D. Mo. 1987) (*Webster I*), *aff'd in part, rev'd in part*, 851 F.2d 1071 (8th Cir. 1988) (*Webster II*), *prob. juris noted*, 109 S. Ct. 780 (1989). But no individual class member is ever identified, so the facts can never be developed with this judge-created "amorphous class." What the court is saying is: "Somewhere out there is a person who might have standing to challenge this statute; we'll pretend that person is

a plaintiff here and let the abortionist-plaintiffs tell you about her hypothetical circumstances and represent 'her' interests." If there are really judicial standards for a case or controversy, and if courts are judges in particular cases and not a "bevy of Platonic guardians," then this constitutional adjudication of hypotheticals should be rejected outright.

II. EVEN IF STANDING WERE SHOWN, ROE AND DOE HAVE NOT FOLLOWED PROPER SUBSTANTIVE AND PROCEDURAL RULES.

A. The Abortion Cases Persistently Avoid Actual Confrontation and Any Trace of Adversarial Clash.

In the abortion cases generally, there has been a lack of investigation as to whether there is any active controversy at all between the individual plaintiffs and the defendants.

It is well to recall again the proposed standards for justiciability proposed by Justice Harlan in his *Poe v. Ullman* dissent:

> 1. Due regard for the fact that the source of the Court's power lies ultimately in its duty to decide, in conformity with the constitution, the particular controversies which come to it, and does not arise from some generalized power of supervision over state and national legislatures;
>
> 2. Therefore, [the Court] . . . should insist that litigants bring to the Court interests and rights which require present recognition and controversies demanding immediate resolution;
>
> 3. Also it follows that the controversy must be one which is in truth and fact the litigant's own, so that the clash of adversary contest which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely . . . .

> 4. Finally, it is required that other means of redress for the particular right claimed be unavailable . . . .

367 U.S. at 525.

This Court in *Roe* and *Doe*, and other courts in literally hundreds of subsequent cases, have failed consistently to investigate what "interests and rights" demand "immediate resolution" and even whether "the controversy . . . is in truth and fact the litigants' own . . . ." Thus, the resulting litigation does not provide the necessary "adversary contest which is needed to sharpen and illuminate issues and gives that aid on which our adjudicatory system has come to rely . . . ." *Poe,* 367 U.S. at 525.

Abortion cases come to the Court almost invariably presented either by anonymous plaintiffs or by abortionist physicians or abortion facilities asserting the rights of anonymous clients. The process is more like a law school class than litigation. The "teacher" thinks up hypothetical circumstances best calculated to advance a point and imputes those facts and circumstances either to an anonymous plaintiff, or if that will not serve, to other anonymous members of a pretended "class" of plaintiffs. In fact, the "class" members are not only never identified, but their interests are represented by plaintiffs who may have very different interests. For example, on what basis is it assumed that unnamed minors are better represented by an abortionist than by their own parents or even by an independent guardian ad litem? In *Bellotti v. Baird,* 433 U.S. 622 (1979), a pro-abortionist lawyer served as guardian ad litem for a hypothetical person. After having reduced the actual existing unborn child to so much "fetal wastage," abortion advocates then can do the opposite trick, and summon forth out of thin air the potential "persons" needed to make up their plaintiff "class."

In *Roe* and *Doe* and their progeny, there is either no attempt to present real facts and real persons, or presentation is made as statistics or anecdotes through expert opinion. When there is a trial at all, as in the present case, it is usually based on expert opinion evaluated under an improper legal standard. As the trial court noted, the abortion cases hold that "the burden of justifying" its requirements is on the state; in cases of doubt, its regulations fail. *Webster I*, 662 F. Supp. at 419-20. But this rule is contrary to the standard applied in all other kinds of litigation. What is the rule?

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions . . . .
>
> The fact that a congressional directive reflects unprovable assumptions about what is good for the people . . . is not a sufficient reason to find that statute unconstitutional . . . .
>
> Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively because there is no conclusive evidence or empirical data.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-63 (1973).

In the abortion cases courts ignore rules of general application in order to engage in evaluating conflicting expert testimony on the current state of the medical art, and in order to reach purported conclusions as to the constitutional validity of state statutes. The abortion cases and their legislative amendments through court actions present virtually no instances of adversarial contest. If all of the relevant medical, sociological, economic and other facts actually pertaining to any given pregnancy were actually developed, the conclusory platitudes of pro-abortion attorneys and

experts so often parroted by the courts without critical review could be made subject to "the clash of adversary contest which is needed to sharpen and illuminate issues . . . and gives that aid on which our adjudicatory system has come to rely . . . ." *Poe*, 367 U.S. at 525.

The result of post-*Roe* abortion regulation reviews by this Court is that cases are decided on assumed or hypothetical facts. The facts are garnered from self-serving affidavits or expert testimony, without meaningful discovery of the facts of specific pregnancies. Often, abortion controversies in the judicial arena are decided without trial. By scrupulously avoiding the principles of adversarial contest, in these controversies that are not cases, courts are enabled to impose fraud on our judicial system and on our society.

An unfortunately typical description of this process is contained in *Thornburgh v. American College of Obstetricians and Gynecologists:*

> [T]he Court prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness . . . there has been no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality of the statute.

476 U.S. at 815 (O'Connor, J., dissenting).

The best that can be said for the type of adjudication undertaken in *Thornburgh* is that, in a perverse sense, it is faithful to the precedent established in *Roe v. Wade* and *Doe v. Bolton*. Those cases, and many in their wake, involved anonymous plaintiffs, who were not subjected to trial and were presented to the Court basically as hypotheticals, with the detailed

factual analysis being provided by the independent research of the justices. Thus it is that in *Roe v. Wade*, major factual and historical "findings" were made from partisan literature — some of it written specifically to influence that very decision[3] — and without the type of critical analysis that might conceivably have been possible had there been a genuine "clash of adversary contest . . . to sharpen and illuminate issues . . . ." *Poe*, 367 U.S. at 525. One natural result is the Court's development of its unworkable trimester framework that has been correctly characterized by members of this Court "clearly on a collision course with itself," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). *Roe* as a sham case follows in its development *Dred Scott v. Sandford*, 61 U.S. 1, 19 How. 393 (1857), another sham case, which was most probably set up by slavery interests to constitutionalize that generation's moral disorders. Lincoln pointed out the fraudulent nature of the *Dred Scott* case in the Lincoln-Douglas debates.

> I have never pretended to know whether Dred Scott's owners were Democrats or Abolitionists, or Free Soilers or Border Ruffians. I have said that there is evidence about the case tending to

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[3] *See* Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution* 137 (1987) (an updated version of *The History of Abortion: Technology Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979)), for a full analysis of the Means-Blackmun-Mohr partisan distortion of history for the abortion constituency and its lobbied decision in *Roe*. *See also* Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 652-53 (1980) ("[T]he discussion [by the Supreme Court of the applicability of wrongful death statutes to an action based on the death of an unborn child] was perfunctory, and unfortunately largely inaccurate and should not be relied upon as the correct view of the law at the time of *Roe v. Wade*").

> show that it was a made up case, for the purpose of getting that decision. I have said that that evidence was very strong in the fact that when Dred Scott was declared to be a slave, the owner of him made him free, showing that he had the case tried and the question settled for such use as could be made of that decision; he cared nothing about the property thus declared to be his by that decision.

Abraham Lincoln, 3 *The Collected Works of Abraham Lincoln* 283 (R. Basler ed. 1953) (Sixth Debate with Stephen A. Douglas at Quincy, Illinois, October 13, 1858). *See also* D. Fehrenbacker, *The Dred Scott Case, Its Significance in American Law and Politics* 575 (1978), for further analysis of the hidden agenda of those who manipulated the *Dred Scott* case to the Court and on the Court. For this hidden agenda factor in *Roe, see* B. Woodward, *The Brethren: Inside the Supreme Court* (1979), and recent memos reported by Bob Woodward of *The Washington Post*.[4]

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[4] Bob Woodward of the Washington Post has unearthed memos that passed among Justices William O. Douglas, Harry Blackmun, Potter Stewart, and Thurgood Marshall during the Supreme Court's, er, consideration of the famous case of *Roe v. Wade*. It transpires that Blackmun admitted that his "guidelines" for the state regulation of abortion were "arbitrary." Marshall gently objected that those guidelines might not serve the "interests" of poor women as well as heart could wish. And Stewart worried that Blackmun's approach was a little too "legislative." Indeed. The whole exchange shows vividly that genuine constitutional issues hardly troubled the majority in *Roe*; they carried on like a bunch of backroom pols bent on pleasing a pet constituency.

This Week, Nat'l Rev., Feb. 24 1989, at 11. Prominent commentators have reached a similar conclusion.

Judge Richard Posner, writing in *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 199, stated that "*Wade* raise[s] . . . the question whether we have a written Constitution, with the limitations thereby implied on the creation

(Continued following page)

B. The Abortion Decisions Are Persistently Overbroad.

As early as *Roe v. Wade,* the dissenting justices pointed out how the Court leapt to conclusions that

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(Continued from preceding page)

of new constitutional rights, or whether the Constitution is no more than a grant of discretion to the Supreme Court to mold public policy in accordance with the Justices' own personal and shifting preference."

Robert H. Bork, testifying before a Senate subcommittee, said that "I am convinced, as I think almost all constitutional scholars are, that *Roe v. Wade* is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.... The trouble is that nobody believes the Constitution allows, much less demands, the decision in *Roe v. Wade* . . ." *The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 14, 16 (1982).

John Hart Ely, in *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973), said that *Roe* "is not constitutional law and gives almost no sense of an obligation to try to be." Further, Ely noted that the decision "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine." Ely also observed that while *Roe* and *Lochner* are twins, they are not identical, but in regard to their differences, "*Roe* may turn out to be the more dangerous precedent."

Archibald Cox, in *The Role of the Supreme Court in American Government* 113-14 (1976), states: "The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations.... Neither historian, nor layman, nor lawyer will be persuaded that all the prescriptions of Justice Blackmun are part of the Constitution."

Alexander Bickel, in *The Morality of Consent* 28 (1975), on the question why the Court usurped that legislative function reserved to the states, says "[o]ne is left to ask why. The Court never said. It refused the discipline to which its function is properly subject."

Richard Epstein, in *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 175-76, notes that no principled ground of decision existed for *Roe* and that "only principled grounds for decision stand between it and the charge of arbitrary decision based upon its naked political preferences."

Even defenders of *Roe* hedged themselves. *See, e.g.,* Tribe, *Toward a Model of Roles in the Due Process of Life and Law,* 87 Harv. L. Rev. 1, 7 (1973), "One of the most curious things about *Roe* is that behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."

were not remotely necessary to decide the immediate cases before it. Once again, this flows almost inevitably from the Court's primary failure to analyze the personal situations of the individual plaintiffs, to say nothing of those of the anonymous class members purportedly represented by those individual plaintiffs.

To the knowledge of this amicus, no satisfactory answer has ever been given, or even attempted, to Justice Rehnquist's observation in *Roe v. Wade* that:

> In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the purpose of precise facts to which it is to be applied.'

410 U.S. at 172 (quoting *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)) (additional citation omitted). Of course, the fact that these flaws were recognized from the beginning makes them no less weighty today than they were at the time:

> If an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justice Holmes (in *Lochner*) and Harlan (in both cases). That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it.

Thornburgh, 476 U.S. at 788 (White, J., dissenting).

The present case indicates that the propensity of some courts in abortion cases to go far overboard in

their pronouncements is as strong as ever. Missouri's declaration that human life begins at conception was qualified on its application so as to have no effect on abortionists — at least none until *Roe v. Wade* is reversed. Nevertheless the Eighth Circuit invalidated it — though the plaintiffs could show no effect on them other than that they didn't like it. *Webster II*, 851 F.2d at 1075-77. With respect to remedy, too, this Court should return to its settled principles.

III. THE ABORTION CASES DECIDED BY THE COURT, FROM ROE v. WADE ON, SHOULD BE REVERSED AND THE LEGISLATIVE BRANCHES ALLOWED TO FULFILL THEIR RESPONSIBILITIES.

Decisions that fail to decide a "case or controversy" are not simply flawed, but void. The Constitution itself limits the federal judicial power to "cases and controversies." U.S. Const. art. III, § 2.

Later decisions built upon the quicksand of "set up" disputes cannot stand. As Justice O'Connor noted, "the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*. . . ." *Thornburgh*, 476 U.S. at 814-15 (O'Connor, J., dissenting). A general reversal of the spurious jurisprudence that commenced with *Roe v. Wade* is the best step at this time out of the legal quagmire of the abortion cases. The *Roe v. Wade* framework itself is medically discredited, legally unworkable and politically explosive.

Merely scaling back the abortion cases is not possible. The procedural flaws are such that there is no ground on which to fall back. Decisions such as *Harris v. McRae*, 448 U.S. 297 (1980), suggest that an "unduly burdensome" requirement be applied before

any statute will be subject to "strict scrutiny." Doubtless this is the direction in which "post-reversal of *Roe*" jurisprudence may turn. However, it is impossible to begin to delineate the parameters of such cases until they have reached the Court with proper plaintiffs, a proper adversarial proceeding and a proper record, interpreting statutes developed by Congress and state legislatures that do not labor under the yoke this Court has placed upon them these past sixteen years.

In an imperfect world, legislative bodies may not decide policy correctly. However, in their fumbling effort to address social controversy, because they are more readily responsive to human experience they are also more likely eventually to ameliorate evils than to exacerbate them. This is because legislative temporizing and compromising is seen as such. Whereas when courts legislate by pronouncements on social issues, an unjustified and uncalled for finality attaches, along with a base alloy of "high purpose." Undue deference accompanies this judicial misbehaviour, thus increasing the social destructiveness of the judiciary's actions.

Thus the legislatively enacted Missouri Compromise of 1820 and the Compromise of 1850, while not pure, in that the evil of slavery continued its existence, by their very temporalness, recognized a moral order, the reality of human nature, and a hopeful possibility of future change. Not so the Supreme Court's intervention in the moral and social confrontation over slavery in *Dred Scott*. The Court's decision actually precipitated the Civil War by effectively destroying legislative efforts to build a consensus on slavery. A modest approach of legislative regulation that continued to keep slavery out of the new territories and

continued a national recognition of slavery as an evil might have ultimately emancipated the slaves in conditions more conducive to full integration into national life. After all, it was only in 1863 that serfdom was abolished in Russia, and only in 1885 that slavery, after being regulated to extinction, was abolished in Brazil.

The social cataclysm of civil war and the continuing scars our society still suffers from that bloodletting, the onset of Jim Crow and a continuing racism, might have been avoided had not the Supreme Court usurped the legislative power and ideologized the moral and social confrontation of that day. Likewise, when the Supreme Court imbedded "separate but equal" in the Constitution, it froze segregation more solidly into American law, further worsening the human condition of injustice in our country.

Similarly, with *Roe* and *Doe* the Court enacted a new social theory based on a continued development of "Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. at 45 (Holmes, J., dissenting). This Court in *Roe,* as with *Dred Scott*, and *Plessy v. Ferguson*, 163 U.S. 537 (1896), is again setting the stage for social upheaval and blood. It is not yet too late for a wiser and more prudent policy to be undertaken.

After the fall of the abortion cases, a predictably wide range of new legislative responses will emerge. Advocates on both sides of the abortion controversy recognize that a handful of states have, by legislative actions, endorsed abortion on demand as this Court ordered nationwide in *Roe*. A similarly-sized handful of states have the legislative consensus necessary immediately to outlaw most abortions. The great majority of states will experience the kind of political

ferment that will allow their respective legislatures to grapple with the diverse interests involved.

A more prudent role for the federal courts would be to give breathing room for the development of consensus to occur. But for this Court to continue dishonestly denying the value of unborn life by ukase at this time is for the United States Supreme Court to again repeat the moral and political blunders that have so marred the Court when it buttressed slavery, spawned Jim Crow, opposed social welfare legislation, and fought unions. *Lochner* must be buried again.

Scientific evidence has never been clearer that human life begins at conception. Such evidence should lead legislatures, and eventually this Court, informed by the spirit of the Declaration of Independence, to recognize the constitutional personhood of the unborn. But for now, at a minimum, the flat earth nonsense of *Roe* must be renounced.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe v. Wade, 410 U.S. at 159.[5]

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[5] *Compare* the difficulty of the United States Supreme Court with the unborn in *Roe*, 410 U.S. at 159, "We need not resolve the difficult question of when life begins," to its difficulty with slaves in *Dred Scott*, 19 How. at 407, who according to them were

> no[t] intended to be included in the general words used in that memorable instrument. It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence . . . .

To the informed heart and mind, neither question is difficult in 1857, 1973 or today. The facts of humanness and the condition of humanity may place us in quandaries, but feigning obtuseness or lying can never be the basis for judicious action.

The highest state court in New York in 1972 had no such "intellectual" problem over when an individual life began. *Byrn v. New York City Health & Hospital Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973). *Byrn* was actually cited in *Roe*, when the Court legislated abortion on demand. The New York court at least admitted the obvious, that the human fetus (Latin for "young") is human and alive.

And now to uphold the great deceit of *Roe* and *Doe*, stare decisis will be trotted out by those who usually care nothing for tradition. Mr. Justice Brandeis has said well why the *stare decisis* doctrine is not proper to deter the Court from doing now what remains still the legally and morally correct course.

> The doctrine of *res judicata* demands that a decision made by the highest court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. But the decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, *but the conditions may have changed meanwhile. Moreover, the judgement of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned.*

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis J., dissenting) (citations omitted) (emphasis added). *See also Thornburgh*, 476 U.S. at 786-89 (White, J., dissenting) (citing the overruling of

Plessy and other cases and stating that "history has been far kinder to those who departed from precedent than to those who would have blindly followed the rule of stare decisis").

Although the accumulated knowledge of when life begins was ignored in 1973, there have been subsequent breakthroughs in publications as early as 1980 that might be more easily understood now in 1989 by some judges and their researchers.

> WHEN DID YOU START GROWING? You started growing from just two cells about nine months before you were born. One cell, a sperm cell, came from your father. Another cell, an egg cell, came from your mother. The two cells joined together inside the mother's body. They formed a special new cell called a fertilized egg. This cell was the start of a whole human being — you.

1 Charlie Brown's 'Cyclopedia, Super Questions and Answers and Amazing Facts, Featuring Your Body 3 (1980).

If *Roe* should remain on stare decisis, so should *Dred Scott* and *Plessy*, and Swift was correct.

> It is a maxim among lawyers that whatever hath been legally done before may legally be done again, and therefore, the lawyers take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of *precedents*, they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.

J. Swift, *Gulliver's Travels* 237 (1962).

The anomaly of having a right to override your mother's decision to deny you blood if she is a Jehovah's Witness, *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964),

cert. denied, 377 U.S. 985 (1964), or the right to demand to be delivered in a manner conducive to being born alive, *In re John or Mary Doe, A Thirty-Nine Week Old Unborn Child*, 247 Ga. 86, 274 S.E.2d 457 (1981); *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated and reh'g en banc granted*, 539 A.2d 203 (D.C. 1988), but being unable to contradict her decision to kill you, if she is a secularist, only demonstrates whose religion is established, *Torcaso v. Watkins*, 367 U.S. 488 (1961), and what the *Roe* and *Doe* decisions are about.

If we are not truly created equal and endowed by our Creator with the right to life, as the Declaration of Independence proclaims, where can we stand when the power of the State to define classes subject to death warrants turns on us? The right to life of non-naturalized persons is presently recognized by this Court. *But see Korematsu v. United States*, 323 U.S. 214 (1944).

There is no rightful defense of the abortion cases. The *Roe* and *Doe* decisions are without redeeming social value.

CONCLUSION

Although this Court has grown to accept fawning over all its errors, it is hoped some advocate will address directly in oral argument the fundamental dishonesty of the abortion cases. Amicus would, by leave, advocate this obvious truth before you even though those arguments would be before those who, because of personal pride and past complicity in the present barbarism, would understandably prefer that the norms of polite deceit be continued. How much better that the lies and false scholarship of *Roe* and *Doe* not be addressed directly, for only with the cover of sophistry can the immorality and foolishness of the abor-

tion cases remain hidden. Taking part in the lie has thus far remained a rule of argumentation before the United States Supreme Court on abortion.

In 1859, after the Supreme Court had decided *Dred Scott* and before Fort Sumter, Abraham Lincoln spoke of those entrenched establishment rulers who were busy

> blowing out the moral lights before us; teaching that the negro is no longer a man but a brute; that the Declaration has nothing to do with him; that he ranks with the crocodile and the reptile; that man, with body and soul, is a matter of dollars and cents.

A. Lincoln, 3 *The Collected Works of Abraham Lincoln* 425 (R. Basler ed. 1953). Lincoln noted that only by dismantling the clear meaning of the Declaration of Independence, "that all men are created equal and endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness," could the Slave Power "repress all tendencies to ultimate emancipation." *Id.* 424.

Now, the Abortion Power seeks to blow out the moral lights before us, as it, too, disdainfully discards the Declaration of Independence's bold and prophetic witness to the worth and dignity of each individual human being — slave or unborn.

> In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows. They grasped not only the whole race of man then living, but they reached forward and seized upon the farthest posterity. They erected a beacon to guide their children and their children's children and the countless myriads who should inhabit the earth and other ages.

A. Lincoln, 2 *Collected Works of Abraham Lincoln* 546 (R. Basler ed. 1953).

This time let us not repeat *Dred Scott v. Sandford*, but in humility recognize the truth of the Child or at least return this great defining issue of America to the normal political process, in hope that we will respond properly and dutifully to the moral lights that have been revealed to us.

Roe v. Wade, Doe v. Bolton, and their spawn must be overruled.

Respectfully submitted,

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MOTION

MOTION FILED
FEB 23 1989

No. 88-605

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

WILLIAM WEBSTER, ATTORNEY GENERAL
OF THE STATE OF MISSOURI

APPELLANT

v.

REPRODUCTIVE HEALTH SERVICES

APPELLEE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to prove that the guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.

This is effectively a motion to allow retained counsel since there will be no expense to this Court, or to the taxpayers.

SUMMARY OF ARGUMENT

The unborn have a constitutional right to be especially represented by counsel to prove that their lives are specifically guaranteed by the U.S. Constitution.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL TO PROVE THEIR LIVES ARE PROTECTED BY THE U.S. CONSTITUTION.

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1]

But this Court refused to allow counsel to represent the unborn and defend their right to life under the U.S. Constitution. Thus the killings commenced.

And the Supreme Court has maintained the killings by steadfastly refusing to

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1. Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

allow counsel to represent the unborn, and defend their right to life under the U.S. Constitution.[2]

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2. The Court has refused to allow counsel for the unborn in all its abortion cases. Some are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 90 L Ed 2d 48 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 704; Thornburgh v. American College of Obstetricians, 90 L Ed 2d 779 (1986), motion to allow counsel for the unborn denied 87 L Ed 2d 702; Hartigan v. Zbaraz, 98 L Ed 2d (1988), motion to allow counsel to for the unborn denied 93 L Ed 2d 697.

The unborn have a constitutional right to be represented by counsel in this case to defend their right to life under the U.S. Constitution.[3] Judges who willfully

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3. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all; these are the sacred truth-seeking procedures which protect the lives of all Americans.

deny this right are guilty of crime.[4] This denial makes Roe v. Wade void.

2.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

Moreover in the aftermath of Dred Scott v. Sanford, legitimate public

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4. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

expectation rested on the assurance that this Court would never again attempt another exception to the universal terms "any person."[5]

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5. This Court's decision in Dred Scott v. Sanford appears to be the only precedent in American history in which this Court has implied an exception to the universal terms "any person" in the Fifth or Fourteenth Amendments. The Court there ruled that the universal words "any person" did not include Negroes, there was a constitutional right to own a slave, and Congress could not prohibit slavery in the free territories. This decision triggered a civil war. Candidate Abraham Lincoln vowed he would not obey Dred Scott. Opponents said their states would withdraw from the Union rather than be deprived of their assumed constitutional right to own slaves and take them to the free territories. 4 Collected Works of Abraham Lincoln 267 (1953). But President Abraham Lincoln responded that if he were bound by Dred Scott, "the people will have ceased to be their own rulers." Id., at 268. Thus the war commenced.

A purpose of the Fourteenth Amendment was to overrule Dred Scott, and place it beyond the power of judges to ever again produce convulsions by implying an exception the universal words "any person." For over a century legitimate public expectation rested on the assurance that this Court would never again attempt an exception to the universal terms "any person."

But without any prior notice, this Court once again, in the precise manner of Dred Scott, attempted to imply an exception to the universal words "any person." In Roe v. Wade, this Court thus combined both total surprise and violent defiance of the long standing legitimate public expectation that never again would this Court violate the universal words "any person."

In particular, this Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the universal words "any person," as used in the Fourteenth Amendment, did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[6]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed to defend the unborn's right to life under the U.S. Constitution.[7]

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6. Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

7. See cases in note 2, supra.

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[8] Judges who willfully deny this right are guilty of crime.[9] This denial makes Roe v. Wade void.

3.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these

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8. See note 3, supra.

9. See note 4, supra.

proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[10]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[11]

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10. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

11. See cases in note 2, supra.

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some

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12. See note 3, supra.

13. See note 4, supra.

> which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion .... of constitutional stages of fetal growth.[14]

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[15]

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14. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

15. See cases in note 2, supra.

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[16] Judges who willfully deny this right are guilty of crime.[17] This denial makes Roe v. Wade void.

5.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of

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16. See note 3, supra.

17. See note 4, supra.

the unborn are protected by the

Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....
> What the Court has done is to compel the State to condone the killings of prenatal infants and even to encourage it by loose controls.
> ....
> The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is the root of the State's expressed desire to curb killing.
> ....
> The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
> ....
> Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
> ....
> With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular

point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

....

In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.

....

At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.[18]

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings by steadfastly refusing to allow evidence to be presented on behalf of the

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18. Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

unborn to prove that their lives are protected by the Constitution.[19]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[20] Judges who willfully deny this right are guilty of crime.[21] This denial makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[22]

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19. See cases in note 2, supra.

20. See note 3, supra.

21. See note 4, supra.

22. "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no

II.
ISSUES RAISED BY COUNSEL NOT RAISED BY THE PARTIES

Although a party has asked this Court to overrule Roe v. Wade, it did not raise the issue that the lives of the unborn are protected by the U.S. Constitution.

The unborn have a right to be especially represented by counsel, to present evidence and arguments not presented by the parties, to show that the universal and unalienable guarantee of life to "any person," made in the U.S. Constitution, does include the unborn.[23]

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public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951).

"Such a mock trial is not a judicial proceeding but a murder." Id., at 1164.

"The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

23. This evidence and arguments are presented in the amicus curiae brief by the Legal Defense For Unborn Children, and incorporated herein by reference.

CONCLUSION

The photograph on the next page shows a child killed by a second stage abortion under Roe v. Wade. These children are entitled by law to have assistance of counsel to prove that the universal and unalienable guarantee of life to "any person," made by the U.S. Constitution, includes the unborn.

When judges use the above procedures to defy the unalienable guarantee of life to "any person" in order to exclude millions of victims from the protection of the U.S. Constitution, so they can be killed with impunity from criminal statutes, it can not be pretended it is any longer the government of the United States, or any government of Constitution and laws. "Such a mock trial is not a judicial proceeding but a murder."

Alan Ernest
Counsel for Movant

AMICUS CURIAE

BRIEF

MOTION FILED
FEB 23 1989

(33)

No. 88-605

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

WILLIAM WEBSTER, ET AL

APPELLANTS

v.

REPRODUCTIVE HEALTH SERVICES, ET AL

APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN

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FEB 23 1983

MOTION FOR LEAVE TO FILE

Interest of Amicus

The brief, which does not support either party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the the Fifth and Fourteenth Amendments' guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life. The parties have not raised this issue; it disposes of all issues in this case.

The universal guarantee of life to "any person" is the most important right in the Constitution, and the lives of millions of children depend on their being permitted to present all relevant evidence to prove their unalienable right to life.

Alan Ernest, Counsel

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Goldberg v. Kelly, 397 U.S. 254.....51

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Martin v. Hunter's Lessee,
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McCulloch v. Maryland, 4 Wheat. 316.....55

Mills v. Comm. 13 Pa. 631 24,34

Ogden v. Saunders, 12 Wheat. 213 54

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Pollard v. Dwight, 4 Cranch 421.....15

Porter v. Lasiter, 87 S.E. 2d 100 14

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Ross v. Oregon, 227 U.S. 150.....62

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Smith v. State, 33 Me. 48.....30

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Sturges v. Crowninshield,
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United States v. Altstoetter, 3 Trials
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United States v. Hale,
422 U.S. 171.....56,58

Yick Wo v. Hopkins, 118 U.S. 356.....39

Texts:

Archbold, Complete Treatise on Criminal
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Berger, Government by Judiciary: The
Transformation of the Fourteenth
Amendment (1977).....52

Bishop, Commentaries on the
Criminal Law (4th ed. 1865).....14

Black's Law Dictionary 45

Blackstone, Commentaries.....11,23,63

Carroll, Alice in Wonderland 44

Coke, Institutes.....11,12

Denman, Introduction to the Practice
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Hawkins, Pleas of the Crown.....11

Hodge, Principles and Practice
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Holmes, The Common Law (1963).....63

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Model Penal Code.....62

Orwell, 1984 (1949).....19

Perkins, Criminal Law
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Plato (Jowett transl. 1942).....56

Ramsbotham, Principles and Practice of
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Russell, Treatise on Crimes and
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Schwartz, Statutory History of the United
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Speer, Inside the Third Reich 57

Storer, On Criminal Abortion
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Taylor, Manual of Medical Jurisprudence
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Velpeau, M.D., Complete Treatise on
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Wharton, Treatise on the Criminal
Law of the United States (1874).....30

Wharton, Treatise on the Law of
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Wharton and Stille, Treatise on
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Wigmore, Evidence (Chadborn Rev. 1972)...56

Writings of Thomas Jefferson
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Articles, Reports & Briefs:

Amicus Curiae Brief by the Legal Defense
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Destro, Abortion and the Constitution:
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Hearings on the Proposed Constitutional
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Rights of the Committee of the Judiciary,
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Jeffries and Edmonds, Abortion: The Dreaded
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Landers, To a Traditionalist, Mr. Ron Sounds So Good, Wall Street Journal.....52

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Interest of Amicus

The amicus defends the right to life of the unborn, which the parties have not done.

Summary of Argument

The unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments, includes the unborn.

Argument

I.

THE GUARANTEE OF LIFE TO "ANY PERSON," MADE BY THE CONSTITUTION, INCLUDES THE UNBORN.

1. THE LETTER OF THE LAW (THE GUARANTEE OF LIFE TO "ANY PERSON," THE TWO MOST IMPORTANT WORDS EVER ENACTED INTO LAW) ON ITS FACE INCLUDES THE UNBORN.

The 5th and 14th Amendments guarantee that not "any person" can be deprived of "life ... without due process of law." The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and thus on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then Roe v. Wade "collapses," because the unborn's lives would be "guaranteed" by the Constitution.[1] In ruling "the word 'person' ... does not include the unborn,"[2] the Court hit the Constitution head on, did what is expressly forbidden, and directly defied the letter of the law of its most important guarantee.

The words "any person" are the two most important words ever written into law. The guarantee of life to "any person" is the single most important guarantee because it protects the lives of everybody from government sanctioned extermination, as happened in Nazi Germany.

And the words "any person" give legal body to the spirit that "all men are created equal" and endowed with an "unalienable" right to life. The words "any person" exactly summarize what America stands for,

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1. Roe v. Wade, 410 U.S. at 156-157.
2. Roe v. Wade, 410 U.S. at 158.

its unique contribution to civilization. As Abraham Lincoln said, what made America great was the promise "not alone to the people of this country, but hope to the world for all future time ... that ALL should have an equal chance."

The words "any person" are the very words which guarantee that equal chance to "ALL"; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions at all.

The Supreme Court of West Germany held that the words, "Everybody has the right to life," did include the unborn; it explained that the word "everybody" is universal.[3]

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3. R. Destro, Abortion and the Constitution The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975). In 1975 the Supreme Court of West Germany ruled that the phrase in its Constitution, "Everybody has the right to life," did include the unborn, that "Abortion is an act of homicide," and

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions; on their face the words "any person" do include the unborn.

2. THE MODIFIER "ANY" INVOKES A VIRTUALLY IRREBUTTABLE PRESUMPTION THAT THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

The Court never studied the letter of the law - the universal words "any person." Instead the Court focused on the isolated word "person," and ignored its modifier "any," which invokes a virtually irrebuttable presumption in favor of life that the words "any person" do include the unborn.[4]

By reading the guarantee of life to "any person" as if it merely said "some persons," the Court did the most forbidden

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the state had a "duty ... to protect unborn life." It noted "Everybody" is universal:

> The right to live is guaranteed to everybody who is "alive." No distinction can be made among the several stages of developing life before birth, or between prenatal or postnatal life. "Everybody" ... means every "living person,"... therefore, "everybody" in this sense also includes unborn human beings.

4. See burden of proof, infra p. 39.

thing and reduced to nothing what is deemed the most important law in the history of political institutions.

3. THE SPIRIT OF THE LAW, THAT "ALL MEN ARE CREATED EQUAL," SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN.

Roe v. Wade violates the spirit of the law, as well as its letter. The promise that "all men are created equal" and endowed with an "unalienable" right to "life" is the guiding spirit of American law. The Supreme Court itself ruled it is the spirit of the Fourteenth Amendment:

> "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[5] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that "all" are "created equal," and "all" shall get their equal chance to live, proves that the words "any person" do include the unborn. Concerning the right to life, the unborn are the equal of anyone.

4. HISTORY SHOWS THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The last time this Court attempted to imply an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857). The 13th and 14th Amendments were intended to overrule this decision that the words "any person," as used in the 5th Amendment, did not include Negroes; there was a constitutional right to own a slave; the phase "all men are created equal" did

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5. The uncontradicted medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."

not include Negroes; Congress could not prohibit slavery in the territories; and Negroes could not sue in federal court to see if they were slave or free.

Abraham Lincoln was a leading opponent of Dred Scott. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He denounced Dred Scott as based on "falsehood," and he alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress, to make slavery legal everywhere and overturn the foundation of our government. Explaining why he would not obey it, President Lincoln said that Dred Scott resulted in "the rule of minority, as a permanent arrangement" which was "wholly inadmissible" and if the President were bound by Dred Scott, "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war, and President Lincoln defied the Court's decision, that there was a constitutional

right to own a slave, when he emancipated slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the principle that "all men are created equal" could "long endure."

The Fourteenth Amendment was intended to rededicate this nation to this original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government." Rep. Jacob Howard, quoted in 1 B. Schwartz, Statutory History of the United States: Civil Rights 262 (1970).

The framers intended to prevent another Dred Scott catastrophe of judges ever again implying exceptions to the words "any person" to exclude anyone; they employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Roe v. Wade is simply another Dred Scott disaster which rests on historical contradictions so insane that to permit it is to confess that men cannot be governed by truth, reason, or laws.[6] The Court did the most forbidden thing, and defied the "unalienable" guarantee of life to "any person," the two most important words ever written into law.

The letter of the law, its spirit, its history, its presumption in favor of life, the medical facts known to the 19th century, as well as the 20th, unite to permit only one lawful conclusion: the guarantee of life to "any person" does include the unborn.

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6. Roe v. Wade rests on the contradiction that without one word of explanation, the framers intended their very promise of life to all, to "any person," to sweep away all their abortion statutes, and make killings, which they had already condemned as criminal, a fundamental "liberty" ranked along with free speech. Roe v. Wade further pretends that the framers somehow silently connived to repudiate a major point of the civil war, so that, in the manner of Dred Scott, judges would be at liberty to again produce more convulsions by implying more exceptions to the words "any person."

II.

ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

1.

ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY."

When the Fourteenth Amendment was adopted in 1868, an abortion was murder if the child was "born alive." And a child could be "born alive" long before the Court's arbitrary point of "viability."[1]

An 1859 study by the American Medical Association stated the law of murder throughout the United States:

> If a person, intending to procure abortion, does an act which causes the

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1. This Court arbitrarily set the point, where the law could begin to protect the unborn, at "viability" (about 7 months gestation) "because the fetus then presumably has the capability of meaningful life outside the ... womb." Roe v. Wade, supra, 163. The point is arbitrary, because the Court cannot explain why (in legal and medical precedent) it can be criminal to kill the unborn a few days after viability, but must be "liberty" to kill the unborn a few days before. The Court invented it.

> child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[2]

Yet in 1973, without any investigation of the law of murder, the Court decreed this very killing to be "liberty" which the American people had universally defined to be "murder." In plainest terms, the Supreme Court decreed: "MASS MURDER IS LIBERTY."

A. THE ENGLISH COMMON LAW WAS THE LAW OF THE LAND IN COLONIAL AMERICA

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[3] So if

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2. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

3. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

the child were "born alive" (even if not "viable"), Coke said the abortion is "so horrible an offense" and "this is murder."[4]

Regina v. West involved this very abortion of a quick, but pre-viable child:

> "The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery ... by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.
> ....
> "A medical witness stated ... that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K 784, 786-788 (1848).

Although not yet viable, the judge cited Coke and instructed the jury that if the child were "born alive," the abortion was

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4. Coke, 3 Inst. 50. "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....(I)t may still be considered as the fundamental code of the English law." 14 The Writings of Thomas Jefferson 57 (Bergh ed. 1907). Jefferson was an authority on colonial law, serving on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

murder.[6] The English writers cited this as the correct statement of the law.[7]

Thus Roe v. Wade decreed killings to be "liberty" which had been condemned as "murder" since earliest colonial times.

B. "BORN ALIVE" ABORTIONS WERE MURDER WHEN THE FOURTEENTH AMENDMENT WAS ADOPTED.

The English common law is the dictionary which courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted, American legal authorities had

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6. Regina v. West, 2 C & K at 788: "I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

7. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).

long followed the common law rule that abortions of pre-viable children "born alive" were murder. In 1858 the preeminent legal writer of the 19th century explained:

> "If a person intending to procure abortion, does an act which causes a [quick] child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder" F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[9] Courts applied this law of murder.[10] It was still the law in 1973.[11] In 1975 the New Jersey courts

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9. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra, 462, 517.

10. Clarke v. State, 117 Ala. 1 (1898). "In Georgia ... the wilful killing of an unborn child so far developed as to be ... called 'quick,' is considered as murder." Porter v. Lassiter, 87 S.E. 2d 100, 102 (1955).

11. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

applied this 17th century murder law to the killing of a pre-viable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[12]

For almost four centuries governments came and went, but the law that born alive abortions are murder, which is binding on the U.S. Supreme Court,[13] remained the law of the land.

Thus Roe v. Wade decreed killings to be "liberty" which had been universally condemned by the framers and adopters of the Fourteenth Amendment to be "murder."

C. THE GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES CHILDREN GUARDED BY THE MURDER LAW

The guarantee of life to "any person" in the Fourteenth Amendment must include

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12. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

13. Chief Justice Marshall ruled that the Supreme Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

all persons whose lives were protected by the law of murder when the Amendment was adopted. No dispute is even possible.

If the killing of Jews had been defined to be murder in 1868, it is certain that the framers did not intend to exclude Jews from the guarantee of life to "any person" so it would be "liberty" to kill Jews with impunity from criminal laws. Changing the names of the victims does not change the legal result.

The people who framed and adopted the Amendment had condemned the taking of a crying, pre-viable infant from its mother's womb to be murder. Thus it is certain that they did not intend to exclude the lives of these children from the guarantee of life to "any person" so it would be "liberty" to kill them with impunity from murder laws.

By arbitrarily setting "viability" as the point the law could begin to protect unborn life, the Court decreed the same

killing to be "liberty" which the American people had condemned as "murder."

The words "any person" do indisputably include children protected by the law of murder. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, the right to life of these children is still guaranteed by the Fourteenth Amendment.

D. ROE_v._WADE_ALLOWS_HYSTEROTOMY_ABORTIONS

Roe v. Wade hysterotomy abortions, basically Caesareans, result in children "born alive."[14] As explained to Congress:

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[15]

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14. Jeffries and Edmonds, Abortion: The Dreaded Complication, Philadelphia Inquirer, August 2, 1981.

15. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976) (statement by Dr. John Willke, M.D.). There are about 140,000 second stage abortions each year. Washington Post, April 26, 1985, A11. Most methods can result in a child born alive.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder. Thus the lives of the children are still guaranteed by the Amendment, and the killings are still murder.

F. THE DECREE "MASS MURDER IS LIBERTY" OVERTHROWS THE U.S. CONSTITUTION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life? The evidence proves that the lives of these children are guaranteed by the U.S. Constitution.

This evidence for the unborn is exactly the same evidence which many people must rely upon to prove their lives are guaranteed by the U.S. Constitution.[16] If

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16. Suppose it were claimed in federal court that it is "liberty" to kill the insane, or invalids, or Jews. What factual, non-argumentative evidence could be found to establish their right to life under the U.S. Constitution?

As with the unborn, it would do no good to object that no one ever heard of a "liberty" to kill them - or to object that such killings had thereto been criminal.

The Amendment merely states that it protects the life of "any person." So, as with the unborn, it does not expressly

the evidence is ineffective for the unborn, then the Roe v. Wade precedent can grow to a "liberty" to kill virtually anyone. If the Supreme Court decreed it "liberty" to kill Jews, this same evidence would prove it "murder," and not "liberty." Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

Roe v. Wade murders reason itself. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United

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refer to them; and its legislative history does not appear to expressly refer to them.

The principle that all people are "created" equal, with an "unalienable" right to "life," having been sneered out of court in Roe v. Wade, now provides no assurance for anyone.

As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; the intention of the legislators is found in the common law.

If the evidence cannot protect the unborn, the lives of many are imperiled.

States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed Dred Scott by reducing it to its plainest terms:

> [We hold these truth to be self-evident, that] all men are created equal - except Negroes.
> That if any one man, choose to enslave another, no third man shall be allowed to object.

The Fourteenth Amendment intended to prevent this forever. Yet Roe v. Wade, reduced to its plainest terms, asserts:

> We hold these truths to be self-evident, that all men are created equal - except those created to be murdered.
> That if any one man, choose to murder another, no third man shall be allowed to object.

By changing the names of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany who asserted the killing of Jews to be legal.[17]

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17. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at

The key doctrines of the Nazi judiciary have been adopted by the courts of the United States: a "supreme judge" which decrees mass murder to be legal; and lower judges who rule they must blindly obey.[18]

The Court did exactly what the guarantee of life to "any person" was intended to prevent, and decreed murder to be legal, by giving "murder" the new name "liberty." But Chief Justice Marshall condemned such sham:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description; may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be evaded by giving a new name to an old

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983-85. Their "supreme judge" had decreed killings to be legal which had been defined by statute to be criminal. But the tribunal held, "The dagger of the assassin was concealed beneath the robe of the jurist."

18. Ernest v. U.S. Attorney etc., cert. denied 475 U.S. 1084 (1986). The U.S. District Judge ruled that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court." But he stated that even if the Supreme Court decreed it liberty to kill Jews, he must obey and permit the killings to continue.

thing? We cannot think so." Craig v. Missouri, 3 Pet. at 433 (1830).

Thus the United States is ruled by the decree "MASS MURDER IS LIBERTY." But murder is still murder, no matter what new name the Court gives it. This is the most catastrophic crime in history. This precedent of judicial alchemy to convert murder into "liberty" can be evoked at whim to kill anyone; it cancels the "unalienable" guarantee of life and makes everybody a mere hostage of this Court; it is a virtual murder gun held to everyone's head - all life now depends merely on judicial whim; it defies the consent of the governed; it smashes the hopes of the whole human race for government by truth and laws, and reduces government to the mere matter of which murderer can grab power and be obeyed. Again people must struggle to ensure that the nation dedicated to the proposition that "all men are created equal" shall not "perish from this earth."

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY-PERSON" BECAUSE THIS COURT FABRICATED EVIDENCE TO FALSELY IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The 19th century abortion statutes supplanted the medieval view that unborn life began at "quickening"[1] and expanded protection of law to all stages of unborn life; they prove the guarantee of life to "any person" includes the unborn, that no distinction can be made among the stages of unborn life.

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already made abortion at any stage of gestation a crime.[2] Within a few years, these statutes were universal.

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1. "Life is the immediate gift of God, a right inherent by nature in every individual: and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb." 1 Bl. Com. 126.

2. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).

And in those few States still following the common law, judicial revision makes it impossible for this Court to assert with any assurance that it was any different than the prevailing statutes:

> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[3]

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3. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts rejected medieval medical views and ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

Wharton, a standard 19th century text, stated that under common law "the protection of the law was cast round an unborn child from its first stage of ascertainable existence, no matter whether 'quickening' had taken place or not." F. Wharton and M. Stille, Treatise on Medical Jurisprudence 927-28 (2d ed. 1860).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately

The theory of a "liberty" to kill the unborn faced a fatal contradiction. How could the Court dare to Dred Scott-like imply an exception to the guarantee of life to "any person" in order to declare killings to be "liberty" which the people had defined to be criminal? This absurd contradiction wrecks Roe v Wade.

To resolve this fatal contradiction the Court fabricated the hypothesis that the 19th century criminal abortion statutes were not intended to protect unborn life, but were only intended to protect the mother. This falsely implied that the people never intended the lives of the unborn to be protected by law. This false hypothesis was fabricated as follows.

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overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

A.

The Court first asserted as fact:

> "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148.

The only authority cited was a 20th century medical history book.[4] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics; the abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[5] They prove the Court's assertion of fact to be false.

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4. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

5. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. They based their judgments on their own experience in performing abortions, and from hundreds of cases reported from around the world. In addition to perforation, other procedures were also safe. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method,[6] which one physician traced back 2000 years,[7] and which they described as "perfectly safe" to woman.

The Court did not examine even one 19th century obstetric textbook; and they prove its assertion, "the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating

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matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

6. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

7. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions, which were known all over the western world to be safe to the mother, to be performed only by physicians.

B.

The Court next asserted: "Abortion mortality was high."[8] This is asserted as fact. The Court cited no authority to support it. The 19th century obstetric authorities prove this assertion to be false; their medical texts show that the abortion operation was "perfectly safe."

The purpose of the Court's false assertion of fact is to go beyond the mere theory that abortion was hazardous to the mother, and infer that the carnage was so

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8. Roe v. Wade, 410 U.S. at 149.

great as to call for legislation to protect women from the medical profession.

C.

Upon these two false assertions of fact, the Court next falsely inferred:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact. Moreover, the 19th century treatises on criminal law expressly stated that these abortion statutes were intended to supplant the ancient common law and protect the lives of the unborn during all stages of gestation:

> "The notion that a man is not accountable for destroying the child before it quickens, arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction" ... is now exploded in medicine.... The foetus is certainly ... as much a living being immediately after conception, as at any other time before delivery.
>
> ....
>
> "There is as much vitality ... on one side of quickening as on the other, and ... the infant is as much entitled to

> protection ... a week before it quickens as a week afterwards.... Acting under these views, the legislatures ... passed acts making ante-quickening-foeticide individually penal." 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

There is no 19th century authority to the contrary. If the purpose of these laws had been to protect the mother, and not the child, these texts would certainly have noted such an important thing.

And State supreme courts ruled that these statutes protected the unborn:

> "(T)he statute ... essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate.... It is now equally criminal to produce abortion before and after quickening." Smith v. State, 33 Me 48 (1851).

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That

legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[9] shows their great respect for unborn life.

D.

The Court next made its irrelevant study of the single word "person," and held it "does not include the unborn":

> "(O)ur observation ... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result; the whole weight rests on the Court's "major portion - far freer" assertion, which is false.[10] The reverse is closer to

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9. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860)

10. The ancient common law only prevailed in the early 19th century. By mid-century, a majority of the States which ratified the Amendment had already enacted statutes

the truth. The evidence indicates that legal abortion was far freer in 1973, than when the Amendment was adopted.[11]

The Court's "major portion - far freer" doctrine, were it even true, is absurdly irrelevant[12] and ominously skirts

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which punished abortion throughout gestation. (Supra n.2) By 1868, over three-fourths had enacted such statutes; and shortly they were universal. In those few states with no statute, this Court cannot claim with assurance that the common law was any different. (Supra n.3) Thus the "prevailing law" for the last half of the 19th century; it was about the same as existed in most states in 1973; and "legal" abortion was not "far freer" then.

11. The statutes listed in Roe v. Wade, 410 U.S. at 140 n37, show that by 1973 four states permitted abortion on demand, while fourteen permitted abortions for other reasons not allowed in 1868. The statutes prevailing in 1868 only permitted abortions to save the life of the mother or child. Thus legal abortion was far freer in 1973 than in 1868, although in most states it was still about the same as it was in 1868.

12. The same thing could be said about "legal slavery," which really was "far freer" for the "major portion" of the 19th century than it is today. Would this prove a right to own a slave today? If the Court could ignore the events of 1860 to 1866 - it could plausibly reaffirm its Dred Scott rule that there was a right to own a slave.

the central issue of the law existing in 1868, and the reason for the vast change.

The Court's assertion that "legal abortion" was then "far freer" refers to the ancient common law that abortion prior to "quickening" was not a crime, on the theory that life began at "quickening." A physician, who helped draft Virginia's 1848 abortion statute, explained its purpose was to supplant this "exploded error":

> "(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of 'quickening' as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.
> ....
> "(T)he civil rights of the unborn child are perfect from the very commencement of its being." L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

The 19th century medical and legal authorities, with none to the contrary, condemned this ancient theory of life:

> "(I)t is the duty of every accoucheur earnestly to protest against the ancient theological and legal opinion that, prior to the fourth month, the embryo had no proper existence.... (T)he merest tyro in physiological investigations must be convinced of the falsity of all such opinions." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864).

Yet the Court exactly adopted, as constitutional law, a view of unborn life which the 1860 president of the AMA called "a barbarous physiology" and which courts ruled "never ought to have been the law anywhere,"[13] and which 19th century legislatures condemned as criminal. The AMA president said in urging States to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of the American Medical Association 56-57 (1860).

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13. Mills v. Commonwealth, supra, 632.

The abortion statutes were urged by America's most eminent medical professors and physicians, and they were intended to protect all stages of unborn life:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[14]

The abortion statutes show the universal guarantee of life to "any person" was not based on "a barbarous physiology"; the Amendment recognizes that there is no time during unborn life that a rational line can be drawn to permit the killings.

But the Court accepted the medieval view, that life began at "quickening"

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14. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

(about 4 months), and arbitrarily enlarged it to "viability" (about 7 months), making a "liberty" to kill which even its only authority, the ancient common law, condemned as criminal. Thus the basis of the Court's decree that "the word 'person'... does not include the unborn." Thus 20th century constitutional law was founded on medieval medical theory which was rejected as false in the 19th century, and remains false today.

In short, the Court manufactured a constitutional right to kill, out of "an exploded error" that an ante-quick child was not alive, which the "merest tyro" knew to be false, and was universally condemned as "a barbarous physiology" found only in "dark and ancient caverns," which 19th century judges ruled "never ought to have been the law anywhere," and which legislatures condemned as criminal everywhere, in order to Dred Scott-like blast an exception to the guarantee of life to "any person," so

tens of millions of victims could be killed with impunity from criminal statutes. This is not law; it is murder under ruse of law.

The Court's arbitrary shopping among medieval notions, rejected by the framers as "barbarous," to define the unalienable guarantee of life to "any person," is a another murder gun precedent pointed at the head of all Americans; it makes everyone a hostage of this Court; judges can arbitrarily pull its trigger to destroy anyone.

The Court now has bloody precedent for doing the most forbidden act; it directly defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and condemned to death millions of victims whom the U.S. Constitution endeavors to preserve. It can now happen to anyone; the Court has cancelled the "unalienable" guarantee of life to "ALL," and sealed it in blood.

E.

In construing its equivalent word "everybody," the Supreme Court of West Germany ruled it did include the unborn:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." [Supra page 3 n.3]

The history of the criminal abortion statutes proves the framers made this same conclusion when they universally guaranteed life to "any person" without any exceptions: there is no time during unborn life that the law can withdraw its protection and permit the killings; rather it is the duty of the law to protect the weak.

Without need of assistance from Chief Justice John Marshall's burdens of proof, as described in the next section, history permits only one rational conclusion: the universal and "unalienable" guarantee of life to "any person" includes the unborn during all stages of unborn existence.

3.

THIS COURT CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" WHEN IT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden when it previously construed "any person."[1] Yet when it came to the unborn, it used a "guilty until proven innocent" burden.

A.

THE BURDENS, DESCRIBED BY CHIEF JUSTICE MARSHALL, PROVE THE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

Chief Justice John Marshall described the conditions the Court must satisfy to lawfully imply an exception to universal terms in the U.S. Constitution.

Before the Court can exclude the unborn from the guarantee of life to "any

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1. The Court properly ruled that the words "any person" included Chinese aliens, saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And this Court was so sure that the words "any person" included "corporations," it refused to even allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

person," so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[2]

The Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it,"[3] and the

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2. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," it would be "dangerous in the extreme" to infer the case "is not within its spirit" because "we believe the framers of that instrument could not intend what they say" unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

3. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within

framers would have changed the guarantee to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany; they carry the life of each American in their hands. The Court bears the heaviest burden of proof to imply an exception to the guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.[4]

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the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd ... as to justify those who expound the constitution in making it an exception."

The Court used these burdens when it ruled it could not read its jurisdiction, which includes "all cases" arising under the Constitution, as if it merely said "some cases." Cohens v. Virginia, 6 Wheat 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. at 339 (1816).

4. The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately

Chief Justice Marshall's rules prove the guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers would not have changed the guarantee to read "any person - except the unborn," so it would be liberty to kill them, because the people had already enacted criminal statutes to protect the lives of the unborn by law. Thus the guarantee of life to "any person" does include the unborn.

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killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." And the Court must prove that if the case of the Jews had been suggested to the framers, they would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law." This same burden protects us all.

B.

THIS COURT EXACTLY DEFIED THE BURDEN DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the guarantee of life to "any person" would "be so monstrous, that all mankind would, without hesitation, unite in rejecting the application," the Court reversed the burden:

First, the Court declared a "liberty" to kill the unborn with impunity from criminal laws, before it even looked to see if the guarantee of life to "any person" included the unborn.[5]

Second, subsequently, the Court looked to see if the guarantee of life to "any person" included the unborn.[6]

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5. Roe v. Wade, 410 U.S. at 153: "(T)he Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision ... to terminate her pregnancy."

6. Roe v. Wade, 410 U.S. at 156-157. "The appellee ... argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

Third, the Court admitted that if the words "any person" included the unborn, its predetermined assertion of a "liberty" to kill the unborn "of course, collapses."[7] But the Court decreed a "liberty" to kill the unborn before it looked to see if the unborn had a "guaranteed" right to live.

Thus the Court had passed its sentence of death, before it even looked to see if the Constitution guaranteed a right to live. It is analogous to a court sentencing an accused to be hung before it even heard the evidence. As Alice's Queen demanded: "Sentence first; verdict afterwards."[8]

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7. Roe v. Wade, 410 U.S. at 156-157: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

8. The vengeful Queen in "Alice in Wonderland" shouted "Off with her head" and when admonished that the jury must first consider its verdict, she said: "No! No! Sentence first- verdict afterwards."
So it was in Roe v. Wade - first the sentence of death; then the verdict whether the law allowed the victim to live.

Fourth, the Court's purpose for first predetermining a "liberty" to kill the unborn, was not only to shift the burden of proof from the advocates of the killings onto the unborn, but also to impose its heaviest "compelling" burden on the unborn, a burden of proof so devastating that state statutes seldom, if ever, survive it.[9]

Fifth, the Court stated that the evidence did not prove "with any assurance" that the guarantee of life to "any person" included the unborn.[10] This confirms that the Court placed the burden on the unborn to prove with "assurance" that the words "any person" included the unborn. This is the heaviest burden which can be imagined.

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9. Roe v. Wade, 410 U.S. at 155: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment. Id., at 156.

10. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).

Finally, by calling upon its false evidence to raise trifling doubts, the Court said that the unborn had not met their burden of proof and ruled "the word 'person' ... does not include the unborn."

If the Court used such burdens to decree a "liberty" to kill Jews, surely none would deny it would be murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

When courts use such burdens to condemn victims to death, it can no longer be pretended it is still the government of the United States - any government of laws. This is still another "murder gun" precedent pointed at the head of every American; judges can arbitrarily use it to destroy anyone. The true burden proves beyond dispute that the guarantee of life to "any person" does include the unborn.

ROE v. WADE CRIMINALLY DEFIED THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THIS COURT USED "IRON CURTAIN" PROCEDURES TO IMPLY THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN; IT USED THESE PROCEDURES TO MAINTAIN ITS KILLINGS.

The Court effected Roe v. Wade by using unconstitutional "iron curtain" procedures in a mock trial without truth.[1]

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1. A. Denial of Assistance of Counsel
Counsel did not especially represent the unborn in the U.S. District Court in Roe v. Wade. And the U.S. Supreme Court denied a request by an original party to allow counsel to especially represent the unborn and defend their right to life. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice
The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find

And the Court maintains its killings by using "iron curtain" procedures in mock trials without truth, despite continual objection that the Court was using criminal procedures to maintain its killings:

— 1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers) counsel to represent the victims being

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evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that the Court's facts were "unknown to the parties" and it never had opportunity to cross-examine the Court's evidence.

D. Denial of Right to Cross-Examine

An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. Since the Court found its evidence in secret proceedings, the parties had not previously seen the evidence. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence

An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And thus the killings commenced.

killed and defend their right to life.[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that "the word 'person'...

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2. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 98 L Ed 2d 478 (1988), motion to allow counsel for the unborn denied 479 U.S. 1003.

does not include the unborn," to be confronted and cross-examined.[3]

3. The Supreme Court willfully refuses to allow evidence to be presented to show that the Constitution's unalienable guarantee of life to "any person" includes the unborn.[4]

These are basically the procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[5]

The Supreme Court's own rulings on due process of law show these procedures to be

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3. See cases, supra note 2.

4. See cases, supra note 2.

5. "The trials ... did not approach even a semblance of ... justice. The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice.... (P)roceedings ... were secret." United States v. Altstoetter, supra, at 1046-47 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes." Id., at 1086.

unconstitutional,[6] and the willful use of these procedures to be criminal.[7]

If the Court had used these procedures to decree it "liberty" to kill Jews, it

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6. Even in civil proceedings (such as where loss of welfare is threatened) due process guarantees (1) prior notice of the factual and legal bases; (2) the right to assistance of counsel; (3) the right to cross-examine adverse evidence; and (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all the procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes.

7. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).

would be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result.

The Court maintains its decree "MASS MURDER IS LIBERTY" by refusing to allow truth to work in its Court. No truth seeking process was left unbloodied. It is notorious that truth is not permitted to work in this Court, and that the Court falsifies history to achieve its ends.[8]

The record proves the Court used "iron curtain" procedures, a mock trial without

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8. "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.... Such conduct impels one to conclude that the Justices are become a law unto themselves.... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408-12 (1977).

"Court had adjourned in the real world and reconvened in Cloud Cuckooland. [The Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, Wall St. J., edit. page, Dec. 27, 1984.

truth, to do the most forbidden thing, to defy the guarantee of life to "any person" so millions of victims could be killed with impunity from criminal statutes; and the Court maintained its killings for fifteen years by using "iron curtain" procedures in mock trials without truth. In the words of the Nuremberg court, "Such a mock trial is not a judicial proceeding but a murder."

These procedures are still another "murder gun" precedent which this Court holds to the head of every American; everyone is now a hostage of this Court; judges can use this "iron curtain" process to destroy anyone. The process makes Roe v. Wade void.[9]

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9. A more detailed description of the procedures is made in the MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed in this case, and incorporated by reference.

5.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER, AND TO ADMIT THAT THE UNALIENABLE GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

For the 95th time, the U.S. Supreme Court is accused of criminally defying the guarantee of life to "any person" and exterminating millions of victims whom the U.S. Constitution endeavors to preserve.

For the 71st time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 75th time, this Court is accused of using criminal procedures to effect and maintain Roe v. Wade killings.

John Marshall would have called Roe v. Wade "treason to the Constitution."[1]

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1. Chief Justice Marshall wrote that this Court could not extend the Constitution "to objects not...contemplated by its framers." Ogden v. Saunders, 12 Wheat. at 332. If the Court usurped such power, it would be "treason to the Constitution." Cohens v. Virginia, 6 Wheat. at 404. By decreeing "liberty" to be the very thing which the framers had condemned to be "murder," the Court has indisputably extended the Constitution to objects not contemplated by its framers. For 15 years, "treason to the

But, for fifteen years, the U.S. Supreme Court has never denied the charges, much less attempted to prove the charges to be false. These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims

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Constitution" has masqueraded as "the supreme law of the land."

The Court supplanted the Constitution as the supreme law. Chief Justice Marshall wrote that "the Constitution derives its whole authority" from the consent of the governed. McCulloch v. Maryland, 4 Wheat. at 403. Yet, the Court now defies this consent; it simply invents a dream world and imposes it on the people by decree. A divided Congress is unable to control this Court, which results in rule by minority.

Thomas Jefferson warned that this Court was "the most dangerous" branch because judges were "installed for life, responsible to no authority (for impeachment is not even a scarecrow)"; and judges twist words to make "anything mean everything or nothing, at pleasure" with judges finally becoming "despots." Thus Roe v. Wade fully explained.

People have lost faith in the simple power of facts to prove: falsehood is called truth; murder is called liberty; treason is called law. This defeat of the consent of the governed as the basis of law is the most momentous revolution in human history. The way out was shown by Abraham Lincoln, who would "call things by their right names, no matter who was offended."

are being killed, is an admission that the charges are true.[2] In the Court's words:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process has compelled the U.S. Supreme Court to confess that the charges are true.

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2. Under the tacit confession rule, failure to deny a charge is admissible as a confession that the charge is true. 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972). The Court has often affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Plato 41, 45 (Jowett tr. 1942).

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[3] Truth cannot be proved false.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[4]

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3. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact; no denial is possible. As John Marshall said, "a fact which has existed cannot be made never to have existed." Marbury v. Madison, 1 Cranch at 167 (1803).

4. Marbury v. Madison, 1 Cranch 137, 179-180 (1803). This correctly states the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... From fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76

The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided. The Court affirmed its duty:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

Third, the Court's steadfast silence for fifteen years in the face of the scores of accusations is unparalleled in the legal history of the world; the Court cited this very circumstance as making confession by silence more trustworthy.

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in

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(1970). This "deliberate blindness" is complicity in criminal extermination.

the teeth of warnings that its silence was being taken as an admission that the charges are true.

Fifth, the charges described judicial crimes not surpassed in all history, that (1) judges had done the most forbidden thing, and defied the unalienable guarantee of life to "any person," the two most important words ever written into law, and criminally exterminated millions of children; (2) the United States was being ruled by the most corrupt decree which the human mind could even imagine: "MASS MURDER IS LIBERTY"; (3) due process of law had compelled the judges to confess to guilt of mass murder; and (4) the judges schemed to reaffirm the legitimacy of their murders in mock trials designed to keep truth from working in all state and federal courts.[5]

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5. In Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), the Court reaffirmed Roe v. Wade by stare decisis in a mock trial without truth.

The parties did not ask the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense

The United States being ruled by the decree "MASS MURDER IS LIBERTY" is the most catastrophic crime in the history of civilization; it smashes the hopes of the whole human race for a government of laws, and

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Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder." The amicus brief laid out the evidence, and concluded: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." But this Court responded to these arguments by saying:

> And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade.

Thus, the Court's response to "arguments" that it was guilty of mass murder. When a court rules that its decree "MASS MURDER IS LIBERTY" must be obeyed without a hearing or even a question, then history could not reveal a more murderous mockery of "the rule of law." The Court hid behind stare decisis in a mock trial and used this ruse of law to defraud all lower courts into obeying Roe v. Wade without question.

reduces government to the matter of which murderer can grab power and be obeyed.

Never in the legal history of the world was it more imperative to deny charges if they were untrue. Judges, under solemn legal duty to uphold the law, are accused of mass murder. The evidence is laid out in court. The judges have done the most forbidden thing, and defied the guarantee of life. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But for 15 years the judges do not meet the evidence; do not prove it false.

A government of laws can permit only one conclusion to be drawn from these facts: The U.S. Supreme Court was met in court with the truth; truth worked in the only manner in which it was permitted to work; and due process of law compelled this Court to admit, in the most emphatic manner which the mind can imagine, that the words "any person" do include the unborn.

Any judge who closes his eyes on these facts, and chooses to take part in a national scheme to kill little children, in defiance of the guarantee of life to "any person," and criminal statutes, to maintain the decree "MASS MURDER IS LIBERTY," knows he is guilty of complicity in mass murder and criminal defiance of the Constitution.[6]

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6. Roe v. Wade asserted to legalize killings which statutes had made criminal. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985.

Perhaps judges responsible for the Roe v. Wade murders did not believe they were breaking the law. But as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it.... It is no doubt true that there are many cases in which the

In explaining how the Nazi regime got away with its monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." The Court knows that truth well; the legal foundation of the United States now rests on the assumption that the gravest crime in history cannot be avenged.

The photo on the last page shows a second stage abortion under Roe v. Wade. If the child were born alive, this Court would be guilty of murder. If the child were born

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criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (1963).

Even if the Supreme Court held a gun to the head of a lower judge, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to murder, for "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing: (1) any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal; (2) but any judge who allows the killings to continue and makes a mistake of law, can be convicted of murder, and be sentenced to death. The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

Truth has worked in this Court; judges cannot stop it. Due process has compelled this Court to admit that the unalienable guarantee of life to "any person" does include the unborn.

CONCLUSION

Merely overruling Roe v. Wade will simply continue its crimes, perhaps on a less extensive scale. The Court misguided this nation and the entire world.

Now the Court must promulgate the truth, that the universal and unalienable guarantee of life to "any person," made in the Fifth and Fourteenth Amendments of the U.S. Constitution, do include the unborn, and States have a duty to protect unborn life.

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AMICUS CURIAE

BRIEF

No. 88-605

(34)

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Eighth Circuit

BRIEF OF COVENANT HOUSE AND GOOD COUNSEL, INC., *AMICI CURIAE*

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34p

Question Presented

In order to promote its compelling interest in preserving values of responsible parenthood, may a state enact statutes seeking to end its participation in, and even to actively discourage, abortion on demand?

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TABLE OF AUTHORITIES

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Cases:

Akron v. *Akron Center for Reproductive Health* 462 U.S. 416 (1983) 12

Brown v. *Board of Education*, 349 U.S. 294 (1955) 19

Clark v. *Jeter*, 486 U.S.—, 100 L.Ed. 2d 465 (1988) 12

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 11

Harris v. *McRae*, 448 U.S. 297 (1980) 17

Lehr v. *Robertson*, 463 U.S. 248 (1983) 11

Maher v. *Roe*, 432 U.S. 464 (1977) 5, 17

May v. *Anderson*, 345 U.S. 528 (1953) 11

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 11

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 11

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 4, 5

Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983) 17

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 4, 11

Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*

Rose v. *Rose*,—U.S.—, 107 S. Ct. 2029 (1987) 11

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 11

Stanley v. *Illinois*, 405 U.S. 645 (1972) 11

Swann v. *Charlotte-Macklenburg Board of Education*, 402 U.S. 1 (1971) 19

Thornburgh v. *American College of Obstetricians and Gynocologists*, 476 U.S. 747 (1987) 12, 17, 18

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Wetmore v. *Markoe*, 196 U.S. 68 (1904) 11

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 7, 11

Wissner v. *Wissner*, 338 U.S. 655 (1950) 11

Statutes:

Rev. Stat. Mo. 1.205.1(1), 1.205.1(2) 16

Rev. Stat. Mo. 188.029 16

Rev. Stat. Mo. 188.205, 188.210, 188.215 16

42 U.S.C.S. s666(a)(5) 11

Other Authorites:

American Humane Association, *Trends in Child Abuse and Neglect: A National Perspective* (1984) 8

Baron & Strauss, *Sexual Stratification, Pornography and Rape in the United States* (1984) 4a

I. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk* (1988) 10

Cherlin, *The Weakening Link Between Marriage and the Care of Children* (1988) 8, 9

Children's Defense Fund, *A Children's Defense Budget FY 1989* (1988) 8, 9

G. Eliot, *Daniel Deronda* (1876) 4

M. Glendon, *Abortion and Divorce in Western Law* (1987) 16

C. Grobstein, *Science and the Unborn* (1988) 15

Herzog, *Boys Who Make Babies* (1984) 14

Homeless Youth: The Saga of "Pushouts" and "Throwaways" in America, Rep. of the Subcomm. on the Constitution of the Comm. on the Judiciary, U.S. Senate, 97th Cong. 2d Sess. (1980) 7

PAGE

Landesman-Dyer & Emmanual, *Smoking During Pregnancy* (1979) 9

Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes* (1987) 12

D. Miller *et at., Runaways—Illegal Aliens in Their Own Land* (1980) 7

National Center for Health Statistics, *Monthly Vital Statistics Reports* 8, 9

National Research Council, *Risking the Future* (1987) .. 2, 9, 13

New York City Office of the Comptroller, *Whatever Happened to Boarder Babies?* (1989) 10

New York State Division of Substance Abuse Services, *Children of Substance Abusers in New York State: Trends and Estimates* (Treatment Issue Rep. No. 67) 10

Park & Neville, *Teenage Fatherhood* (1987) 14

Rosen & Johnson, *Drug-Addicted Mothers, Their Infants and SIDS* (1988) 10

"Seeking Stardom in Joe Clark, the Movie" New York Times, B1 (May 4, 1988) 19

Shaffer & Caton, *Runaway and Homeless Youth in New York City: A Report to the Ittleson Foundation* (1984) 7

Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis* (1986) 4a

Stressguth *et al., IQ at Age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy.* (1989) 9, 10

Torres & Forrest, *Why do Women Have Abortions?* (1988) 6, 14

Tribe, The Supreme Court 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973) 18

PAGE

Uhlenberg & Eggebeen, *The Declining Well-Being of American Adolescents* (1986) 7, 8

United States Department of Commerce, *Statistical Abstract of the United States 1987* (1986) 9, 14

United States Department of Commerce, Bureau of the Census *Marital Status and Living Arrangements* Current Population Reports, Series P-20 (1988) 8

United States Department of Health and Human Services, *Study Findings Study of National Incidence and Prevalence of Child Abuse and Neglect* (1988) 8

Vinovskis & Chase-Lansdale, *Hasty Marriages or Hasty Conclusions?* (1988) 15

Vinovskis & Chase-Lansdale, *Should We Discourage Teenage Marriage?* (1987) 15

Weitzman, *The Divorce Revolution* (1985) 15

K. Wooden, *Weeping in the Playtime of Others* (1976) 7

Yates *et al., A Risk Profile Comparison of Runaway and Non-Runaway Youth* (1988) 7

WILLIAM L. WEBSTER, *et al.*,
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vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

BRIEF *AMICI CURIAE*

Covenant House and Good Counsel, Inc. respectfully submit this brief *amici curiae* in support of the State of Missouri in this case. The written consents of the parties have been obtained and submitted to the Clerk on this date.

Statement of Interest

Covenant House is a New York not-for-profit corporation dedicated to serving homeless and runaway children. With programs currently located in 11 North and Central American cities, Covenant House provides crisis shelter and services, along with some longer-term options, to over 20,000 such children annually. A large number of those receiving care are adolescent mothers and their children: thus in Covenant House's New York program alone over 800 teenage mothers arrive each year bringing with them over 1000 infants and toddlers. Young pregnant women and adolescent fathers comprise another substantial segment of those served.

Covenant House has a strict "open intake" policy, admitting all young people under 21 who seek help, and requires no adherence to particular religious or ethical viewpoints by those who come. Still, based on its long experience working with desperately vulnerable teenagers and children, most of whom have been exiled from their homes by neglect, abuse, or rejection, the agency adheres to a strong pro-life philosophy. No abortions are performed at Covenant House nor is abortion counseling given; in any case, very few of the pregnant young women who

come have any interest in that option.[1] (Obtaining an abortion outside the agency is, of course, no ground for penalty or stigma at Covenant House.) The agency daily confronts, in working with the families of the teenagers and children in care, the kind of "opt-out" parenthood which characterizes abortion on demand, and which it files this brief to combat.

Good Counsel, Inc., is a New Jersey not-for-profit corporation dedicated to the shelter and care of homeless unwed mothers and pregnant women. Since its inception in May, 1985, Good Counsel has provided assistance to over 100 such women. Good Counsel runs four homes throughout the New York City metropolitan area, and offers its services as an alternative to women who might otherwise choose abortion.

Women stay at the homes for an average of six months, both before and after delivering their children. Good Counsel offers them food, shelter and the company of other women who share their problems. Women from many different backgrounds have sought shelter, but not surprisingly most are from poor and minority families. A given creed or acceptance of a certain lifestyle is not a requirement for aid at Good Counsel. Those pregnant women who already have children are able to shelter them at Good Counsel during their stay. At the end of their stay, which can last up to a year, Good Counsel assists the mothers in finding more permanent shelter and employment.

As two agencies which have wrestled for years with the dilemmas posed by pregnancy for young women and men, Covenant House and Good Counsel seek through this brief to add a somewhat different point of view to the polarized debate over abortion.

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[1] This is unsurprising, since the pregnant young women and mothers served by Covenant House are predominantly members of minority groups and from low-income households, both factors generally found to be associated with low interest in abortion. *See* Nat'l Research Council, 1 *Risking the Future* 113 (1987).

Summary of the Argument

The bitter debate over abortion that has plagued this Court since *Roe* v. *Wade*, 410 U.S. 113 (1973), has been framed as a contest between, on the one hand, the woman's right to make personal choices about reproduction, and, on the other, the state's interest in "potential" or actual unborn life as well as in maternal health. Left out of that paradigm, however, is another interest of increasingly compelling character: the state's interest in encouraging responsible parenthood among those who do become parents.

Careful consideration of the nature of abortion on demand and its effects on pre- and post-natal parenting strongly suggests that it is in irreconcilable conflict with this substantial state interest. Because the Missouri statutes under review merely seek to remove the State from appearing to *sanction* abortion on demand, they are plainly constitutional. Yet if they are seen as conflicting unavoidably with *Roe* v. *Wade*, that decision should be reconsidered and overruled or limited. In that event the Court should leave open the question whether strict anti-abortion statutes can only be enacted as part of a general state policy to assist needy parents and to protect unwed mothers from discrimination.

INTRODUCTION

To Daniel the words Father and Mother had the altar-fire in them; and the thought of all closest relations of our nature held still something of the mystic power which had made his neck and ears burn in boyhood. [2]

For Daniel Deronda, abandoned as an infant, it was impossible to take for granted the bond between parent and child. And his creator, George Eliot, found "greatness" in her characters insofar as they were "full of conscience and tender heart for the footsteps that tread near and need a leaning-place."[3] It was, in her view, the best kind of "unapplauded heroism" to attend to "the beatings of the hearts that are close to us, as the hunger of the unfledged bird to the breast of its parent."[4]

This Court, too, has always regarded with special solicitude the quiet demands placed on parents by their unfledged children. The responsibilities of parents are both a "right" and a "high duty". *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). It is both the "function and freedom" of parents to prepare children for "obligations the state can neither supply nor hinder". *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court faced squarely the sad truth that parenthood, especially that undertaken outside marriage, can involve a "distressful life", "psychological harm" and other health detriments, and "unwanted stigma". 410 U.S. at 153. The Court recognized, too, "the distress, for all concerned, associated with the unwanted child". *Id.*

Amici feel that distress keenly, as well, through their work with homeless children unwanted by their parents, and with young pregnant women, mothers and fathers. These young lives are searing indictments of society's indifference, but even more

[2] G. Eliot, *Daniel Deronda* 409 (1978 1st ed. 1876) (Chapt. XXXVII).

[3] *Id.* at 474 (Chapt. XLIII).

[4] *Id.*

directly of the parents who failed adequately to nurture them, or minimally to prepare them for the complexities of life in the great world. It was not society, after all, which determined their birth or upbringing, but rather concrete men and women making awesome choices about parenthood.

As *Pierce* put it, "[t]he child is not the mere creature of the State", 268 U.S. at 535, and the state has therefore a profound interest in encouraging responsible parenthood among its citizens. Yet that interest has not, strangely, been considered directly in the debate over abortion that has gripped this Court for almost two decades. *Roe* v. *Wade* and its successors attempted the excruciating task of balancing the "personal liberty" and "privacy" interests of pregnant women against the state's interest in "potential life" and regulation of medicine. *Roe* v. *Wade*, *supra*, 410 U.S. at 147-156. None of those decisions addressed, however—possibly because not clearly discussed by the participants—how the balance of these competing interests should take account of the state's larger efforts to encourage responsible parenthood.[5]

It is the view of *Amici* that such efforts are of compelling importance to children like the ones they serve—and much more plainly so now than at the time *Roe* was decided. Yet for reasons both obvious and subtle, state-sanctioned access to abortion on demand operates to frustrate those efforts. *Amici* thus support the holding of the Court in *Maher* v. *Roe*, 432 U.S. 464, 477 (1977) that a state may "favor normal childbirth" over abortion, and support the Missouri statutes here.

[5] The Court in *Roe* did note that one argument advanced "occasionally" in support of abortion laws is that they "discourage illicit sexual conduct". 410 U.S. at 148. Although the context of sexual conduct resulting in pregnancy may profoundly affect the parents' ability to discharge their duties to a child, the existence of abortion laws as a punitive sanction to discourage sexual misconduct is insupportable. *Id.* A state's interest in its citizens' affirmative parental obligations is distinct, however, from its interest in their sexual conduct, and by any reasonable measure vastly more substantial. Thus, as discussed *infra* at 12, men may be held financially and personally accountable for a child from the moment of its conception whether or not his sexual conduct was lawful.

If, however, those statutes are seen as in hopeless collision with *Roe* v. *Wade* and its successors, then *Amici* urge reexamination of those decisions insofar as they give unequivocal constitutional sanction to abortion at any stage of pregnancy.[6] Where a state has clearly manifested in the whole array of its policy a strong concern for supporting responsible parenthood, it should be allowed to discourage abortions on demand as part of that policy.[7] States which offer no affirmative commitment of assistance to parents unable to bear the burdens of their role, however, may be less able to justify strict regulation of abortion.

I. THE STATE HAS A COMPELLING INTEREST IN ENCOURAGING RESPONSIBLE PARENTHOOD FROM THE MOMENT OF CONCEPTION.

Children are not reared by law, by regulation, or by agency. They are raised by people, whether by their natural or adoptive parents, extended family members, or state-designated caretakers. If the young are to survive, to learn, and to flourish, they must be nurtured by attentive human hands and hearts. That is ultimately why the Court has limited state interference with parental rights to those cases involving "harm to the physical or mental

[6] *Amici* note as well their belief, founded in part on working with thousands of young women and their children, that no meaningful definition of human life can exclude the unborn from the moment of conception. While the Constitution may not compel states to provide protection for all human life in all circumstances, *Amici* believe, *Roe* to the contrary notwithstanding, that it does not *forbid* strong state efforts in that direction. This brief, however, takes as its subject only the effect of considering larger issues of parental responsibility in the structure of *Roe* itself.

[7] *Amici* address in this analysis only the issue of "abortion on demand"—that is, for purposes of this discussion, those abortions which end pregnancies resulting from fully consensual sexual conduct (*ie.*, excluding rape or incest) and those which do not pose serious health risks for the mothers. Such abortions currently comprise over 90 percent of all those performed. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Persp. 169, 170 (1988). *Amici* readily recognize that nonconsensual and life-threatening pregnancies pose deeply complex questions beyond the scope of the issues discussed in this brief—or fairly presented on the facts of this case.

health of the child or to the public safety, peace, order, or welfare. . . ." *Wisconsin* v. *Yoder*, 406 U.S. 205, 230 (1972).

A. The States Are Entitled To Have Grave Concern Over The Quality Of Parental Care Provided To Born And Unborn Children.

Unfortunately in this imperfect age such harms abound; indeed, in the last two decades nothing less than a crisis in parenting has occurred in this country. For *Amici* this crisis is daily visible in the hundreds of "throwaway" children for which they must provide care. On the heels of a dramatic rise in the number of "runaway" teenagers in the late 1960's and early 1970's,[8] by 1980 some 250,000 children had become truly "homeless"—abandoned or exiled by their parents.[9] These children, whether they ran away or were "pushed out", frequently leave highly abusive home environments,[10] only to find even worse abuse and despair on the street.[11] Yet it is clear that these severely damaged youth are to some very real extent part of what other observers have seen as a major decline in the well-being of American adolescents in the past twenty years—with death rates, out-of-wedlock pregnancy rates, drug and alcohol use, and delinquency rates all rising, while measures of educational achievement have fallen.[12] While not "conclusive", the evidence for this age group suggests

[8] *See, e.g.*, D. Miller, *et. al., Runaways—Illegal Aliens in Their Own Land 17 (1980)*; K. Wooden, *Weeping in the Playtime of Others* 80 (1976).

[9] *Homeless Youth: The Saga of "Pushouts" and "Throwaways" in America, Report of the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess.* 27 (1980).

[10] D. Shaffer & C. Caton, *Runaway and Homeless Youth in New York City: A Report to the Ittleson Foundation* 64-65 (1984) (50 percent had experienced serious physical abuse at home).

[11] *See, e.g.*, Yates, *et al., A Risk Profile Comparison of Runaway and Non-Runaway Youth*, 78 Am. J. Pub. Health 820 (1988).

[12] Uhlenberg & Eggebeen, *The Declining Well-Being of American Adolescents*, 82 The Public Interest 25, 30-34 (1986).

that "there has been a declining commitment of parents to their children over the past several decades."[13]

With regard to smaller children, the situation is no less disturbing. Reports of child maltreatment virtually doubled between 1976 (the first year for which national figures are available) and 1981,[14] then rose again by 90 percent between 1981 and 1986.[15] Because substantiation rates remained the same throughout the entire decade, it is impossible not to conclude, as did one recent report, that "there has been a substantial real increase in the numbers of abused and neglected children."[16] One of the most recent in-depth studies found that over 1.6 million children experienced abuse or neglect in 1986, with small children under age 2 at greatest risk of fatality from abuse.[17] Child homicide rates, which had remained relatively steady in the early 1970's, increased dramatically from 1972 to 1986, by 42 percent for children under one year and 50 percent for children aged 1 to 4.[18]

Abuse and neglect are the most graphic indicators of weakening parent-child ties, but others abound. Thus in the United States the proportion of births out of wedlock virtually tripled from 1965 to 1985, while divorce rates were doubling, leaving 27 percent of children under age 18 in single-parent families or with non-parent relatives by 1987.[19] Children born out of wedlock and

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[13] *Id.*, at 35.

[14] American Humane Ass'n, *Trends in Child Abuse and Neglect: A National Perspective* 16 (1984).

[15] Children's Defense Fund, *A Children's Defense Budget FY 1989* 200 (1988).

[16] *Id.*, at 201.

[17] U.S. Dep't of Health and Human Services, *Study Findings, Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988* 3-14, 5-15 (1988).

[18] Based on data reported in Nat'l Center for Health Statistics, *Monthly Vital Statistics Reports*. Between 1971 and 1972 the death-by-homicide rate rose 2 percent for children under age 1, and fell 14 percent for children aged 1 to 4. *Id.*

[19] Cherlin, *The Weakening Link Between Marriage and the Care of Children*, 20 Family Planning Persp. 302, 303 (1988); U.S. Dep't of Commerce, Bur. of Census, *Marital Status and Living Arrangements: March 1987, Current Pop. Rep., Series P-20, No. 423* 21 (1988).

those affected by divorce are extremely likely to live in poverty,[20] in substantial part because their fathers pay little or nothing for their support.[21] If since the 1960's there has been, in the words of one scholar, a "weakening link between marriage and the care of children,"[22] there has also grown up an even more troubling attitude among fathers in particular. For them, as Lenore Weitzman has succinctly put it, "parenting is becoming increasingly optional."[23] Not surprisingly, then, between 1969 and 1985 the proportion of children under 18 living in poverty increased by 45 percent.[24]

The issue of parental commitment to children does not, however, begin with their birth. In the last ten years it has become starkly apparent that the actions of a mother even during the earliest weeks of pregnancy can have tragic consequences for their children. Failure to obtain timely prenatal care, for example, can lead to prematurity and low birthweight.[25] It is thus alarming that such failure has recently been on the increase.[26] Use of alcohol, even in the earliest phases of pregnancy, can substantially affect measures of a child's intelligence at age 4.[27] Smoking during pregnancy increases the chances of miscarriage, stillbirth,

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[20] Cherlin, *supra* note 19, at 304.

[21] Children's Defense Fund, *supra* note 15, at 88-89 ("Data from 1985 and 1986 reveal that the majority of divorced, separated, and never-married mothers were rearing their children with no financial help from the children's fathers." *Id.* at 88.)

[22] Cherlin, *supra* note 19, at 303.

[23] *The Divorce Revolution* 369 (1985).

[24] U.S. Dep't of Commerce, *Statistical Abstract of the United States 1987* 443 (1986) (13.8% in 1969 to 20.1% in 1985).

[25] *See* Nat'l Research Council, I *Risking the Future* 196 (1987), and studies cited therein.

[26] Nat'l Center for Health Statistics, *Advance Report of Final Natality Statistics, 1986* 37 *Monthly Vital Statistics Rep.* 11 (7/12/88).

[27] Stressguth, *et al.*, *IQ at Age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy*, 25 Developmental Psych. 3, 8 (1989).

prematurity, and low birthweight.[28] Abuse of illegal drugs poses the direst risks; as one scholar put it, an "infant delivered to a drug-addicted woman is at risk for problems of growth and development as well as neonatal abstinence, and is also at increased risk of infections and exposure to HIV."[29] Even worse, such infants have a 5 to 10 times increased risk of dying of sudden infant death syndrome, with neurobehavioral problems likely to extend into early childhood.[30] Nor should these cases be regarded as exotic: in New York alone, 24,000 children (1 out of every 10) were born to substance abusers in 1986.[31] Many of these children will become "boarder babies" in hospitals, with prospects of long-term, expensive, and destructive placement in foster care.[32]

In face of this evidence, it is impossible to imagine responsible state governments taking a passive stance toward the protection and care of children within their borders. Any reasonable policy toward encouraging proper parental behavior cannot begin any later than the earliest stages of pregnancy; nor can it end until late adolescence. Children are desperately vulnerable *throughout* their minority.

B. The State's Right To Encourage And Enforce Parental Responsibility For Children Voluntarily Conceived Is Firmly Grounded In The Constitution.

Parents, children, and indeed all family ties enjoy special sanctuary in American law. The Constitution does not counte-

[28] *Id.* at 9; Landesman-Dyer & Emmanuel, *Smoking During Pregnancy*, 19 Teratology 119 (1979).

[29] Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 Ped. Clinics N.Am. 1403, 1410 (1988).

[30] Rosen & Johnson, *Drug-Addicted Mothers, Their Infants, and SIDS*, Ann. N.Y. Acad. Sciences 89, 92 (1988).

[31] N.Y.S. Div. of Substance Abuse Services, *Children of Substance Abusers in New York State: Trends and Estimates* 15 (1988) (Treatment Issue Rep. No. 67).

[32] *See* N.Y.C. Office of the Comptroller, *Whatever Happened to the Boarder Babies?* (1989).

nance state action to separate family members without cause. *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). Nor does it permit interference in the sensitive educational and emotional decisions of family members. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). The Constitutional rights protecting the family are "rights far more precious than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953), and are among the "basic civil rights of man." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

Yet this protection is not grounded in mere sentiment. The unique constitutional rights granted the family, and parents in particular, are mirrored by the great duties demanded of those who have voluntarily entered into that relationship. As this Court not long ago observed, "the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr* v. *Robertson*, 463 U.S. 248, 257 (1983). Indeed, "the family itself is not beyond regulation" when the state is acting reasonably to "guard the general interest in youth's well being". *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

While the special role of the states in family law has limited the occasions on which this Court has faced the exact scope of parental responsibility toward children, those opportunities have not been fruitless. Thus in garnishment cases the Court has long recognized the special obligations of parent to child. *See Rose* v. *Rose*,_U.S._, 107 S.Ct. 2029 (1987) (exception to federal anti-garnishment statute for child support payments); *Wissner* v. *Wissner*, 338 U.S. 655, 659-660 (1950) (although wife could not attach husband's life insurance, Court recognized possible exception for child support); *Wetmore* v. *Markoe*, 196 U.S. 68, 74 (1904) (child support payments cannot be discharged in bankruptcy). As Justice O'Connor has noted,

> Our Anglo-American tradition accords a special sanctity to the support obligation. Unlike other debts, for example, the

obligation to support spouse and child is enforced on threat of contempt.

Rose, 107 S.Ct. at 2040 (concurring). Support of children is not a mere "contractual obligation or . . . a debt due", but rather a "policy of the law" deeply rooted in our values. *Wetmore*, 196 U.S. at 74.

Most crucially for this case, that obligation begins, for men at least, at their child's very conception. It is the universal policy of the states to permit paternity actions against fathers whether or not they have had any contact with mother or child since conception, actions which may be brought throughout the child's minority. *See Clark* v. *Jeter*, 486 U.S._, 100 L.Ed.2d 465 (1988); 42 U.S.C. §666(a)(5) (Supp. 1988). The risk assumed by a man in voluntary sexual intercourse is that a child will be conceived and born, a child that will require an extended commitment at least of financial support, and usually of shared custody and care.[33] Against this risk the Constitution erects no shield.

II. THE STATE'S INTEREST IN ENCOURAGING RESPONSIBLE PARENTHOOD IS DEEPLY COMPROMISED BY BEING FORCED TO SANCTION ABORTION ON DEMAND.

For women, by contrast, abortion on demand[34] creates an entirely different parent-child relationship. Except to protect maternal health, no state may interfere with a mother's decision to end her unborn child's life until the end of the second trimester. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1987); *Akron* v. *Akron Center*

[33] Thus a remarkably high proportion even of unmarried teenage fathers live with their child. Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Family Planning Persp. 240 (1987).

[34] For an explanation of *amici*'s use of the term "abortion on demand", see note 7, *supra*.

for Reproductive Health, 462 U.S. 416, 435-38 (1983).[35] Parenthood thus remains optional for them until fetal "viability" is reached.

From the standpoint of encouraging responsible parenthood among the population generally, this six-month grace period comes, in *Amici*'s view, at a heavy price. In three ways the existence of abortion on demand cuts to the heart of parental commitment: attitudes of mothers toward prenatal behavior, attitudes of fathers toward their paternal obligations, and larger societal views of children. Because the "trimester" and "viability" lines are wholly irrelevant to any realistic view of parental duties, state-sanctioned abortion on demand radically conflicts with state interests in insuring the well-being of all children.

Early prenatal care and abstention from high-risk behavior during pregnancy are, as discussed above,[36] crucial to the life and health of children. A state policy encouraging or appearing to encourage abortion on demand sends a quite different message to pregnant women—that the life (or "potential" life) they carry is, until "viability", subject to termination at any time it becomes inconvenient. By the time the third trimester is reached, of course, the unborn child—now suddenly invested with legal personhood—may be permanently damaged by neglect or abuse. For young women not initiated in the delicate medical/legal debate over the nuances of "trimesters", any responsibility for personal sacrifice or even prudent medical attention may seem fanciful as long as parenthood remains strictly optional.

For fathers, by contrast, abortion on demand presents an often excruciating dilemma. Some are eager to become parents

[35] In *Roe* v. *Wade*, of course, the Court explicitly denied that it was creating a right for every woman to "terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses", 410 U.S. at 153, but as later interpreted that decision has come to mean exactly that, at least through the first two trimesters. *Thornburgh*, *supra*, 476 U.S. at 782 (Burger, C.J., dissenting).

[36] *Supra*, at 9-10.

and suffer a deep sense of loss after an abortion.[37] Many others, including many encountered by *Amici* in their programs, are like "Joe":

> Joe came to the group very shaken and reported that Liz, his casual paramour of some months earlier, had not had an abortion after all. . . . Joe told us he was very angry with Liz. She deceived him. Then he told us that really hadn't had very much to do with her decision-making and certainly not with its implementation. Joe was clearly troubled. He developed a sleep disturbance and started to drink excessively. . . . He thought he hated Liz. But he couldn't just shrug it off. That kid was his, whatever that meant.[38]

What it all too often means in the long run, of course, is paternal flight, instability, or non-support.[39] In psychological terms this is not terribly difficult to understand. Why feel any commitment to a child whose birth was solely at the mother's discretion? Why stick around after having been "deceived"? That this reaction is callous toward his partner and grossly irresponsible toward his child may be obvious to an observer, but it is nevertheless all too typical a scenario, with often devastating consequences for the innocent child.

The question of how paternal commitment to children is affected by the existence of abortion on demand becomes especially nagging upon scrutiny of out-of-wedlock birth rates. From 1975 to 1983, while the number of abortions in this country was rising by 46 percent,[40] the number of births to unmarried women was

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[37] It is worth noting, in this regard, that only a small minority of women having abortions cite the desire of the husband or partner as a reason for the decision. Torres & Forrest, *supra* note 6, at 170 (23 percent).

[38] Herzog, *Boys Who Make Babies*, in *Adolescent Parenthood* 65, 69 (M. Sugar ed. 1984).

[39] *See* Park & Neville, *Teenage Fatherhood*, in Nat'l Research Council, 2 *Risking the Future* 145, 153-156 (1987).

[40] *Statistical Abstract*, *supra* note 24, at 69.

climbing 60 percent.[41] (Total live births, by contrast, rose by only 15 percent during those years.)[42] More tellingly, perhaps, a correlational analysis of abortion ratios and illegitimacy ratios for the 50 states and the District of Columbia reveals a strong *positive* relationship between the two.[43] That is, in states where women are more likely to terminate their pregnancies through abortion they are also more likely to bear a child out of wedlock.[44] In light of these facts it can only appear that the Court in *Roe* v. *Wade* was mistaken in believing that, at least on a society-wide basis, access to abortion would reduce the number of "unwanted" children or of mothers suffering from the "stigma" of being unmarried. 410 U.S. at 153. Abortion on demand appears to operate to attenuate the ties between parents, and between fathers and children.[45]

On an even larger scale, moreover, state-sanctioned abortion on demand is extremely difficult to reconcile with efforts of the state to combat "optional" parenthood[46] in other areas. This is so precisely because "viability," the all-or-nothing dividing line between absolute "reproductive freedom" and irrevocable parenthood, is a meaningless concept in the real world of parenting. *No* child is capable of living without intensive support and care until at least their teenage years.[47] How can a state reasonably tell its

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[41] *Id.* at 61.

[42] *Id.* at 59.

[43] Details of that survey are discussed in Appendix A, *infra*.

[44] *See* Appendix A, *infra*.

[45] It is important to note, in this context, that children of married teenage mothers seem to fare better on important measures of adjustment than those of the unmarried. Vinovskis & Chase-Lansdale, *Hasty Marriages or Hasty Conclusions*, The Public Interest 128, 131 (Winter 1988); Vinovskis & Chase-Lansdale, *Should We Discourage Teenage Marriage?* The Public Interest 23, 33-36 (Spring 1987).

[46] *See* Weitzman, *supra* note 23, at 369.

[47] Conversely, if "viability" is conceived in strictly biological terms, test-tube fertilization and artificial insemination now mean that day-old preembryos can grow to maturity wholly apart form their biological parent. C. Grobstein, *Science & The Unborn* 8-10 (1988). It has thus become a concept meaningless at both ends of the spectrum.

citizens not to push out, abuse, or abandon their children while proclaiming they have absolute liberty to do exactly those things to "non-viable" offspring? *Amici* do not contend that any causal relationship exists between the rise of abortion on demand since the early 1970's and the decline, discussed *supra* at 7-10, in the overall well-being of American children throughout that period. Still, it is precisely the attitude on which abortion on demand is premised—opt-out parenthood—that also stands behind so many blights on the lives of born children.

In comparison with European nations, American law is extreme in its allowance of abortion with virtually no restrictions throughout the first and second trimesters.[48] Although a great diversity exists among developed countries in the extent to which abortion is legally allowed, most of them flatly eschew abortion on demand.[49] Only the most jaundiced view of parenthood, and callous disregard of children's welfare, could induce a state to do otherwise.

III. THE CHALLENGED STATUTES SHOULD BE UPHELD AS PROPERLY GROUNDED IN A LEGITIMATE STATE INTEREST IN DISCOURAGING ABORTION ON DEMAND.

The State of Missouri has chosen not to endorse the concept of optional parenthood in its statutes regulating abortion. The law under review challenges parents, through its preamble, to respect the "protectable interests in life, health and well-being" of unborn children. RSMo 1.205.1(1), 1.205.1 (2) (1986). It requires doctors to test with particular care of the likelihood of an unborn child's viability. RSMo 188.029 (1986). And it withholds from support for elective abortions all state funds, employees, and facilities. RSMo 188.205, 188.210, 188.215 (1986).

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[48] M. Glendon, *Abortion and Divorce in Western Law* 14, 22-24 (1987).

[49] *Id.* at 14.

A. The Challenged Act Is Valid Under A Reasonable Reading Of This Court's Past Decisions.

In doing these things, the statute appears to go no further than the narrow boundaries marked by *Harris* v. *McRae*, 448 U.S. 297, 314-318 (1980) (so long as statute "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy" it may "encourage alternate activity" through allocation of state resources); *Maher* v. *Roe*, 432 U.S. 464, 473-474 (1977) (same); and *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 482-486 (1983) (upholding second-physician requirement to protect fetal viability). To the extent that *Thornburgh, supra*, 476 U.S. at 768-771 (rejecting safeguards for viable unborn children), is to the contrary, it should be overruled as violative of the state's interest in protecting children from parental maltreatment.

B. If The Challenged Law Is In Conflict With Roe v. Wade, Then That Case Should Be Reconsidered And Overruled To The Extent It Mandates State Approval Of Abortion On Demand.

Missouri's statute poses no threat to its citizens' *freedom* to obtain abortions until "viability." Yet it does evince a strong state policy discouraging abortion on demand, even in the first trimester. To that admittedly limited extend, it may collide with the spirit, if not the letter, of *Roe* v. *Wade, supra.*

In such a collision it must be the statute, and not *Roe*, which survives. By ignoring the compelling interest of the states to encourage parental responsibility among those who have voluntarily assumed the risk of parenthood, *Roe's* analysis of the competing interests was tragically incomplete. Men who engage in sexual intercourse are liable to the full responsibility of parenthood from the moment of conception. If *any* children are to have reasonable assurances of healthy birth and productive life, that same stan-

dard must be applied to the mothers that carry them.[50] And, too, in *Amici's* view a proper respect for human life makes *Roe's* dismissal of concern for the unborn seem perverse and extraconstitutional. *See, Thornburgh, supra,* 476 U.S. at 792-794 (White, J., dissenting).

C. If Roe v. Wade Is Reconsidered, The Question Of What Affirmative Obligations Toward Parents Must Be Assumed By States With Strict Anti-Abortion Statutes Should Be Left Open.

In saying that *Roe* conflicts with the states' compelling interest in parental responsibility, however, *Amici* are all too well aware of the tragic burdens borne by ill-prepared young parents. Nor do *Amici* discount the long history of discrimination against women that is implicitly recognized by *Roe's* account of the consequences of unwanted motherhood. 410 U.S. at 153. *See,* Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 Harv. L. Rev. 1, 41 (1973). Finally, it would be exceedingly optimistic to assume that both these concerns are adequately addressed in the legal regimes of most states.

While *Roe* is in error, then, it may not be possible, on the record of this case, fully to elaborate a correct alternative. *Amici* believe, above all, that a decision to overrule *Roe* should at the same time leave open a subsidiary question: do states which choose to enact strict controls on abortion thereby assume an affirmative duty to provide reasonable assistance to needy expectant parents, as well as safeguards against discrimination against unwed mothers? Thus it may be impossible to justify, even on a rational basis analysis, a strict anti-abortion statute resting on the

[50] *Roe* explicitly rejected, of course, the purported "unlimited right to do with one's body as one pleases". 410 U.S. at 154. It is therefore not possible to distinguish mothers from fathers on the simple basis of who carries the unborn child. *But see* note 7, *supra*. Yet as the social and economic circumstances of younger men and women approach nearer parity, *Roe's* other factors related to the "life and future" of the parent also become less persuasive distinctions.

state's concern for responsible parenthood when other parts of the state's code belie such concern. And it may lie within the equitable power of the federal courts to fashion remedies against longstanding discriminatory practices toward single mothers based on their gender. *Cf. Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 11-14 (1971); *Brown* v. *Board of Education,* 349 U.S. 294, 299-300 (1955).[51]

CONCLUSION

Everybody look at her like she a mistake . . . . But she just a baby. When she look at me and I look at her she don't know she a mistake.[52]

In the long struggle over abortion on demand, it has been the grave misfortune of this Court to see mistakes when it ought to see babies. Most parents are luckier; they understand, and bravely assume, the most basic of human tasks from the moment they know of life in the womb. For others it does no good to pretend that society can treat parenthood as lightly as a consumer contract; it is not cancelable at will out of dissatisfaction. If the next generation is to receive the care and nurturance it deserves, states must discourage the concept of provisional parenthood that is central to abortion on demand.

The challenged Missouri statutes do no more than this, and their invalidation by the lower courts was plain error. Surely the time has come, in this nightmarish struggle over the unborn, to embrace unapplauded heroism and to shelter unfledged hearts.

[51] It is quite possible, on the other hand, that with *Roe's* demise the political processes of the various states will satisfactorily address these problems. *See* Glendon, *supra* note 48, at 49-50, 53-58.

[52] N.Y. Times, May 4, 1988, at B1, col.1 (statement of young would-be actress about effects of birth of child on her career).

The decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

ABORTION AND OUT-OF-WEDLOCK BIRTHS

An Interstate Analysis

It was the perception of *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), that access to abortion would lessen "the distress, for all concerned, associated with the unwanted child", especially when born to an "unwed mother". If that is true on a large scale, greater resort to abortion should reduce the percentage of children born to unmarried women. In areas where abortion is less common—for reasons of access or community resistance—the percentage of children born to unwed mothers should be greater.

To test this hypothesis on a limited scale, 1985 figures were obtained for each of the 50 states and the District of Columbia in two categories. First, the ratio of abortions to live births was calculated for each locale—a number indicating how likely it is that pregnant women will resort to abortion.[1] Second, the percentage of all births in 1985 that were to unmarried mothers was obtained for each jurisdiction—an imperfect-but-hard-to-improve measure of the likelihood their babies were "wanted", in *Roe's* formulation.[2]

The two rates for each jurisdiction are listed below, along with rankings in each category:

Births to Unwed Mothers & Abortions for 1985

State	Abortion Rate[1]	Ranking	Out of Wedlock Birth Rate[2]	Ranking
Alabama	32.4	28	24.9	12
Alaska	26.9	31	18.2	31
Arizona	37.6	22	23.9	15
Arkansas	15.4	46	22.4	17
California	64.6	5	24.6	13

State	Abortion Rate[1]	Ranking	Out of Wedlock Birth Rate[2]	Ranking
Colorado	44.2	14	16.6	40
Connecticut	49.7	8	21.3	23
Delaware	47.7	10	26.2	8
D.C.	242.3	1	56.7	1
Florida	46.8	11	25.8	9
Georgia	39.8	18	25.7	11
Hawaii	61.0	6	19.9	24
Idaho	15.1	47	10.8	50
Illinois	35.8	23	25.7	10
Indiana	19.9	43	19.8	25
Iowa	24.1	39	13.6	46
Kansas	25.6	34	14.7	45
Kentucky	18.6	45	18.5	28
Louisiana	23.6	40	28.6	4
Maine	29.3	29	17.8	35
Maryland	43.3	15	29.1	3
Massachusetts	49.3	9	18.4	30
Michigan	46.7	12	18.1	33
Minnesota	25.0	35	15.1	43
Mississippi	13.6	48.5	32.9	2
Missouri	26.1	32.5	21.6	21
Montana	27.5	30	16.8	39
Nebraska	26.1	32.5	14.8	44
Nevada	64.7	4	15.6	42
New Hampshire	45.5	13	13.4	47
New Jersey	65.5	3	22.3	18
New Mexico	22.0	41	26.3	7
New York	75.2	2	28.1	5
N. Carolina	38.2	21	22.1	19
N. Dakota	24.3	37	11.5	49

State	Abortion Rate[1]	Ranking	Out of Wedlock Birth Rate[2]	Ranking
Ohio	35.7	24.5	21.8	20
Oklahoma	24.7	36	17.2	37
Oregon	38.6	20	18.7	27
Pennsylvania	35.0	24.5	22.8	16
Rhode Island	59.6	7	19.6	26
S. Carolina	21.6	42	26.4	6
S. Dakota	13.6	48.5	17.9	34
Tennessee	33.5	26	24.3	14
Texas	32.7	27	16.4	41
Utah	11.9	50	8.7	51
Vermont	42.7	17	17.1	38
Virginia	39.7	19	21.4	22
Washington	44.1	16	18.5	29
W. Virginia	19.0	44	17.4	36
Wisconsin	24.2	38	18.1	32
Wyoming	11.4	51	13.3	48

If the *Roe* hypothesis is true, then there should be a significant *negative* correlation between abortion and out-of-wedlock-birth rates. In fact, however, the Pearson coefficient (r) for the two rates is not only positive but strongly positive ($r = .71$, $p, < .01$). Spearman's Rho rank-order coefficient is also significantly positive for the two sets of data (.31, $p < .05$). It appears, then, that states with higher abortion rates will in fact have *higher* out-of-wedlock birth rates than other states.

Is this the result of skewing in the data? Both the District of Columbia and Mississippi, in particular, seem to present special cases. Both have extremely high minority populations; one is wholly urban, while the other is by far the poorest state in the nation, and one of the most rural. Because they have the two highest out-of-wedlock birth rates but are at opposite ends of the rank-

ings on abortion, they tend to distort the results. If both are removed from the calculus the correlation coefficient declines to r = .36, still a significantly positive correlation at a 95 percent confidence level. (Removing D.C. alone reduces r to + .26 and the confidence level to 90 percent.)

Are other, cultural factors at work which actually have a greater effect on the rates? Two possible indicators of such underlying factors, state-by-state sales of sex magazines and state-by-state "status of women" indices,[3] proved to have no significant association with the out-of-wedlock birth rate. Adult abortion may, however, be something of a cultural factor in its own right: one interstate correlational study found strong positive correlations between the adult abortion rate in individual states and the teenage pregnancy and abortion rates.[4]

It is impossible to suggest causal relationships on the basis of these various statistical findings. But it does seem clear that *Roe's* hypothesis as framed above is flatly incorrect: increased access to abortion has, if anything, an inflating effect on births to unwed mothers. That both abortions and out-of-wedlock births increased at similarly high rates in recent times—far more than fertility generally—only serves to reinforce that impression.[5]

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[1] Figures computed using those provided in Henshaw, *et al.*, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Persp. 63 (1987), and Children's Defense Fund, *A Call to Action to Make Our Nation Safe for Children: A Briefing Book on the Status of American Children in 1988* 18 (1988).

[2] Figures computed from Children's Defense Fund, *supra* note 1, at 18.

[3] The figures were taken from Baron & Strauss, *Sexual Stratification, Pornography, and Rape in the United States*, in *Pornography and Sexual Aggression* 185, 190-191 (Donnerstein & Malamuth ed. 1984).

[4] Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis*, 18 Family Planning Persp. 210, 215 (1986). Unfortunately this study did not specifically examine out-of-wedlock pregnancies among teenagers.

[5] *See* text at 15, *supra*.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court Of The United States

October Term, 1988

WILLIAM L. WEBSTER, et al.,
Appellants

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. May the Court logically avoid reconsidering a judicial decision recognizing an implied constitutional right when the Court has before it state efforts to regulate that right, especially if in so doing the Court could lose control of the constitutional issue to a less suitable branch of government?

2. May the Court both preserve the constitutional concept of individual rights yet also determine who has standing as a "person" to claim constitutional protection using a criterion that decides standing based on subjective worthiness judgments distinguishing among objectively distinct human individuals?

3. Does the equal protection clause mandate that a state interpret its homicide laws to allow a woman to abort a life-threatening or rape-induced pregnancy but to protect the preborn child's right to life over the woman's right to privacy in all other cases?

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Baker v. Dallas Hotel Co., 73 F.2d 824 (5th Cir. 1934)	24
Boys Markets v. Retail Clerks Union Local 770, 398 U.S. 235 (1970)	5
Brandenburg v. Ohio, 395 U.S. 444 (1969)	21
Brown v. Board of Education, 349 U.S. 294 (1955)	5
Buck v. Bell, 274 U.S. 200 (1928)	9
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	21
Crosswhite v. Shelby Operating Corp., 30 S.E.2d 673 (Va. 1944)	24
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Dunn v. Blumstein, 405 U.S. 330 (1972)	20
Edelman v. Jordan, 415 U.S. 651 (1973)	5
Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869)	7
Floyd v. Anders, 440 F. Supp. 535 (D.S.C. 1977)	9, 12
Hamner v. Dagenhart, 247 U.S. 251 (1918)	5
Korematsu v. United States, 323 U.S. 214 (1944)	20
Plessy v. Ferguson, 163 U.S. 537 (1896)	5, 7
Powell v. McCormack, 395 U.S. 486 (1969)	6
Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988)	5
Roe v. Wade, 410 U.S. 113 (1973)	passim
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Cases: *Page*

Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 8, 9, 17

Shapiro v. Thompson, 394 U.S. 618 (1969) 20

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 7, 8

The Antelope, 23 U.S. 66 (1848) 9

Thornburg v. American College of Obstetrics and Gynecologists, 476 U.S. 747 (1986) 16

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

United States v. Darby, 312 U.S. 100 (1941) 5

Washington v. Davis, 426 U.S. 229 (1976) 21

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Commentators:

Bickel, *The Morality of Consent* (1975) 6

Boyle, *That the Fetus Should be Considered a Legal Person,* 24 Am.J.Juris. 59 6

TABLE OF AUTHORITIES — (Continued)

Commentators: *Page*

Bury My Heart at Wounded Knee (New York 1972) 9

Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L.Rev. 807 (1973) ["Byrn, An American Tragedy"] 6, 11

Byrn, *The Abortion Amendments: Policy in the Light of Precedent,* 18 St. Louis U.L.J. 380 (1974) 7, 12

Coleman, *Roe v. Wade: A Retrospective Look at A Judicial Oxymoron,* 29 St. Louis U.L.J. 7 (1984) 6

Comment, *Homo Sapienism: Critique of Roe v. Wade and Abortion,* 39 Alb.L.Rev. 856 (1975) 6

Dellapenna, *The History of Abortion: Technology, Morality, and Law,* 40 U.Pitt.L.Rev. 359 (1979) 6, 11

Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment,* 63 Calif. L.Rev. 1250 (1975) 7, 11

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 920 (1973) 7

Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* 1973 Sup. Ct. Rev. 159 ..... 3, 7

Freund, Sutherland, Howe, and Brown, *Constitutional Law* 667 (4th Ed. 1977) 6

Galebach, *A Human Life Statute,* 7 Human Life Review 3 (1981) 7

Glenn, *Abortion and Inalienable Rights in Classical Liberty,* 20 Am.J.Juris. 62 (1975) 3

Krimmel and Foley, *Abortion: An Inspection Into The Nature of Human Life and Potential Consequences of Legalizing Its Destruction,* 46 U.Cin.L.Rev. 725 (1977) 13

TABLE OF AUTHORITIES — (Continued)

Commentators: *Page*

Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality (pt. 1)*, 14 N.Y.L.F. 411 (1968) 11

Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) 11

Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979) 23

Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973) 7

Sherry, *The Law of Innkeepers*, §1.6 (rev. ed. 1981) 26

Simes, *Future Interests*, 132 (1951) 18

Uddo, *A Wink from the Bench: The Federal Courts and Abortion*, 53 Tul.L.Rev. 398 (1979) 7

Witherspoon, *Reexamining Roe; Nineteenth-Century Statutes and the Fourteenth-Amendment*, 17 St. Mary's L.J. 29 ..... 11, 12

Medical Authorities:

American College of Obstetrics and Gynecologists, Terminology Bull., No. 1 (Sept. 1965) 15

Arey, *Developmental Anatomy*, 55 (1974) 13

Asimov, *The Genetic Code*, 20 (1962) 13

Brash, *Human Embryology*, 2 (1956) 13

Gilbert, *Biography of the Unborn*, 13 (1963) 13

Greenhill & Friedman, *Biological Principles and Modern Practice of Obstetrics*, 23 (1974) 13

TABLE OF AUTHORITIES — (Continued)

Medical Authorities: *Page*

Guttmacher, *Life in the Making*, 55 (1933) 15

Hamilton & Mossman, *Human Embryology*, 14 (1972) 13

Krieger, *The Human Reproductive System*, 88 (1969) 13

Langman, *Medical Embryology*, 3 (1975) 13

Lauria, *Thirty-Six Lectures in Biology*, 146 (1975) 13

Moore, *The Developing Human*, 1 (1977) 13

Patten, *Human Embryology*, 43 (1968) 13

Roberts, *An Introduction to Medical Genetics*, 1 (1963) 13

Simpson & Beck, *Life: An Introduction to Biology*, 139 (1965) 13

Thomas, *Introduction to Human Embryology*, 52 (1968) 13

Torrey, *Morphogenesis of the Veriebrates*, 47 (1971) 13

Waddington, *Principles of Embryology*, 45 (1958) 13

Hearings Before the Subcommittee on Separation of Powers on S. 158 ..... 13, 14, 17

Other Authorities:

1867 Ohio S.J. App. 233 19

Restatement (Second) of Torts §314 (1965) 21, 22

Restatement (Second) of Torts §314 A(2) (1965) 24, 26

Restatement (Second) of Torts §322 ..... 22, 24, 26

No. 88-605

IN THE

Supreme Court Of The United States

October Term, 1988

WILLIAM L. WEBSTER, et al.,

Appellants

vs.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS ALABAMA LAWYERS FOR UNBORN CHILDREN, INC.'S BRIEF IN SUPPORT OF APPELLANTS

Amicus Alabama Lawyers for Unborn Children, Inc., ("Alaw-Life") hereby submit this Brief in support of Appellants William L. Webster, *et al.*[1]

[1]Amicus Alaw-Life is exempt from Supreme Court Rule 28.1. Over 125 Alabama lawyers comprise its membership.

STATEMENT OF INTEREST

Alabama Lawyers for Unborn Children, Inc. ("Alaw-Life") respectfully submits this Amicus Brief for the Court's consideration. Both parties consent. A-1, A-2. Alaw-Life members oppose abortion in most cases and represent in legal proceedings the interests of preborn persons and those who advocate their interests, often against abortion clinics and allied governmental entities. This Court's decision in this case and the inherent reconsideration of *Roe v. Wade,* 410 U.S. 113 (1973), directly affects those interests. Alaw-Life believes that the perspective held by its members, that preborn persons are entitled to constitutional standing as "persons" and the same degree of constitutional protection afforded other "persons", either will not be addressed or addressed adequately by the parties and other *amici.*

The parties did not address this issue in their respective Jurisdictional Statement and Motion to Affirm even though evaluation of the validity of state abortion regulations clearly requires addressing whether the State is constitutionally *BOUND* to recognize and protect these rights of preborn persons. Alaw-Life does not believe that either party will address this issue in their briefs on the merits. Alaw-Life is aware of only a few of the other amici that even address the "personhood" issue and of none who resolve the issue in the manner proposed here — protecting preborn persons from abortion except in rape-induced or life-threatening pregnancies because respect for every person's individual rights requires it.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), had as its goal the vindication of individual rights. 410 U.S. at 129, 152-54, 165-66. The Bill of Rights concept of individual rights is that an individual may exercise autonomy free from governmental intrusion except to the extent necessary to protect others from harm; that an individual may claim governmental protection from harm by others on the same terms

that the government provides it to others; and that the Court is best suited to resolve conflicts involving the freedom from governmental intrusion and the right to claim governmental protection.[2] This Court must reconsider *Roe* because *Roe* provides the starting point to resolution of the regulatory controversy involved here. *Roe* — itself purporting to vindicate individual rights while adopting a result inconsistent with individual rights — involves a conflict of the kind the Court is best suited to resolve, and the Court will lose control over the issue to a less suitable branch of government if it does not act soon.

Roe must be overruled. Our individual rights depend upon a definition of standing as a "person" to claim constitutional protections that rests upon criteria that are objectively verifiable independent of governmental control; *Roe* adopts a definition of "person" dependent upon "worthiness" judgments within governmental control. No autonomy of right or protection of right exists if government is allowed to select who among individuals is worthy to have "rights". Choices must be between rights, not between individuals. Otherwise, these rights become privileges given to those the government deems worthy and withdrawn from everyone else.

Reversing *Roe* provides a starting point to deal with abortion in a manner that enables every individual, preborn and born, to claim freedom from governmental intrusion and protection from harm as a matter of right. Recognition of the principles of self defense and individual responsibility mandate that the Constitution protect the pregnant woman's right to abort when the pregnancy is rape-induced or life-threatening, and that the Constitution protect the infant's right to live in all other situations. This solution affords both the pregnant woman and the infant the same degree of governmental protection and makes it available on the same terms as it is to others.

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[2] *See, e.g.,* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* 1973 Sup. Ct. Rev. 159, 179; Glenn, *Abortion and Inalienable Rights in Classical Liberty,* 20 Am.J.Juris. 62 (1975).

ARGUMENT

I. This Court Must Reconsider *Roe v. Wade*

Evaluation of the Missouri abortion regulation statute's constitutionality mandates, at the outset, reconsideration of *Roe v. Wade,* 410 U.S. 113 (1973), the seminal decision defining the permissible parameters of state abortion regulation. The statute's express terms, containing a legislative declaration of life's beginning, makes reconsideration of *Roe*'s prohibition of such declarations unavoidable. Alaw-Life accordingly respectfully requests that the Court decline plaintiffs-appellees' astonishing request that it bypass the issue.

The Constitution contains no express language conferring the right to abort; that concept is a creation of *Roe v. Wade,* 410 U.S. 113 (1973). The right must be defined before the extent of its infringement may be ascertained. Evaluation of *Roe*'s persuasiveness in establishing the abortion right, and its accuracy in defining that right's proper parameters, must necessarily precede any determination of whether Missouri's regulations respecting the time,[3] place,[4] and manner[5] unduly infringe the *Roe* privacy right.

The Constitution contains express language protecting every "person" from the denial of life without due process of law. *U.S. Const. amend. V, XIV*. Evaluation of the soundness of *Roe*'s declaration that preborn individuals do not receive this protection necessarily must precede any determination of whether Missouri's legislative finding that life begins at conception is mandated, permitted, or prohibited by the Constitution. *See* 410 U.S. at 151-52; R. S. Mo. §1.205.

The Eighth Circuit recognized that it could not sidestep *Roe*. Finding Missouri's regulations constitutionally infirm,

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[3]When the infant reaches his or her sixteenth week, the Missouri statute requires that his or her abortion be performed in a hospital. R. S. Mo. §188.025.

[4]The Missouri statute restricts politically-funded counselling and abortion procedures. R. S. Mo. §§188.205-15.

[5]The Missouri statute requires the physician to make a determination regarding viability. R. S. Mo. §188.029.

that court relied on *Akron v. Akron Ctr. for Reproductive Health,* 462 U.S. 416 (1983),[6] and expressly struck down Missouri's prohibition of public employee participation in most abortions because "this prohibition violates the due process clause as interpreted by *Roe* and its progeny."[7] The Eighth Circuit also invalidated Missouri's declaration that life begins at conception "because, as the Supreme Court has stated, 'a State may adopt one theory of when life begins to justify its regulation of abortions.' "[8] *See* R. S. Mo. §1.205.

Nor may plaintiffs rest on *stare decisis* to avoid *Roe*'s reconsideration. *Plaintiffs-Appellees' Motion to Affirm* at 16-17. *Stare decisis* is a slender reed on which to rest in the constitutional realm.[9] Plaintiffs' own authorities illustrate why. Quoting extensively from *Brown v. Board of Education,* 349 U.S. 294 (1955), *See Plaintiffs-Appellees' Motion to Affirm* at 17, Plaintiffs then insist that reversing a fifteen year old decision would wreak untold havoc. *Plaintiffs-Appellees' Motion to Affirm* at 17-18. Yet *Brown* itself overruled a decision on a moral issue much like *Roe* even though that decision had stood for more than fifty years[10] and even though in so doing it precipitated much social upheaval. Unsound law must not be allowed to stand, whether for half a century or for fifteen years, merely because of the inertia of its prior incorrect declaration.[11]

This Court must reconsider *Roe* because *Roe* does not satisfactorily resolve a conflict among individual rights — a matter that the judiciary is best suited to handle. Individual rights are founded upon the premise that government will

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[6]*See Reproductive Health Service v. Webster,* 851 F.2d 1071, 1074 (8th Cir. 1988), *citing* 462 U.S. at 430-31; 851 F.2d at 1075, *quoting* 462 U.S. at 444; 851 F.2d at 1079, *quoting* 462 U.S. at 427.

[7]851 F.2d at 1083.

[8]*Id.* at 1075, *quoting Akron,* 462 U.S. at 444.

[9]*Edelman v. Jordan,* 415 U.S. 651, 671 n.14 (1973); *see also, Boys Markets v. Retail Clerks Union Local 770,* 398 U.S. 235, 240-41 (1970).

[10]*See Plessy v. Ferguson,* 163 U.S. 537 (1896).

[11]*Compare, e.g., Hamner v. Dagenhart,* 247 U.S. 251, 272 (1918) (invalidated child labor law) *with United States v. Darby,* 312 U.S. 100, 113, 116 (1941) (upheld FLSA, overruled *Hamner*'s precise rationale 23 years later).

not restrict one person's autonomy except when necessary to protect another from harm, but can be counted on to do so then. Resolution of a conflict of individual rights requires identifying the competitors and then fashioning relief consistent with individual rights. Regarding abortion, the decisionmaker must decide whether the competitors are characterized as the woman and the government or the woman and the preborn infant.

The dispositive issue of interest characterization is whether the infant has standing as a "person" — the right to claim rights. Following this determination, the decisionmaker then must ascertain under what circumstances abortion prohibition unduly infringes the woman's autonomy and under what circumstances it is necessary to prevent harm to another. Courts are best suited for such choices.[12]

Roe neither properly characterizes the interests nor resolves the conflict. *Roe* purports to vindicate individual rights but reaches a result — characterizing the infant as a "nonperson" — inconsistent with that value. The Court's inability to enforce its decisions makes its ability to persuade essential to its ability to govern.[13] Because *Roe*'s rationale has proved unpersuasive,[14] proposals for nullifying legisla-

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[12]The abortion controversy presents a choice between interpreting the Constitution to confer autonomy of right on individuals, and interpreting it to confer autonomy only insofar as the government sees fit to grant it. "Such a [constitutional] determination falls within the traditional role awarded courts to interpret the law, and does not involve 'a lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' " *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[13]*See generally*, P. Freund, A. Sutherland, M. Howe and E. Brown, *Constitutional Law* 667 (4th Ed. 1977).

[14]Commentary on *Roe* consistently has remained overwhelmingly critical. Coleman, *Roe v. Wade: A Retrospective Look at A Judicial Oxymoron*, 29 St. Louis U.L.J. 7 (1984); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U.Pitt.L.Rev. 359 (1979). *See* Bickel, *The Morality of Consent* (1975); Comment, *Homo Sapienism: Critique of Roe v. Wade and Abortion*, 39 Alb.L.Rev. 856 (1975). Boyle, *That the Fetus Should be Considered a Legal Person*, 24 Am.J.Juris. 59; Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L.Rev. 807 (1973) ["Byrn, An American Tragedy"]; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159. Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L.Rev. 1059 (1973).

tion[15] and constitutional amendments[16] abound. The Court could lose control of the issue to a less suitable branch of government[17] or to an unneccessary constitutional amendment.[18]

This Court must reach the conflict between individual rights underlying this case; a decision leaving it to Congress or state legislatures abdicates the judicial function. "The very

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[15]Legislative solutions include a statute depriving the lower federal courts of jurisdiction over such cases. Uddo, *A Wink From the Bench: The Federal Courts and Abortion*, 53 Tul.L.Rev. 398 (1979), and one declaring that life begins at conception. Galebach, *A Human Life Statute*, 7 Human Life Review 3 (1981).

[16]Numerous commentators have proposed amendments to do away with *Roe*. *See, e.g.*, Byrn, *The Abortion Amendments: Policy in the Light of Precedent*, 18 St. Louis U.L.J. 380 (1974) [hereinafter cited as Byrn, *The Abortion Amendments*]; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L.Rev. 1250 (1975).

[17]Congress unlike the Court, must be responsive to changes in popular will. If stare decisis generally strengthens the Court's position (*Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), restrictions excepted), flexibility strengthens the hand of Congress. Placing the definition of "person" in the hands of Congress would at least open the possibility that standing would be expanded and contracted as particular political minorities held or lost majority favor. The Court would risk an *Ex parte McCardle* showdown any time it attempted to interfere. Standing as a "person" would be much more secure if left to the Court's *Carolene Products* function. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). The Court would have incentive to maintain stability rather than to be moved by popular opinion; it could check its *Roe* mistakes in the same manner that it checked *Plessy v. Ferguson*, 163 U.S. 537 (1896), and with less chance of provoking a confrontation with Congress.

[18]It weakens the veracity of constitutional language to add provisions that single out an identified class of individuals for protection that existing provisions already purport to grant to all. A constitutional amendment requires majority approval that a court decision does not, but may provide, in fact, no more protection that a court decision offers. *See, e.g., Slaughter-House cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (limiting privileges and immunities clause to federal rights).

purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of public controversy, to place them beyond the reach of officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnett,* 319 U.S. 624, 628 (1943). Deciding who can claim the right to live and under what circumstances cannot be left to the legislative branch. Dire consequences have ensued when the Court has allowed popular will to define who has standing as a "person".[19] This Court must retain control of this issue, face it, and take this opportunity to articulate a persuasive rationale.

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[19]Ironically, the best example of this phenomenon in the past, like *Roe,* involved the Court's preservation of slavery in some states by placing a narrow construction on standing to claim autonomy of right. In *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), the Court held that a slave did not have the right to sue in federal court because, being black, he was not then and could never become a "citizen" of the United States. *Id.* at 403-04, 410. The Court summarized:

> The question before us is, whether [African Americans] compose a portion of this people . . . ? We think they are not, . . . and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On that contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and WHETHER EMANCIPATED OR NOT, . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404-05 (empahsis added).

The Court was not compelled to reach this conclusion. It could have justified a broad construction of "the people" based upon the Declaration of Independence and used the fourth amendment quarantee of the "rights of the people to be secure in their *persons*," U.S. Const. amend. IV (emphasis added), an amendment negating provisions suggesting support for slavery, U.S. Const. art I, §9 and art. IV §2. The implied limitation placed by the Court upon a principle that appeared contrary to the principle's express terms proved unpersuasive. The Court lost control of the issue, the Civil War followed, and the fourteenth amendment reversed the Court's decision. *See, e.g., The Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 73 (1873).

II. Biological Reality And Constitutional Precedent Mandate Rejection Of *Roe*'s Characterization Of The Unborn As Nonpersons

Roe is wrong because it mischaracterized the competing interests involved in an abortion, and denied preborn human beings standing as "persons" in the tradition of some of this Court's most notorious and regrettable decisions.[20] Justice White has accurately observed that *Roe* declares that "the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus."[21] *Roe*'s denial of standing to the preborn is unpersuasive because it contradicts settled modern constitutional principles and established medical fact. *Roe*'s erroneous adoption of a definition of "person" that excludes some human beings reduces individual rights for all to individual privileges dependent upon governmental whim. Any protection the law affords to those without standing to claim it for themselves depends entirely upon the "convenience, whim, or caprice" of the majority. Like the African American slaves of the last century, those deemed unworthy have "no rights or privileges but such as those who held the power and the Government might choose to grant them". *Scott v. Sandford,* 60 U.S. (19 How.) 393, 448-50 (1857).

Individual rights depend on the proposition that *every* individual — not just those the government deems worthy — have standing to claim on the same terms as everyone else the freedom from governmental intrusion and the government's protection from intrusion by others. Determining who qual-

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[20]*See Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857); *The Antelope,* 23 U.S. 66 (1848); *see also, Buck v. Bell,* 274 U.S. 200, 207 (1928); *see generally, Bury My Heart at Wounded Knee* (New York 1972) at 342-48 (describes situation in which General Sherman ruled one native American was a "person" but his brother was not).

[21]*Doe v. Bolton,* 410 U.S. 179, 221 (1973) (White, J., dissenting). *Floyd v. Anders,* 440 F. Supp. 535, 538 (D.S.C. 1977), *vac.* 440 U.S. 445 (1979), followed this approach, but *see* infra Note 28, holding that a second *trimester* infant who lived three weeks after an abortion was "not a person whose life state law could legally protect".

ifies as a "person" with standing to claim constitutional protection requires establishing objectively-verifiable criteria free of value judgments. Otherwise individual rights become individual privileges, granted and withdrawn according to the ebb and flow of judgments of "worthiness".

Distinct human existence is the only standing criterion that preserve autonomy of right for all individuals because it is the only criterion that can be verified objectively without making worthiness judgments among individuals. Accepting this criterion to preserve individual rights for all individuals mandates that a constitutionally protected "person" is a human being from the moment of his or her medically verifiable distinct individual existence — fertilization.

When an individual's autonomy is subject to another's approval, its exercise is a privilege and not a right. Likewise, if standing is subject to government will, standing is a privilege, dependent upon a governmental determination of worthiness. Autonomy of right requires guaranteed protection of its exercise. Autonomy subject to government approval cannot be autonomy of right.

A government fashioning the criterion for standing must respect individual rights. The criterion chosen must be verifiable, inclusive, and objective to ensure that every individual can claim autonomy of right. First, the criterion must be verifiable independent of government judgment. Second, the criterion must include all individuals by attaching standing from the point of time that is designated as the beginning of individuality. Finally, the method for designating the beginning of standing must only inquire into the fact, and not the quality, of individual existence. Power to make a qualitative inquiry undermines a criterion's objectivity.

The Court in *Roe* denominated the preborn as a "potential life". 410 U.S. at 163. The state might, if it so desired, protect "potential life" after the preborn infant reached viability unless his or her continued presence endangered maternal life or health. 410 U.S. at 162-63. The preborn infant was not entitled to claim protection in his or her own right until birth. The Court justified choosing birth as the criterion dispositive of standing based upon its analysis of the law's historical

treatment of the preborn. The Court's historical analysis was erroneous.[22] From 1868, the year the Fourteenth Amendment passed, forward, almost all states have criminalized abortion to protect the infant.[23] *Roe*'s choice of criterion, however, reveals a more fundamental error. If standing begins at birth, one may discern the criterion for standing by

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[22]Id. at 132-41. The Court's historical analysis relied upon two articles by Professor Cyril H. Means; Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality (pt. 1)*, 14 N.Y.L.F. 411, 418-28 (1968), cited in 410 U.S. at 132-33 n.21; and Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971), cited in 410 U.S. at 135 n.26. Commentators since *Roe* have demonstrated serious inaccuracies in Means's analysis. *See, e.g.*, Byrn, *An American Tragedy*, supra note 14, at 815-35; Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U.Pitt.L.Rev. 359, 366-407 (1979); Destro, supra note 14, at 1267-86; Witherspoon, *Reexamining Roe; Nineteenth-Century Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 ["Witherspoon"].

[23]*Roe*'s contrary contentions are erroneous. *Roe* says English common law did not protect infants before quickening because they were deemed unworthy, 410 U.S. at 132-33; in fact, problems of proving the woman was pregnant mandated the quickening requirement. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L.Rev. 807, 823-25. *Roe* says legislative abortion prohibitions in this country did not "begin generally to replace the common law" until "after the War Between the States", 410 U.S. at 138-39; in fact, eighteen of thirty states prohibited it as early as 1849, and twenty-seven of thirty states had such legislation as of 1864. *See* Witherspoon, 17 St. Mary's L.J. at 33 n.15 (collects these). *Roe* says "most . . . statutes dealt severely with abortion after quickening but were lenient with it before quickening", 410 U.S. at 139; in fact, twenty of thirty states with statutes the year the Fourteenth Amendment passed imposed the same penalties before and after quickenting. Witherspoon, 17 St. Mary's L.J. at 36 n.22. *Roe* says "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman", 410 U.S. at 149; in fact, twenty of thirty-six states by 1883 imposed a harsher penalty upon proving the infant's death, Witherspoon, 17 St. Mary's L.J. at 38 n.24, fourteen of the twenty provided the same punishment for killing the child as killing the mother, *id.* at 40 n.28, seventeen states characterized the infant's death with other homicide, *id.* at 44 n.47, and twenty-three of the states and six territories the year the Fourteenth Amendment was ratified referred to the preborn child as a "child" in their statutes. *Id.* at 50 n.57, 58. *Roe* says if preborn infants received protection as "persons", why was there an exception "for the purpose of saving the life of the mother?" 410

comparing the preborn with the born. The difference is that the latter live outside the mother while the former live within.[24]

This criterion is independently verifiable because it is referenced to birth, and birth is beyond government control. It also is sufficiently inclusive because it designates birth as the beginning of individuality and attaches standing from that point. It cannot, however, satisfy the third requirement. Obviously, birth begins an infant's existence only if the infant does not exist before that time. This can only occur, however, if existence is restricted to a *physically independent* existence. The distinction between dependent and independent existence is purely qualitative. For this reason, birth is an unacceptable criterion.

Roe's qualitative inquiry makes its criterion subjective. Government capacity to alter its scope produces unpalatable results. It requires no conceptual leap for government to use physical dependence as a springboard to exclude children,[25] the handicapped,[26] and the elderly from the class of those entitled to claim the law's protection. All these could fit *Roe*'s characterization as "not persons in the whole sense." One three-judge panel, relying on *Roe*, has held that an infant aborted after twenty weeks was "not a person whose life the state law could legally protect," even though he lived for three weeks thereafter.[27] A more recent Indiana decision holding that parents could allow a newborn infant with

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U.S. at 153 n.54. In fact, self defense against an innocent attacker is allowed against *born* as well as unborn. *E.g.*, Witherspoon, 17 St. Mary's L.J. at 47. *Roe* asks "why is the woman not a principal or an accomplice?" 410 U.S. at 158 n.54. In seventeen states, she was. Witherspoon, 17 St. Mary's L.J. at 59. n.90.

[24]*See generally*, Byrn, *The Abortion Amendments*, at 385-89.

[25]Hearings Before the Subcommittee on Separation of Powers on S.158, at 44 ("If the issue is primarily one of personhood, then I submit that this is not fully achieved until late adolescence.").

[26]*See* N.Y. Times, Feb. 4, 1983, §1 at 10, col. 6.

[27]*Floyd v. Anders*, 440 F. Supp. 535, 538 (D.S.C. 1977), *vac.* 440 U.S. 445 (1979).

Down's Syndrome to starve to death demonstrates the pernicious influence of *Roe*'s weak standing criterion.[28]

Roe selected a criterion imposing subjective worthiness determinations because *Roe* relied upon subjective factors in making the selection. *Roe* looked to Stoic philosophers, English common law, Protestant theology, Aristotelian logic, and Renaissance Catholic dogma as its sources. *See* 410 U.S. at 160-61. *Roe* looked everywhere but to scientific observation.

Whatever significance theologians, psychologists, anthropologists, and philosophers attach to fertilization, there is no dispute that it marks the *point biologically* at which distinct individual existence begins.[29] This scientific fact is

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[28]*See* N.Y. Times, Feb. 4, 1983, §1 at 10, col. 6.

[29]*See, e.g.*, M. S. Gilbert, *Biography of the Unborn*, 13 (1963); J. Langman, *Medical Embryology*, 3, 23-27 (1975); C. H. Waddington, *Principles of Embryology*, 45 (1958); S. Rep. 97-___ on S. 158, 97th Cong. 1st Sess. at 7-9 *quoting* L. Arey, *Developmental Anatomy*, 55 (1974); I. Asimov, *The Genetic Code*, 20 (1962); J. Brash, *Human Embryology*, 2 (1956); J. Greenhill & E. Friedman, *Biological Principles and Modern Practice of Obstetrics*, 23 (1974); W. Hamilton & H. Mossman, *Human Embryology*, 14 (1972); M. Krieger, *The Human Reproductive System*, 88 (1969); S. Lauria, *Thirty-Six Lectures in Biology*, 146 (1975); K. Moore, *The Developing Human*, 1, 12 (1977); B. Patten, *Human Embryology*, 43 (1968); J. Roberts, *An Introduction to Medical Genetics*, 1 (1963); G. Simpson & W. Beck, *Life: An Introduction to Biology*, 139 (1965); J. Thomas, *Introduction to Human Embryology*, 52 (1968); T. Torrey, *Morphogenesis of the Vertebrates*, 47 (1971); Hearings Before the Subcommittee on Separation of Powers on S. 158 ["Hearings"], at 8, (Testimony of Dr. Jerome Lejune, Professor of Fundamental Genetics, Medical College of Paris), 12-13 (Testimony of Dr. Hymie Gordon, Professor and Chairman, Department of Medical Genetics, Mayo Clinic), 14 (Testimony of Dr. Micheline M. Mathews-Roth, Principal Research Associate, Harvard University), 25 (Testimony of Dr. Watson A. Bowes, Jr., Division of Prenatal Medicine, University of Colorado, Denver), 39-41 (Testimony of Dr. Alfred M. Bongiovanni, Professor, University of Pennsylvania Medical School), 48 (Testimony of Dr. Jasper Williams, Past President, National Medical Association); *see generally*, Krimmel and Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing its Destruction*, 46 U.Cin.L.Rev. 725, 744-62 (1977); 39 Albany L.Rev. at 873-74.

not a recent discovery.[30] Physicians who reject fertilization as the beginning of individual life do so for subjective philosophical reasons, not scientific biological ones.[31] Even abortion proponent Dr. Alan Guttmacher recognized, contrary to *Roe,* that fertilization was an individual's biological beginning:

[30]"Physicians have now arrived at the unanimous opinion, that the foetus in utero is alive from the very moment of conception . . . [T]he willful killing of a human being, at any state of its existence is murder . . . " H. Storer, *Why Not? A Book For Every Woman* at 28-29, 79 (1986), reprinted in part in Hearings, supra Note 28 at 681 (ellipsis in the original).

[31]Some physicians, like others who enjoy constitutional protection, unquestionably believe, for nonscientific reasons, that true "personhood" requires more than distinct existence; however, none can deny that distinct existence begins at fertilization. Opponents of abortion regulation distinguish between the distinct life of a human being and "human life" — the former plus some additional ability or feature. Dr. Leon Rosenberg believes conception (meaning fertilization) is "a critical event in human reproduction" and that fertilization creates a new cell "that contains all of the genetic information needed to develop ultimately into a human being." *Hearings* at 49. He, however, concludes that "the fertilized human egg is a living cell with the potential for human life," and that, in his view, "there is an enormous difference between the potential for human life and . . . 'actual human life.' " *Id.* (quoting S. 158, 97th Cong., 1st Sess., §1 (1981)). Dr. James Neel followed this line of thought by contending that a newly conceived infant is not a person until he or she goes through the stages of prenatal development that he believes are similar to the stages of evolution. *Hearings, supra,* at 77-78. University of Pennsylvania Medical School professor Dr. Alfred M. Bongiovanni exposes the logical flaw of this view when, after testifying that life begins at fertilization, he states: "If the issue is primarily one of personhood then I submit that this is not fully achieved until late adolescence. The dramatic changes . . . at the time of puberty [are] just as amazing as the multiplication and differentiation of cells from the single fertilized ovum." *Id.* at 44.

The *Roe* View

When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer [of when life begins].

Roe v. Wade, 410 U.S. 113, 159 (1973).

The Scientific View

The nucleus of the sperm-head, bearing all the hereditary factors which come through the father, becomes indissolubly united with the nucleus of the ovum, bearing all the hereditary factors which come from the mother *— AND A NEW LIFE, A COMPOSITE OF THEM BOTH, IS BEGUN.*

Dr. A. Guttmacher, *Life in the Making,* 55 (1933) (emphasis added; hereafter, "Guttmacher").

Fertilization as a criterion in itself is independently verifiable. "Distinct existence" is a matter of observation, not a matter of judgment. Unlike *Roe*'s criterion, it grants standing at the beginning of individuality and is objective. By definition, one individual must be distinct from another. An individual's existence distinct from his or her parents begins at fertilization; to inquire whether fertilization has occurred is to inquire concerning the fact of individual existence without regard to its quality.

Roe's contention that "conception is a process over time rather than event", 410 U.S. at 159, is an illusory play on words. Obstetricians, who stood to gain from abortion, in 1965 changed the meaning of "conception" from "fertilization" — the uniting of the sperm and the ovum — to "fertilization plus," fertilization plus a number of subsequent events such as implantation and cleavage.[32] So defined, "conception" is indeed a process. However, fertilization is still an event. *See supra,* Note 28; Guttmacher at 55. *Roe*'s

[32]*See* American College of Obstetrics and Gynecologists, Terminology Bull., No. 1 (Sept. 1965).

verbal sleight of hand cannot change what science affirms[33] — that distinct life begins at fertilization.

The contention that living gametes do not differ from a living zygote assumes either that fertilization does not produce a separate organism from the cells of two larger organisms, or that this change does not matter. If either assumption were correct, chosing fertilization as the beginning of distinct existence would not satisfy step three of the standing test. Having no basis in observation, the choice would be a mere judgment call not better than those *Roe* made. Neither assumption, however, is correct.

Gametes are living cells before they join at fertilization. They are parts of larger organisms, and are not organisms themselves. A zygote, on the other hand, is an entire organism. *See* Guttmacher at 55. Destroying a gamete does not destroy a human organism; destroying a zygote does. *Id.* The difference is fundamental because it determines whether the abortion harms "another". As for the second objection — the zygote's dependence on his or her mother — the fact that a person physically depends upon another does not make him or her any less a person. Taking account of physical dependence is a qualitative inquiry.

The "[s]ubstantial problems" that *Roe* argues are presented by abortifacient birth control methods, 410 U.S. at 161, reveal their illusory nature upon close examination. Scrutinized under the lens of individual rights, these problems quickly evaporate. Critics seeking to preserve birth control methods that are thought to be abortifacient do not dispute the fact of individual existence from the moment of fertilization. They contend that respect for individual rights

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[33]Characterizing as "religious" the view that life begins at fertilization, *see Thornburg v. American College of Obstetrics and Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring), solves nothing. *See id.* at 795-96 n.4 (White, J., dissenting). Any side of any issue can be called "religious". *Id.* This characterization obscures the fundamental issue of which view is scientifically verifiable apart from the religious belief. Others may have religious or philosophical beliefs that distinct life does not begin at fertilization, but the foregoing authorities establish that secular scientific observation says it does. *See* supra, Note 29.

is too costly. These critics argue that protecting preborn individuals does not justify curtailing the use of the IUD or "morning after" pill, implying that the integrity of newly distinct individuals must give way to the autonomy of their parents. These critics "red circle" the autonomy of some individuals for special protection at the expense of the existence of others. Their approach offers a plausible alternative to respect for individuals' rights, but one our Constitution's present Bill of Rights cannot support.

Roe refuses to recognize standing from fertilization because the preborn are not "persons in the whole sense." 410 U.S. at 162. If that is the test, standing "is not achieved until late adolescence."[34] If *Roe* is correct, then all pre-adolescent children, born or preborn, have no standing to claim protection, but only such protection as others with standing chose to give them. *See Scott v. Sandford,* 60 U.S. (19 How.) at 404-5. The most cursory review of the law governing capacity to sue and be sued, to contract, and to own property in one's own name would confirm that *BORN* children "have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. By *Roe*'s view, the pre-adolescents, no less than the preborn, merely "represent only the potentiality of life." *Id.* Surely the fact that one's property ownership is contingent upon being born, or one's use rights upon reaching majority, must not define whether the Constitution confers on preborn individuals the standing to claim protection for the only freedom they *can* exercise — the freedom to live.

Roe's characterization of the preborn as "potential life" is scientifically inaccurate. Characterizing the preborn requires recognizing that they are genetically unique, distinct, and alive from the moment of fertilization forward. Like pre-adolescent childhood, a child's prebirth development is more akin to a vested expectancy than a contingent one. The

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[34]The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separate of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., Vol. 1 at 44 (statement of Dr. Alfred M. Bongiovanni, Professor, University of Pennsylvania Medical Faculty).

interest that an infant presently has is best termed "vested expectancy" in adult life.

American law has recognized vested expectancies in property and liberty. The born and preborn owners of these interests may presently claim protection for rights that they cannot presently exercise. A vested remainderman has the present right to protect his future "possessory" interest by precluding those now in possession from destroying the value of the property, and by claiming just compensation in the event of condemnation. *See generally,* L. Simes, *Future Interests* 132-35 (1951). The same principle applies to liberty in the form of "good time" credits awarded to inmates. An inmate who has accumulated "good time" credits owns a vested expectancy in liberty, a present interest in future freedom. Although the inmate cannot yet exercise freedom, he or she can claim the Constitution's protection for its future exercise. *See Wolff v. McDonnell,* 418 U.S. 539, 555, 557-58 (1974).

The owners of vested property and liberty expectancies are given the present right to claim protection because these rights need only the passage of time to become fully exercisable. The interests presently exist; their full exercise needs time to mature.

These same principles mandate protecting the preborn and born infant's vested expectancy in adult life. The infant is an owner in the sense that he or she is, at the instant of fertilization, a distinct human individual. His or her interest is "vested" in the sense that he or she is presently living. *See supra,* Note 29. It is an expectancy in the sense that he or she, like a newborn child or a ten-year old, cannot presently enjoy adult life. If the Constitution protects vested expectancies in property and liberty, certainly it must also protect a "vested expectancy" in life. The preborn infant should be able to claim this protection against those who would destroy the value of his or her interest.

This characterization represents past American law more honestly than *Roe.* Most states have prohibited abortion since 1848. At the time the Fourteenth Amendment was passed, and for over one hundred years thereafter, the overwhelm-

ingly majority of states punished abortion at all stages of pregnancy, imposed harsher penalties upon proof of the infant's death, called the preborn infant a "child," and required the specific intent to destroy the child (without regard to the impact on the mother's health). *See supra,* Note 23. This characterization represents more honestly the intent of the framers.[35] This characterization represents more honestly the scientific facts. *See supra,* Note 29.

The preborn infant's dependence on his or her mother for support during pregnancy does not destroy the analogy. The fact that the holders of vested expectancies are presently dependent on others does not make their interest any less valid and enforceable. The remainderman depends upon the life tenant to preserve the value of the property. The life tenant is prohibited from committing waste or negative waste, and must preserve the remainderman's interest. Similarly, the inmate depends upon the state to preserve the value of his interest. If the state does not feed him during his incarceration, he will starve to death. The state, like the life tenant, must provide this support until the inmate can enjoy his freedom. Is the preborn's interest due any less recognition and protection?

Reversing *Roe* is more than simple preservation of legal consistencies. The Court should reverse *Roe* to protect preborn infants because to deny them protection undermines protection as a matter of right for all individuals.[36]

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[35]The same Ohio legislators who approved the Fourteenth Amendment three weeks later passed an abortion prohibition because they concluded that "the killing of a human being, at any stage of its existence, is murder." 1867 Ohio S.J. App. 233, 234.

[36]Choosing the point that minimizes individual value judgments is itself a value judgment, but it is a value judgment necessary to preserve autonomy of right. If autonomy of right is not subject to the will of another, standing to claim protection for the right must not be within another's control. Fertilization eliminates the most discretion because it bases standing upon an event alone rather than upon a judgment.

III. The Court Can Resolve The Conflict Of Abortion Consistent With The Constitution By Treating Both Of The Competing Individuals Like Adults

Abortion brings into conflict the rights of two individuals. The principles of responsibility and self-defense are fundamental to a system that respects individual rights. Applied to abortion, they yield a solution, consistent with the system, to the difficult issues that abortion presents. Simply stated, a woman may only end support for her preborn infant's life if she did not originally choose to risk supporting it, or if, although she did assume that risk, she must end support to save her own life.

Traditional principles of equal protection analysis mandate that a state that permits abortion beyond cases in which pregnancy results from rape or threatens maternal life enforces its homicide laws differently according to whether the victim has been born.[37] Different treatment of a person's right to live according to whether he or she is born denies a fundamental right because of a physical characteristic over which the one affected has no control.[38] Distinctions based upon these characteristics generally are disfavored,[39] and distinctions that affect fundamental rights such as the right to live must be narrowly drawn to further a compelling state interest.[40]

The only conceivably compelling interest that the state could offer for such a distinction is that it is necessary to protect the pregnant woman's right of privacy. The right of privacy, like other constitutional rights, is not absolute and

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[37]Whether the state accomplishes this end by express statutory language or by inconsistent enforcement of a facially neutral statute is irrelevant. *See Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886).

[38]For the state to decline to protect an individual's constitutional rights is for it to deny that right entirely. Autonomy that does not enjoy state protection is illusory.

[39]*See, e.g., Korematsu v. United States,* 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

[40]*See, e.g., Dunn v. Blumstein,* 405 U.S. 330, 338-39 (1972) (voting rights); *Shapiro v. Thompson,* 394 U.S. 618, 134 (1969) (travel restrictions).

not standing alone in a vacuum. The Constituion does not grant one the autonomy to harm others freely. Even freedom of speech is not this absolute. Words that create a "dangerous probability of imminent lawlessness"[41] and those "which by their very utterance inflict injury or tend to incite immediate breach of the peace"[42] do not enjoy First Amendment protection. Privacy, therefore, cannot justify making a birth/prebirth distinction in protecting life.[43]

Protecting the pregnant woman's right to abort for life threatening or rape-induced pregnancies is just as important as protecting the preborn infant's right to live in all other situations. A system that respects individual rights must necessarily recognize the principles of self defense and individual responsibility as means of breaking conflicts between competing interests. Like anyone else, the pregnant woman has the right to use deadly force to repel an attacker threatening her life, regardless of whether the attacker is consciously attacking. *Model Penal Code* §210.0(3) (Proposed Official Draft 1962). Like anyone else, a pregnant woman is not obligated to provide aid to one whose life is imperilled if she did not choose to do something risking that peril and the other's perilous position did not result from that choice, even though her declining to provide assistance will cause the other's death. *Restatement (Second) of Torts* §314 (1965). Forc-

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[41]*See, e.g., Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (per curiam); *Schenck v. United States,* 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

[42]*See Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

[43]The solution admittedly imposes a heavier immediate burden upon women than it imposes upon men. The heavier burden is not caused by discriminatory treatment, but by the application of a neutral principle; mere adverse impact is not inconsistent with the Fourteenth Amendment. *See, e.g., Washington v. Davis,* 426 U.S. 229, 242 (1976). Holding both men and women responsible to those rendered vulnerable by their decisions and actions concerning procreation has different consequences for the latter because the latter's choice has different consequences. Here equal treatment producing unequal results is essential to preserve everyone's individual rights.

ing the continuation of life-threatening or rape-induced pregnancies, like refusing to recognize the preborn as persons, enables the government to make worthiness determinations that undermine every individual's ability to claim autonomy from government or governmental protection from others as a matter of right.

Fundamental to the concept of integrity is the right to claim government protection to prevent harm resulting from the exercise of autonomy by another. Fundamental to autonomy is the right to be free from government interference. Fundamental to an effective mechanism that respects these two principles is individual responsibility. If integrity is the right to claim government protection and if government protection may not extend beyond what is necessary to prevent harm, integrity must be tailored to the harm threatened. Individual responsibility serves this function because a government that follows this principle limits its interference in the autonomy of an individual to what is necessary to protect others from the harmful consequences of that individual's act without otherwise limiting the autonomy to act.

Responsibility defines the limits of both integrity and autonomy. It limits integrity by precluding enforced samaritanism, and limits autonomy by enforcing accountability. A government that professes a belief in individual rights may not limit autonomy to the extent of compelling one individual to render assistance to another unless the former is responsible for the latter's disadvantaged position.

Thus, an individual may, with legal impunity, walk by a dying man. *See Restatement (Second) of Torts* §314 (1965). However, government must require an individual to render assistance to another when the former has voluntarily acted, innocently or otherwise, in a manner that placed the latter in peril. *Id.* §322. The mechanism chosen must vindicate responsibilty. It must not require good samaritanism nor neglect to achieve accountability.

A government that respects individual rights also must attach standing to claim government protection at the beginning of distinct individuality because attaching standing at any other point destroys autonomy of right.

The principle of self-defense provides a means of identifying these situations. Self-defense is the autonomy to repel an unlawful intrusion by another. It is the autonomy to preserve one's integrity when government protection is unavailable. Government protection is unavailable when the intrusion is lawful or when the intrusion results from the victim's own decision. Holding individuals responsible for the consequences of their actions, while permitting them to defend themselves against harmful intrusions that do not result from their actions and against life-threatening intrusions of every kind, provides a mechanism for resolution that respects individual rights.

Whether self-defense justifies using force against another depends not only upon the harm threatened, but also upon whether the threat is lawful. *Id.* at 1611-12. Because the harm results from the infant's need for physical support, the woman may "defend herself" only if she is not required to provide it. Does she defend against an attack or seek to avoid an obligation?[44]

If the law imposes upon a person the affirmative duty to provide assistance to another, the extent of that duty is defined by what "a reasonable man would believe to be necessary to afford the aid or protection to which [the person owed the duty] is entitled, but no more."[45] This definition is couched in terms of: (1) the knowledge of the person owing the duty, and (2) the nature of the peril facing the person to whom the duty is owed. Placed in the context of the pregnancy relationship, the aid "a reasonable [woman] would believe to be necessary" to provide is that of continuing to carry the preborn infant until birth, because the assistance

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[44]Commentators who contend a pregnant woman is always a "good samaritan," e.g., Regan, *Rewriting Roe v. Wade*, 77 Mich.L.Rev. 1569, ignore this distinction. *But cf. id.* at 1611-12 (acknowledges "lawfulness" requirement).

[45]*Restatement (Second) of Torts* scope note to topic seven, chapter twelve: "Duties of Affirmative Action." (1965).

the infant requires is physical support. These, however, cannot be the only two determinants.

Another factor in determining whether aid is reasonable is the effect of providing assistance upon the one that must render it. The Restatement only directly mentions this in a discussion of affirmative duties found in the comments in section 314A.[46] This section provides that the person owing the duty "will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained."[47]

Illustrations under section 322, concerning the duty to aid another harmed by the actor's conduct, whether tortious or otherwise, indicate that the person undertaking the duty must at least endure inconvenience in the prevention of further harm to those jeopardized by his conduct.[48] Requiring innkeepers to take special precautions to discharge their duty to provide safe premises when small children are guests supports this conclusion.[49] Neither the comment, the illustrations, nor the cases, however, address the situation in which the burdens incident to providing aid compare to those of a "normal" pregnancy. *See generally, supra,* Note 14, 29 St. Louis U.L.J. at 32-33.

To posit such a case, imagine a dweller in a remote cabin in the American Rockies that is accessible only during the summer months, with no telephone or shortwave. He has just settled in for the winter, stocking enough food to last him comfortably until the snow melts. On the last day that descent to "civilization" is possible, his snowmobile strikes a hunter and that accident causes an avalanche, closing the road. Whether or not the cabin dweller is at fault, the Restatement requires that he assist the hunter. Since it is no

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[46] *Id.* §314A comment f.

[47] *Id.*

[48] *Id.* §322 comment b, illustrations 1-3.

[49] *See Crosswhite v. Shelby Operating Corp.*, 30 S.E.2d 673, 674-75 (Va. 1944); *see also Baker v. Dallas Hotel Co.*, 73 F.2d 825, 827-28 (5th Cir. 1934); *see generally* 40 Am.Jur.2d Hotels §83 (1968).

longer possible to descend the mountain or to summon help, "reasonable care to prevent . . . further harm" seemingly would mean taking the hunter in for the winter. Caring for the hunter would impose a burden on the cabin dweller somewhat analogous to a normal pregnancy. Fulfilling this obligation in light of limited food could present threats to the cabin dweller's health, and if food supplies are low enough, to his life. *Id.*

If the person with the duty to assist "will seldom be required to do more" than give first aid and seek medical help, the Rocky Mountain cabin dweller's plight provides one example of the exceptional case. If food is not a factor, merely caring for the hunter throughout the winter appears to be what section 322 of the Restatement requires the cabin dweller to do. Although the cabin dweller will suffer the prolonged inconvenience of having the hunter around, his duty to protect the hunter from further harm renders the inconveniences unavoidable.

The applicability of this model to the relationship created by the "normal" pregnancy is evident. Self-defense becomes a concern only if requiring a woman to fulfill the obligations she risked undertaking would deprive her of individual integrity. The burdens imposed by the "normal" pregnancy or by one threatening health are simply the cost of the obligation of support. They limit the woman's present autonomy because they result from her past choices of action.

The assumption underlying the discussion of the proposed mechanism thus far is that the woman experiencing unwanted pregnancy has chosen to risk pregnancy. When she has not, she is not responsible, under the principle of individual responsibility, for the infant's existence, and, under the principle of self-defense, must be permitted to cease providing support. A system that respects individual rights requires as much.[50]

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[50] Critics who contend that this result vindicates less important rights at the cost of more valuable ones are misguided. The right to exist may be more fundamental than the right to be free from having to provide support for nine months. But more is at stake. A woman pregnant because

An innkeeper may take every precaution to keep the inn accident free. Regardless of the precautions taken, however, the duty to give aid if a guest becomes injured is unaffected.[51] It is the choice of engaging in an act posing risk to another, and not the extent of the risk posed, that triggers the duty. *See also,* Restatement (Second) of Torts §322.

Likewise, the woman may take every precaution against creating a distinct individual dependent upon her for support. But she, like the innkeeper, has the duty to provide assistance if her precautions fail. The fact that she takes such precautions does not make her participation in the act creating the dependency any less voluntary. Since she remains responsible, she remains obligated.

The cabin dweller hypothetical illustrates why life-threatening pregnancies are distinct. The decision to repel an unlawful attack must remain with each individual. Even if sharing his food with the hunter will mean that he will be hungry, this does not justify relieving the cabin dweller of his responsibility. He may claim to be excused from his responsibility only if he is unable to discharge it without bringing about his own death, only if sharing the food with the hunter would mean that he would starve. It is only at this point that considerations of self-defense may be viewed as a limit upon the cabin dweller's obligation.[52]

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of rape has a decidedly greater interest in choosing to end a resulting pregnancy than a sunbather has in choosing not to throw a nearby life preserver to a drowning swimmer. Yet the law protects the sunbather's interest at the cost of the swimmer's life.

[51]*See* Restatement (Second) of Torts §314A(2) (1965). *See generally* J. Sherry, *The Law of Innkeepers* §1:6 (rev. ed. 1981).

[52]Unless his life is at stake, the cabin dweller's interest in protecting his "autonomy" is freedom from hunger and related health problems, and freedom from the time constraint of caring for the hunter. The hunter's interest is in protecting his integrity, because he will perish if he does not remain with the cabin dweller throughout the winter. In using the principle of "responsibility" to resolve this conflict, the interest of the hunter must prevail. The cabin dweller actively created the hunter's dependent condition; the hunter did not. The cabin dweller's responsibility for his past actions limits his present autonomy. If the cabin dweller's life is at stake, the interests involved are different. The conflict is now the

Although life-threatening pregnancies result from past choices, mortality is a consequence that government may not impose. Government prohibition of abortion when pregnancy endangers maternal life is inconsistent with respect for individual rights. Self-defense limits individual responsibility. Individual responsibility can break conflicts between one individual's autonomy and that of another, or between one individual's integrity and the autonomy of another. It cannot break conflicts between the integrity of two individuals.

Allowing government to break autonomy-autonomy or autonomy-integrity conflicts allows it to perform the necessary function of determining which right is worthiest. Allowing government to break an integrity-integrity conflict, however, allows it to determine which individual is worthiest. This is neither necessary nor permissible. Each individual must be able to defend his or her integrity against intrusion by the integrity of another if government is to respect individual rights.

The principles of responsibility and self-defense are fundamental to a system that respects individual rights. When applied here, they yield a solution, consistent with that system, to the difficult issues that abortion presents. Simply stated, a woman may only end support for her preborn infant's life if because of rape she did not originally choose to risk supporting it, or if, although she did assume that risk, she must end support to save her own life.

This solution recognizes that abortion involves a conflict between two individuals, allowing for the death of one only when a similar situation would justify this result if the individuals were both adults. It provides each individual protection of his or her integrity except to the extent

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cabin dweller's integrity versus that of the hunter's — a question of standing. Although the cabin dweller still is responsible for the hunter's vulnerability, the government cannot, for that reason, find that his life is no longer worth protecting. If the government could force him to give up his life, it would be able to determine which of two individuals is more worthy of protection. A government able to make this choice does not recognize individual rights because it only recognizes the standing of individuals whom it deems worthiest.

necessary to allow for the other's self-defense. It treats the freedom to abort with the same respect that it accorded any exercise of autonomy in a system that respects individual rights, and limits it only as is necessary to prevent harm to others.

CONCLUSION

Roe must be reconsidered because it is the cornerstone of all abortion regulation law and governs the evaluation of Missouri's regulations here. That cornerstone is crumbling; the Court soon will lose control of the abortion issue if it does not act definitively now chooses to discard *Roe*. Judicial misinterpretations should be supported artificially until they become archaic relics; those affected in the interim deserve better.

Roe, while acknowledging that our Constitution values respect for individuals' rights, adopted a result undermining individual rights. Only judicial recognition that human beings are constitutional "persons" from the moment of fertilization guarantees the preborn's *right* to claim the freedom from governmental intrusion and protection from harm by others. Science tells us distinct existence begins at fertilization; religious and social beliefs to the contrary do not justify refusing constitutional standing until some later stage of development.

Recognizing that abortion presents a conflict between the rights of two individuals, a conflict resolution mechanism that treats each individual the same without regard to individual physical characteristics like age or developmental stage is mandated. This mechanism requires prohibiting abortion in all cases except rape-induced and life-threatening pregnancies.

For the foregoing reasons, Alaw-Life respectfully requests that this Court *REVERSE* the Eighth Circuit decision below, *OVERRULE Roe*, and recognize the standards and criterion described above.

Counsel of Record for Amicus Alaw-Life

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served upon counsel listed below by placing copies in the United States mail, postage prepaid, on this the ____ day of February, 1989.

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APPENDIX

Planned Parenthood®
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February 16, 1989

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Re: *Webster v. Reproductive Health Services,* 88-605

Dear Mr. Coleman:

Appellees hereby consent pursuant to Rule 36.3 to the filing of an *amicus curiae* brief on behalf of Alabama Lawyers for Unborn Children, Inc.

Sincerely yours,

Roger K. Evans
Director of Litigation

RKE/ts

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Birmingham, Alabama 35201

Re: William L. Webster, et al., v. Reproductive Health Services, et al., No. 88-605

Dear Mr. Coleman:

In response to your request, Attorney General William L. Webster and the State of Missouri consent to your filing an amicus curiae brief on behalf of the Alabama Lawyers for Unborn Children, Inc.

Very truly yours,

WILLIAM L. WEBSTER
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JLS:j

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG) AND THE AMERICAN ASSOCIATION OF PRO-LIFE PEDIATRICIANS (AAPLP) AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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February 23, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Burlington Northern Railroad Co. v. Oklahoma Tax Comm., 107 S.Ct. 1855 (1987)	11
City Council v Taxpayers for Vincent, 466 U.S. 789 (1984)	13
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	3
Colautti v. Franklin, 439 U.S. 379 (1979)	19, 27, 30
DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 108 S.Ct. 1392 (1988)	12
Frisby v. Schultz, 108 S.Ct. 2495 (1988)	13
Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834)	5
Harris v. McRae, 448 U.S. 297 (1980)	3
Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)	11
New York State Club Assn. v. City of New York, 108 S.Ct. 2225 (1988)	13
Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983)	2, 12, 13, 23
Planned Parenthood v. Ashcroft, 655 F.2d 848 (8th Cir. 1981)	2
Regan v. Time, Inc., 468 U.S. 641 (1984)	30
Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988)	*passim*
Reproductive Health Services v. Webster, 662 F. Supp. 407 (W.D. Mo. 1987), *superceding*, 655 F. Supp. 1300 (W.D. Mo. 1987)	*passim*
Roe v. Wade, 410 U.S. 113 (1973)	2
United States v. Salerno, 107 S.Ct. 2095 (1987)	12
STATUTES	
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Mo. Rev. Stat. 188.015(4) (1986)	4
Mo. Rev. Stat. 188.029 (1986)	*passim*
Mo. Rev. Stat. 188.030(2) (1986)	2
Mo. Rev. Stat. 188.030(3) (1986)	2

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

General

Black's Law Dictionary (5th ed. 1979) 5, 10

W. Blackstone, *Commentaries on the Laws of England* (University of Chicago Paperback 1979) 5

E. Coke, *Third Institutes of the Laws of England* (1644) 5

M. Dalton, *The Countrey Justice* (1618) 5

W. Lambarde, *Eirenarcha, or of the Office of the Justices of Peace* (DaCapo Press Reprint 1970) .. 5

Medical

Amon, et al., *Obstetric Variable predicting survival of the immature newborn ([less than] 1000 gm): A five-year experience at a single perinatal center,* 156 Am. J. Ob. Gyn. 1380 (1987) 10

Baraitser, et al., *Prenatal Treatment of Fetal Hydrops,* 6 Prenatal Diagnosis 109 (1986) 6

J. Beck, *Elements of Medical Jurisprudence* (11th ed. 1860) 5

Benacerraf, *In Utero Treatment of a fetus with diaphragmatic hernia complicated by hydrops,* 155 Am. J. Ob. Gyn. 817 (1986) 6

Berkowitz, *Intravascular transfusion in utero: The percutaneous approach,* 154 Am. J. Ob. Gyn. 622 (1986) 6

E. Blechschmidt, *The Beginning of Human Life* (1977) 5

Buckwald, et al., *Mortality and Follow-up Data for Neonates Weighing 500 to 800 g. at Birth,* 138 Am. J. Dis. Child. 779 (1984) 20

Campbell, et al., *Routine Ultrasound Screening for the Prediction of Gestational Age,* 65 Ob. Gyn. 613 (1985) 18

Chervenak, et al., *A comparison of sonographic estimation of fetal weight and obstetrically determined gestational age in the prediction of neonatal outcome for the very low-birth weight fetus,* 152 Am. J. Ob. Gyn. 47 (1985) 21

TABLE OF AUTHORITIES—Continued

Crawford, et al., *Ultrasonic tissue characterization of the placenta: Is it of clinical value,* 13 J. Clin. Ultrasound 533 (1985) 25

R. Creasy & R. Resnik, *Maternal-Fetal Medicine: Principles and Practice* (1984) 18, 21, 22, 23

Cruikshank, *Amniocentesis for Determination of Fetal Maturity,* 25 Clin. Ob. Gyn. 773 (1982) 24

D. Danforth and J. Scott, *Obstetrics & Gynecology* (5th ed. 1986) ..... *passim*

A. Dean, *Principles of Medical Jurisprudence* (1854) 5

Eilers, et al., *Classroom Performance and Social Factors of Children with Birth Weights of 1250 Grams or Less,* 77 Pediatrics 203 (1986) 7

Farrell, et al., *A sensitive and specific ultrasonic sign of fetal lung maturation,* 4 J. Ultrasound Med. (supp.) 80 (1985) 26

Fried, et al., *Echogenicity of fetal lung: Relation to fetal age and maturity,* 145 Am. J. Radiology 951 (1985) 26

Garite, *Testing for Fetal Lung Maturity,* 9 Perinatol. Neonatal. 85 (1985) 26

Goldstein, et al., *Ultrasonographic assessment of gestational age with the distal femoral and proximal tibial ossification centers in the third trimester,* 158 Am. J. Ob. Gyn. 127 (1988) 18

Goldstein, *Ultrasound Assessment of fetal intestinal development in the evaluation of gestational age,* 70 Ob. Gyn. 682 (1987) 18

Gross, et al., *Sonographic free floating particles (FFP) in amniotic fluid predict mature lecithin/sphingomyelin ratio* (Paper Presented at the Third Annual Meeting of the Society of Perinatal Obstetricians, San Antonio, TX, Jan. 27-29, 1983) 25

Guzick, et al., *Ultrasound prediction of fetal weight in prolonged pregnancy,* 151 Am. J. Ob. Gyn. 783 (1985) 21

TABLE OF AUTHORITIES—Continued

Page

Hadlock, et al., *Estimating Fetal age using multiple parameters: A prospective evaluation in a racially mixed population,* 156 Am. J. Ob. Gyn. 955 (1987) 18

Hadlock, et al., *Estimation of fetal weight with the use of head, body and femur measurements —A prospective study,* 151 Am. J. Ob. Gyn. 333 (1985) 21

Harrison, Golbus & Filly, *The Unborn Patient: Prenatal Diagnosis and Treatment* (1984) 6

W. Hern, *Abortion Practice* (1984) 18

Kazzi, et al., *The relationship of placental grade, fetal lung maturity, and neonatal outcome in normal and complicated pregnancies,* 148 Am. J. Ob. Gyn. 54 (1984) 25

Kitchen, et al., *Outcome in infants of birth weight 500 to 999 gm: A continuing regional study of 5-year-old survivors,* 111 J. Pediatr. 761 (1987) .. 20

Kitchen, et al., *Outcome in infants with birth weight 500 to 999 gm: A regional study of 1979 and 1980 births,* 104 J. Ped. 921 (1984) 20

Kitchen, et al., *Collaborative study of very-low-birthweight infants: Technigues of perinatal care and mortality,* Lancet 1: 1454 (June 26, 1982) 7

A. Kurjak, ed., *The Fetus as a Patient* (1985) 6

Ludman, et al., *Birth Weight, Respiratory Distress Syndrome and Cognitive Development,* 141 Am. J. Dis. Child. 79 (1987) 24

McCormick, *The Contribution of Low Birth Weight to Infant Mortality and Childhood Morbidity,* 312 N. Eng. J. Med. 82 (1985) 20

MacGregor, et al., *Underestimation of Gestational Age by Conventional Crown-Rump Length Dating Curves,* 70 Ob. Gyn. 344 (1987) 18

Mercer, *Fetal foot length as a predictor of gestational age,* 156 Am. J. Ob. Gyn. 350 (1987) 18

TABLE OF AUTHORITIES—Continued

Page

Michejda, *Present Status of intrauterine treatment of hydrocephalus and its future,* 155 Am. J. Ob. Gyn. 873 (1986) 6

K. Moore, *The Developing Human: Clinically Oriented Embryology* (3d ed. 1982) 5

Mullin, et al., *Ultrasound Screening for Free-Floating Particles and Fetal Lung Maturity,* 66 Ob. & Gyn. 50 (1985) 26, 29

Myers, *Hospital Guidelines for Fetal Viability Assessment and Postdecision Responsibilities,* 54 Mount Sinai J. Med. 191 (1987) 8

Nwaesai, et al., *Preterm Birth at 23 to 26 Weeks' gestation: Is active obstetric management justified,* 157 Am. J. Ob. Gyn. 890 (1987) 6, 11

Ott, et al., *Accurate ultrasonic estimation of fetal weight III: Prospective evaluation of new formulae,* 3 Am. J. Perinatol. 307 (1986) 21

Ott & Doyle, *Ultrasonically Estimated Weight and Gestational Age: Predictors of Neonatal Respiratory Distress Syndrome,* 32 J. Repro. Med. 915 (1987) 21, 22, 26

Paneth, et al., *Newborn Intensive Care and neonatal mortality in low-birth-weight infants,* 307 N. Eng. J. Med. 149 (1982) 7

Patterson, *Estimation of Fetal Weight During Labor,* 65 Ob. Gyn. 330 (1985) 21

C. Pauerstein, ed. *Clinical Obstetrics* (1987) 15, 19

Pritchard, MacDonald, & Gant, *Williams Obstetrics* (17th ed. 1985) ..... *passim*

Reece, et al., *Embryonic trunk circumference: A new biometric parameter for estimation of gestational age,* 156 Am. J. Ob. Gyn. 713 (1987) 18

Rickards, et al., *Extremely Low Birth Weight Infants: neurological, psychological, growth and health status beyond five years of age,* 147 Med. J. of Austl. 476 (1987) 8

Sampson, et al., *Single Ultrasonic Estimation of Fetal Weight in Utero Compared with Birth Weight,* 30 J. Repro. Med. 28 (1985) 21

TABLE OF AUTHORITIES—Continued

Page

Shennan, et al., *Perinatal factors associated with death or handicap in very preterm infants*, 151 Am. J. Ob. Gyn. 231 (1985) 20

Skouteli, et al., ***Predictors for Survival and Normal Neurodevelopmental Outcome of Infants weighing Less Than 1001 Grams at birth***, 27 Dev. Med. & Child Neuro. 588 (1985) 7

Stewart, et al., *Outcome for Infants of very low birthweight: Survey of World Literature*, Lancet 1: 1038 (May 9, 1981) 7

Streissguth, et al., *IQ at Age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy*, 25 Develop. Psych. 3 (Jan. 1989) 5

Tait, *Improved Flurorescence Polarization Assay for Use in Elevating Fetal Lung Maturity I: Development of the Assay Procedure*, 32 Clin. Chem. 248 (1986) 24

Tahilramaney, et al., *Ultrasonic estimation of weight in the very low-birth weight fetus: A resident versus staff physician comparison*, 151 Am. J. Ob. Gyn. 90 (1985) 21

Tahilramaney, et al., *Ultrasound in evaluation of fetal pulmonary maturity*, 10 Perinatol. Neonatol. 9 (1986) 26

Thompson & Makowski, *Estimation of Birth Weight and Gestational Age*, 37 Ob. Gyn. 44 (1971) 21

Verloove-Vanhorick, et al., *Neonatal Mortality Risk in Relation to Gestational Age and Birthweight*, Lancet 1:55 (Jan. 11, 1986) 10, 20

E. Volpe, *Patient in the Womb* (1984) 6

Walker & Patel, *Mortality and Morbidity in infants born between 20 and 28 weeks gestation*, 94 Brit. J. Ob. Gyn. 670 (1987) 10

Watts, *Intraperitoneal Fetal Transfusion under Direct Ultrasound Guidance*, 71 Ob. & Gyn. 84 (1988) 6

TABLE OF AUTHORITIES—Continued

Page

Yu, et al., *Prognosis for infants born at 23 to 28 weeks' gestation*, 293 Br. Med. J. 1200 (1986).. 10

Zilanti, et al., *Assessment of maturity through the study of the ultrasonic image of the fetal intestine*, 4 J. Ultrasound Med. (suppl) 81 (1985) 26

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BRIEF OF THE AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG) AND THE AMERICAN ASSOCIATION OF PRO-LIFE PEDIATRICIANS (AAPLP) AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE *AMICI CURIAE*

The AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS (AAPLOG) is a national organization of obstetricians and gynecologists founded in 1973 and dedicated to reaffirming the unique value and dignity of individual human life in all stages of development from the moment of conception. The organization is engaged in educational and research projects which enhance the goals of the organization. The AMERICAN ASSOCIATION OF PRO-LIFE PEDIATRICIANS (AAPLP) is a national educational organization comprised of pediatricians who are dedicated to fostering respect for human life at all stages of development.

SUMMARY OF ARGUMENT

This is a facial challenge to the constitutionality of several Missouri restrictions on the performance of elective abortions. Of particular interest to these *amici* is section 188.029 of the Missouri, Revised Statutes, which requires that the physician make a determination of viability when he "has reason to believe" that the fetus is at twenty or more weeks gestational age, and that the physician "perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child. . . ."

Missouri has, in force, three other provisions which have been previously upheld and which protect the viable fetus during abortion by requiring: (1) the use of that method of abortion which will best preserve the life of the fetus (sec. 188.030.2); (2) the presence of a second physician (sec. 188.030.3), and (3) that both physicians exercise the same standard of care toward any infant born alive from an abortion as would be given to any infant intended to be born alive and not aborted (sec. 188.030.3). *See Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Planned Parenthood v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981). By enacting the provision challenged here, the Missouri legislature has prefaced these three provisions with the logical prerequisite that a physician who intends to perform an abortion when the physician "has reason to believe" that the fetus is of twenty or more weeks gestational age first make a determination of viability. If the physician determines in his medical judgment that the fetus is viable, the restrictions of section 188.030 become effective.

Missouri has an "important and legitimate interest" in the fetus throughout pregnancy which becomes "compelling" at viability. *Roe v. Wade*, 410 U.S. 113, 163 (1973). As the Supreme Court in *Harris v. McRae* said of the *Roe* decision, "the state interest in protecting the potential life of the [viable] fetus was found to justify a criminal prohibition against abortions, except where necessary for the preservation of the life or health of the mother." 448 U.S. 297, 313 (1980). Since the states have not been permitted to protect the life of the viable unborn child by limiting the reasons for which post-viability abortions can be performed, the states have taken the only available recourse by attempting to regulate the method of a post-viability abortion.

If Missouri's interest is truly "compelling," then the State must be permitted to protect viable unborn children by requiring physicians—in their best medical judgment—to utilize standard medical technology to make objective findings as part of their determination of viability. As Justice O'Connor has observed, "recent studies have demonstrated increasingly earlier fetal viability." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 457 (1983). Preterm infants are surviving not only at earlier gestational ages, but with increasingly improved outcomes. Given the potential for survival of infants of twenty-four weeks gestational age, and the four week margin of error in estimating gestational age, Missouri's requirement of determination of viability when the physician "has reason to believe" that the fetus is twenty or more weeks gestational age is reasonable. A "compelling interest" is, at a minimum, one demanding attention. By demanding attention to certain objective factors that are directly related to viability, Missouri reasonably protects its compelling interest.

The plain language of section 188.029 requires only those tests which are "necessary" to make a finding of three non-exclusive factors relevant to viability: gestational age, fetal weight, and fetal lung maturity. The courts below misread the plain language of the statute by reading into section 188.029 a requirement of a single test—amniocentesis—that is simply not required. At twenty weeks gestation, an ultrasound examination to determine gestational age is standard medical practice. It is routinely provided by the plaintiff clinics. An ultra-

sound examination can effectively provide all three designated findings of sec. 188.029.

In this facial challenge, the Appellees have failed to establish that "no set of circumstances exists under which the Act would be valid." The Missouri regulation "reasonably furthers" the State's compelling interest in viable fetal life and imposes no physical or psychological burden on the woman's decision to abort. Accordingly, sec. 188.029 should be held constitutional in its entirety, and the judgment of the court below should be reversed.

ARGUMENT

I. MISSOURI HAS A COMPELLING INTEREST IN PRESERVING THE LIFE OF THE UNBORN CHILD WHO IS REGARDED BY MEDICAL SCIENCE AS A PATIENT.

A. Medical Science Regards the Unborn Child As A Patient.

Missouri Revised Statutes (Mo.Rev.Stat.), section 188.029 provides:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions.
>
> In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

Mo. Rev. Stat. sec. 188.029 (1986).[1] The State of Missouri enacted this statute because it has an important and legitimate interest in the life of the unborn child[2] throughout pregnancy that becomes "compelling," according to this Court, at viability. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

[1] "Gestational age" is measured "from the first day of the woman's last menstrual period (LMP)." Mo.Rev.Stat. 188.015(4) (1986). This definition is consistent with standard medical practice. D. Danforth & J. Scott, *Obstetrics & Gynecology* 263 (5th ed. 1986); Pritchard, MacDonald, & Gant, *Williams Obstetrics* 139 (17th ed. 1985); C. Pauerstein, ed. *Clinical Obstetrics* 121 (1987).

[2] Throughout this brief, we use the terms "unborn child" and "fetus" interchangeably. Although "fetus" is a medical term, derived from Latin, that describes the developing unborn of any viviparous animal, the common law and medical jurisprudence have traditionally used the term "child" or "unborn child" to refer to the unborn offspring of human parents at any time of pregnancy. *See e.g., Black's Law Dictionary* 559 (5th ed. 1979); *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257 (1834); W. Lambarde, *Eirenarcha, or of the Office of Justices of Peace* 217-18 (1581 ed.) (DaCapo Press Reprint 1970); M. Dalton, *The Countrey Justice* 213 (1618 ed.) (Walter J. Johnson Inc. reprint 1975); E. Coke, *Third Institutes of the Laws of England* 50 (1644) ("childe"); 1 W. Blackstone, *Commentaries on the Laws of England* 129 (University of Chicago Paperback 1979); 4 Blackstone 198 ("child").

Medical science, however, has an interest in the unborn child from a much earlier point in prenatal development. Medical science affirms that human life begins at conception. K. Moore, *The Developing Human: Clinically Oriented Embryology* 1, 13 (3d ed. 1982); E. Blechschmidt, *The Beginning of Human Life* 16-17 (1977). This is the traditional understanding of American medicine since at least the early nineteenth century. 1 J. Beck, *Elements of Medical Jurisprudence* 462-64 (11th ed. 1860); A. Dean, *Principles of Medical Jurisprudence* 37-41, 123-31 (1854); S. Farr, *Elements of Medical Jurisprudence*, in T. Cooper, *Tracts on Medical Jurisprudence* 40 (1819). The unborn child who is adversely affected by alcohol in the first month of pregnancy is the same child who suffers intellectual disabilities at four years. Streissguth, et al., *IQ at Age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy*, 25 Develop. Psych. 3 (Jan. 1989). Since the time of the *Roe* Court's pro-

nouncements about the potentiality of human life, a new medical discipline has emerged: fetology. This science treats the unborn child as a distinct patient.

> Indeed, the fetus is no longer dealt with as a maternal appendage ultimately to be shed at the whim of biologic forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother.

Pritchard, MacDonald, & Gant, *Williams Obstetrics* 267 (17th ed. 1985) (hereinafter "*Williams Obstetrics*"). "[T]he status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we long have given the pregnant woman." *Id.* at 139. *See generally*, A. Kurjak, ed. *The Fetus as a Patient* (1985); Harrison, Golbus & Filly, *The Unborn Patient: Prenatal Diagnosis and Treatment* (1984); E. Volpe, *Patient in the Womb* (1984).

Medical technology for the child *in utero* has advanced greatly, developing surgery and treatment for previously untreatable conditions.[3] Medical technology also has moved the line of viability earlier in pregnancy. In *Roe*, the Court found that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160 (footnote omitted). Viability may now occur as early as twenty-two weeks, with substantial potential of viability at twenty-four weeks. Nwaesei, et al., *Preterm birth at 23 to 26 weeks' gestation: Is active obstetric management justified*, 157

[3] *See generally*, Watts, *Intraperitoneal Fetal Transfusion Under Direct Ultrasound Guidance*, 71 Ob. & Gyn. 84 (1988); Baraitser, et al., *Prenatal Treatment of Fetal Hydrops*, 6 Prenatal Diagnosis 109 (1986); Michejda, *Present Status of intrauterine treatment of hydrocephalus and its future*, 155 Am. J. Ob. Gyn. 873 (1986); Benacerraf, *In Utero treatment of a fetus with diaphragmatic hernia complicated by hyrops*, 155 Am. J. Ob. Gyn. 817 (1986); Berkowitz, *Intravascular transfusion in utero: The percutaneous approach*, 154 Am. J. Ob. Gyn. 622 (1986).

Am. J. Ob. Gyn. 890 (1987). Missouri may take into account these tremendous advances in medical science and technology and regulate to protect those fetuses who may survive the abortion procedure.

B. The Lives of Premature Unborn Children Who Might Be Preserved By Mo. Rev. Stat. section 188.029 Have Been Enhanced By Recent Advances in Medical Science.

In recent years, great strides have been made in the medical and nursing management of very low birth weight (VLBW) infants, leading to an increasing survival rate. Paneth, et al., *Newborn intensive care and neonatal mortality in low-birth-weight infants: A population study*. 307 New Eng. J. Med. 149 (1982); Kitchen, et al., *Collaborative study of very-low-birthweight infants: Techniques of perinatal care and mortality*, Lancet 1: 1454 (June 26, 1982). There has been "an impressive fall in the neonatal mortality rate among the very low-birthweight and extremely low-birthweight [less than 1001 g] infants . . . in centres around the world." Skouteli, et al., *Predictors for Survival and Normal Neurodevelopmental Outcome of Infants Weighing Less Than 1001 Grams at Birth*, 27 Dev. Med. & Child Neuro. 588 (1985).

A significant percentage of these children survive with little or no permanent disability. One short-term follow-up study "concluded that there has been an increase in the proportion of healthy survivors with a relatively low permanent handicap rate of 6% to 8% of all VLBW newborns." Eilers, et al., *Classroom Performance and Social Factors of Children With Birth Weights of 1250 Grams or less*, 77 Pediatrics 203 (1986) (citing Stewart, et al., *Outcome for infants of very low birthweight: Survey of world literature*, Lancet 1: 1038 (May 9, 1981)). Long-term follow-up has yielded equally encouraging results. One study of 60 VLBW survivors at age five years

and beyond showed that 74% had no important disability; 17% had a mild or moderate disability; only 9% were severely disabled. Rickards, et al., *Extremely-low-birthweight infants: neurological, psychological, growth and health status beyond five years of age*, 147 Med. J. of Austl. 476 (1987). An important finding was that severe disability was less prevalent at five years (9%), than at the two-year review (15%). *Id.* at 481. Even though a fetus may be "previable" (defined as including any fetus estimated to be under 500 grams birthweight or under 22 weeks gestational age), "all delivery room staff [must] be prepared for the possibility of the delivery of a liveborn viable fetus. When this occurs, appropriate pediatric intervention *must* be made, independent of prior obstetric decisions." Myers, *Hospital Guidelines for Fetal Viability Assessment and Postdecision Responsibilities*, 54 Mount Sinai J. Med. 191, 192 (1987) (emphasis in original).

Medical practice and evolving technology thus support intervention to preserve the lives of premature infants born alive. Through section 188.029, Missouri has sought to protect its compelling interest in the lives of viable unborn children.

II. THE PLAIN LANGUAGE OF MO. REV. STAT. SECTION 188.029 REQUIRES TESTING FOR VIABILITY THAT REASONABLY FURTHERS MISSOURI'S COMPELLING INTEREST IN PROTECTING THE LIFE OF THE VIABLE UNBORN CHILD.

The plain language of Mo.Rev.Stat. section 188.029 indicates that it was enacted to provide objective, medical factors for the physician in making his assessment of viability in accordance with sound standards of medical practice. The second sentence provides that—in making the determination of viability when the physician "has reason to believe" that the fetus is of twenty or more weeks gestational age—"the physician shall perform or

cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determinations of viability in the medical record of the mother." This provision provides substantial flexibility for the attending physician. First, he may perform the tests himself or he may delegate that responsibility. *Cf. City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 448 (1983). Second, no particular kind of test is specified by weeks of gestation. Third, the physician is not required to administer any specific test for each of the factors. Rather, he may choose from "such tests as are necessary to make a finding" on all three factors. If one test or examination yields a finding for all three factors, that test is sufficient. The emphasis is on the end—making "a finding"—and not on the means—particular tests.

It is a familiar practice of legal interpretation that "necessary" is a word that "must be considered in the connection in which it is used, as it is a word susceptible of various meanings." *Black's Law Dictionary* 928 (5th ed. 1979). Under section 188.029, it is not "necessary" for the physician or his agent to make the best finding, a finding derived from the most sophisticated medical technology, the most detailed finding, or the most comprehensive finding. And, it should be quite obvious, the plain language does not make it necessary to use a test that will yield no finding. A test or examination that is futile to make a finding cannot, within the realm of logic, be considered "necessary to make a finding" within the plain language of section 188.029.

This relaxed standard affords flexibility to the physician within the context of developing medical technologies, in different locations, with different costs. The flexible standard corresponds admirably both to the array of tests or examinations that are available today to

make a finding of gestational age, weight, and lung maturity and to the certainty that new tests or examinations will be developed in the future for making a finding on these three factors. At twenty or more weeks gestation, certain tests are available in standard, current medical practice that can yield a finding on all three factors. If only one test is performed and a finding of previability (immaturity) is made, the results may be a "false positive" and the fetus being aborted might actually be viable. The state has a compelling interest in protecting these viable fetuses by requiring findings on more than one factor; false positives may be eliminated and maturity revealed.[4] At twenty weeks gestation, certain tests

[4] The importance of considering all three factors is underscored by disagreement in the medical literature as to any single factor being determinative of viability. "[I]n infants weighing [less than] 1000 gm at birth, birth weight rather than gestational age is the more important variable influencing survival." Amon, et al., *Obstetric variable predicting survival of the immature newborn ([less than] 1000 gm): A five-year experience at a single perinatal center*, 156 Am. J. Ob. Gyn. 1380 (1987) (footnote omitted). This finding differs from Yu et al., *Prognosis for infants born at 23 to 28 weeks' gestation*, 293 Brit. Med. J. 1200 (1986): "Gestation, not birth weight, however, is the parameter that must be used by the obstetrician as a guide to making critical decisions about the care of the mother and fetus. Gestation is a better predictor of outcome because of the inherent inaccuracies in clinically or sonographically estimating fetal weight." *Id.* (footnote omitted). *See also*, Walker and Patel, *Mortality and morbidity in infants born between 20 and 28 weeks gestation*, 94 Brit. J. Ob. Gyn. 670, 673 (1987): "This gives support to the widespread use of ultrasound scans in early pregnancy. Since obstetricians have to manage pregnancies on the basis of gestational age, and since the occurrence of problems in mid-trimester can seldom be predicted, confirmation of gestational age early in all pregnancies is important." In a group of 1338 very preterm and/or very-low-birthweight infants, "the best obstetric estimate of gestational age was a better predictor of neonatal mortality than birthweight." Verloove-Vanhorick et al, *Neonatal Mortality Risk in Relation to Gestational Age and Birthweight*, Lancet 1:55 (Jan. 11, 1986). "Although birth weight and gestational age have been shown to be major determinants of neonatal survival,

that are available later in gestation may be futile to make a finding. As gestation progresses, other tests become available to make a finding. Conversely, at twenty weeks gestation, certain tests or examinations are available that may be less accurate than other tests as gestation progresses. However, at each point in gestation at twenty weeks or later, medical practice currently provides tests or examinations that can make a finding on each of these three factors. Section 188.029 requires no more. Since each of these three factors is related to viability, and since infants born alive at 22-24 weeks may be viable, section 188.029 "reasonably furthers" Missouri's compelling interest in the life of the viable unborn child.

III. THE COURT OF APPEALS FAILED TO APPLY THE CORRECT STANDARD OF REVIEW IN THIS FACIAL CHALLENGE TO THE FETAL VIABILITY TESTING PROVISIONS OF MO. REV. STAT. SECTION 188.029.

It is a settled principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. *Burlington Northern Railroad Co. v. Oklahoma Tax Comm.*, 107 S.Ct. 1855 (1987); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The application of the plain meaning is particularly important in a facial challenge to the constitutionality of a state statute because the language is challenged on its face and

> the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [] Act might operate unconstitu-

gestational age better reflects fetal maturation and is therefore more likely to be a better predictor of outcome." Nwaesei, et al., *Preterm birth at 23 to 26 weeks' gestation: Is active obstetric management justified?*, 157 Am. J. Ob. Gyn. 890, 894-95 (1987).

> tionally under some conceivable set of circumstances is sufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 107 S.Ct. 2095, 2100 (1987). Finally, this Court has held that " 'the elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.' " *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades*, 108 S.Ct. 1392, 1397 (1988). This canon applies even to the construction of state abortion statutes. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 493 (1983).

In *Planned Parenthood v. Ashcroft*, this Court upheld the constitutionality of Missouri's requirement of the attendance of a second physician at the abortion of a viable fetus. Mo.Rev.Stat. section 188.030.3 (1986). Section 188.030.3 requires that both physicians "take all reasonable steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the mother." This Court held that "the State's compelling interest in protecting a viable fetus justifies the second-physician requirement even though there may be the rare case when a physician may think honestly that D & E is required for the mother's health. Legislation need not accommodate every conceivable contingency." 462 U.S. at 485 n.7.

> Viable fetuses will be in immediate and grave danger because of their premature birth . . . By giving immediate medical attention to a fetus that is delivered alive, the second physician will assure that the State's interests are protected more fully than the first physician alone would be able to do. And given the compelling interest that the State has in preserving life, we cannot say that the Missouri requirement of a second physician in those unusual circumstances where Missouri permits a third-

> trimester abortion is unconstitutional. Preserving the life of a viable fetus that is aborted may not often be possible, but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur.

Id. at 485-86.

Section 188.029 is a logical precursor to the second physician requirement upheld in *Ashcroft* and is sustained by the same medical and legal understanding. It is manifestly justified by Missouri's compelling interest in the viable fetus. By requiring findings on three nonexclusive factors that are directly related to fetal viability, are not deemed to be conclusive determinants of viability, and are made through methods that are consistent with standard medical practice, section 188.029 "reasonably furthers" Missouri's compelling interest in the life of the viable unborn child. *Ashcroft*, 462 U.S. at 486.

The courts below, however, applied an erroneously heightened standard of review, which not only disregarded this Court's holding in *Ashcroft* but completely failed to apply the normal standard of review in a facial challenge to the constitutionality of state legislation. With the narrow exception of First Amendment claims of protected speech, plaintiffs rarely prevail on a facial challenge. *New York State Club Ass'n. v. City of New York*, 108 U.S. 2225, 2233 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)). By failing to apply the proper standard of review to this facial challenge, the courts below applied a stricter standard of review to this state abortion statute than is commonly applied to legislation touching core First Amendment speech. *Cf. Frisby v. Schultz*, 108 S.Ct. 2495 (1988). The State is not required to address and answer every possible application of the law to any imaginable circumstance. The courts below erred by failing to up-

hold the second part of section 188.029 insofar as it "reasonably furthers" Missouri's compelling interest in the life of the viable unborn child. Like the second physician requirement upheld in *Ashcroft*, the determination of viability when the physician "has reason to believe" that the unborn child is of twenty or more weeks gestation in section 188.029 may be applied in cases in which the physician subsequently finds that the fetus is not viable. But, based on the unrebutted medical testimony that an error of plus/minus four weeks can be made in the determination of gestational age, the courts below held that a determination of viability when the physician "has reason to believe" that the unborn child is of twenty or more weeks gestation is reasonably related to the state's compelling interest in the viable fetus. The courts below erred by failing to apply this same analysis to the second part of section 188.029. Because both parts of section 188.029 "reasonably further" Missouri's "compelling interest" in the viable unborn child, both parts of section 188.029 are constitutional.

IV. THE DETERMINATION OF GESTATIONAL AGE, FETAL WEIGHT, AND LUNG MATURITY IS DIRECTLY RELATED TO THE DETERMINATION OF VIABILITY AT TWENTY OR MORE WEEKS GESTATION AND REASONABLY FURTHERS MISSOURI'S COMPELLING INTEREST IN THE LIFE OF THE VIABLE UNBORN CHILD.

Requiring a determination of viability when the physician "has reason to believe" that the fetus is of twenty or more weeks gestational age "reasonably furthers" Missouri's compelling interest in the life of a viable unborn child, because there is a substantial potential for error in the clinical determination of gestational age by last menstrual period (LMP). At the trial in this case, medical testimony from witnesses both for the plaintiffs

and for Missouri admitted the substantial potential for error in this determination. There is a four week or greater potential for error in predicting gestational age based upon the information provided by the patient (T.II-48 (Hern)). Dr. Maulik agreed that if a physician estimated a twenty week fetus based on information provided by the patient, "in fact the fetus could be as little as 16 weeks old or as much as 24 weeks old." (T. I-55). In addition, there was also testimony that the use of sonography (despite its cost) is good medical practice for a woman believed to be twenty weeks and that fetuses at twenty-four weeks are viable (T. I-55, T. I-61). Dr. Crist testified that sonography and manual examination of the uterus were used to determine fetal age at 20 weeks and that ultrasonography and a "normogram" were used to estimate fetal weight at twenty weeks gestation (T.I-99; T.II-65 (Widdicombe)). These tests are *standard medical practice*, according to this testimony.

This testimony is supported by substantial medical literature. It is well known that the clinical assessment of gestational age is prone to inherent inaccuracy and the degree of inaccuracy can be quite large. "Clinical assessment of gestational age is fraught with error because the LMP is uncertain in 20% to 40% of gravidas." D. Danforth & J. Scott, *Obstetrics & Gynecology* 263 (5th ed. 1986) (hereinafter "Danforth"); C. Pauerstein, ed., *Clinical Obstetrics* 268 (1987) (hereinafter "Pauerstein"). One study found that "even when the LMP is reported with certainty, in 15% of pregnancies the clinically assessed gestational age will vary by at least 3 weeks from the age assigned to the newborn by careful pediatric examination." *Id.* It is important, and standard medical practice, to have an accurate assessment of gestational age. Section 188.029, therefore, directly enhances the determination of accurate gestational age at twenty or more weeks gestation.

A. Gestational Age Is Directly Related to the Determination Of Viability at Twenty or More Weeks Gestation and Can Be Determined By A Standard Ultrasound Examination.

A standard text on obstetrics provides: "Precise knowledge of the age of the fetus is the imperative for ideal obstetric management." *Williams Obstetrics* at 246. Indeed, one of the "major goals" of prenatal care is to "determine the gestational age of the fetus." *Id.* at 247, 249; Danforth at 366. "[B]ecause duration is one of the most important parameters to be considered when clinical judgments are being made, an accurate determination of gestational length is one of the important functions of prenatal care." Danforth at 365.

Accurate knowledge of gestational age is important for several reasons. "Knowledge of dates is essential in the management of pregnancy because gestational age forms the X-coordinate of many graphs pertaining to the evaluation of fetal status." Danforth at 263. In addition, "[a]ccurate information about maturity is needed by the obstetrician deciding whether to prematurely abbreviate a pregnancy, for example, or perform a repeat cesarean section." *Id.* "The degree of maturity attained is pivotal in making the decision to abbreviate a particular pregnancy for the benefit of mother or fetus." Pauerstein at 268; *Williams Obstetrics* at 602. Inaccurate estimation of fetal age can contribute "to the development of respiratory distress syndrome (RDS) in the newborn with a resultant increase in perinatal morbidity and mortality." *Id.* Dr. Maulik testified for the plaintiff in the district court that "viability is a correspondent of gestational age." (T. I-30) Accurate knowledge of gestational age is, therefore, directly related to the state's compelling interest in the life of the viable fetus.

Several methods can be used "with reasonable accuracy" to determine gestational age. Danforth at 365. These include: estimation of the date of the last menstrual period (LMP), manual examination, maternal perception of fetal movement (quickening), measurement of fundal height, and ultrasound or sonography. Both Dr. Maulik (T.I-30, I-35) and Dr. Crist (T.I-101) testified at trial that determination of gestational age by menstrual history is the least reliable method. A pelvic examination is also "unreliable as a method for dating." Danforth at 365. In the first trimester, even under "ideal conditions," a pelvic examination can be inaccurate to plus/minus 2 weeks. Danforth at 263. Moreover, if the uterus is retroverted (turned backward in relation to the pelvic axis) "as it is in approximately 30% of women, the accuracy of fetal age determination deteriorates to [plus or minus] 4 weeks." *Id.* The plaintiffs' witness, Dr. Maulik, testified in the district court that the pelvic exam was "not very accurate." (T. I-31). Another method—maternal perception of quickening—is useful only as a "rough estimate" of gestational age. Danforth at 365. Another method involves the measurement of fundal height—the length from the top of the uterus to the pubic symphysis. This is used to measure pregnancy primarily in the second trimester, when the pregnancy is more advanced. Where the physician is making regular, periodic measurements, the height of the fundus, although not a precise measurement of gestational age, may corroborate other clinical estimations of gestational age. Danforth at 365-66.

Finally, it has become standard medical practice to use ultrasound to determine gestational age at approximately 20 weeks gestation when gestational age is uncertain:

> The accurate determination of gestational age is one of the most important goals of prenatal care. It is reasonable for the obstetrical care provider to ask at about 20 weeks, "Am I confident of this patient's gestational age?" If not, ultrasound should be used

to determine the gestational age prior to the third trimester.

Danforth at 366. *See also id.* at 262 (Table 15-1). "When gestational age cannot be clearly identified, sonography is likely to be of considerable value." *Id.* at 249. "Ultrasonography has become an integral part of the assessment of age and health of the fetus." R. Creasy & R. Resnik, *Maternal-Fetal Medicine: Principles and Practice* 210 (1984) (new 1989 edition forthcoming) (hereinafter "Creasy & Resnick"). The use of sonography to determine gestational age is also standard abortion practice. Hern, *Abortion Practice* 207 (1984).

The district court found that "it is standard medical practice to determine 'gestational age' by ultrasound examination and fetal skull measurements whenever it appears that a woman is at least 20 weeks pregnant." 662 F.Supp. at 422. Indeed, the court found that such an examination to determine gestational age is "performed on every woman seeking a second trimester abortion" at the plaintiff, Reproductive Health Services. *Id.* at 422 n.43. *See also* T.II-6, 23-24, 47-48 (Hern).

With the use of ultrasound, at least five fetal parameters (measurements) are used to determine gestational age at 20 weeks or later.[5] These include: measurement of

[5] *See generally,* Goldstein, et al., *Ultrasonographic assessment of gestational age with the distal femoral and proximal tibial ossification centers in the third trimester,* 158 Am. J. Ob. Gyn. 127 (1988); Goldstein, et al., *Ultrasound Assessment of fetal intestinal development in the evaluation of gestational age,* 70 Ob. Gyn. 682 (1987); Hadlock, et al., *Estimating fetal age using multiple parameters: A prospective evaluation in a racially mixed population,* 156 Am. J. Ob. Gyn. 955 (1987); MacGregor, et al., *Underestimation of Gestational Age by Conventional Crown-Rump Length Dating Curves,* 70 Ob. Gyn. 344 (1987); Mercer, *Fetal foot length as a predictor of gestational age,* 156 Am. J. Ob. Gyn. 350 (1987); Reece et al., *Embryonic trunk circumference: A new biometric parameter for estimation of gestational age,* 156 Am. J. Ob. Gyn. 713 (1987); Campbell, et al., *Routine Ultrasound Screening for the Prediction of Gestational Age,* 65 Ob. Gyn. 613 (1985).

the crown-rump length (CRL), the biparietal diameter (BPD), femur length (FL), fetal head circumference (HC), and the abdominal circumference (AC). Pauerstein at 268-72. *See also* T.I-29-44, 55-71 (Maulik), T.I-97-108, 116-121 (Crist). Measurement of crown-rump length, biparietal diameter "and possibly femur length are the most accurate indicators of fetal age before 26 weeks of gestation." Danforth at 269. The plaintiffs' witness, Dr. Maulik, testified in the district court that "from 15 weeks to 24 weeks, we will use measurements of the fetal head, fetal skull to be precise, and also the fetal thigh measurements" and head circumference. (T.I-34). The standard use of ultrasound to determine gestational age when the fetus is believed to be of twenty or more weeks gestation indicates that section 188.029 is in complete accord with standard medical practice.

Nevertheless, in a manner akin to "divide and conquer," the lower courts invalidated the second and third required findings of fetal weight and lung maturity. Then—having reduced the non-exclusive findings from three to one—the courts refused to sever and uphold the remaining required finding of gestational age by relying on the dictum in *Colautti v. Franklin,* 439 U.S. 379, 388-89 (1979) that legislatures cannot "proclaim one of the elements entering into the ascertainment of viability . . . as the determinant of when the State has a compelling interest in the life or health of the fetus." 851 F.2d at 1074-75; 662 F.Supp. at 423. Aside from the fact that it was the lower courts, and not Missouri, which thereby designated only one finding, the plain language of section 188.029 does not even make the gestational age finding the sole, conclusive, or determinative factor in assessing viability. Rather, it merely requires a finding of gestational age as a part of the physician's assessment of viability ("[i]n making this determination"). Thus, the dictum in *Colautti* simply does not apply to section 188.029. Accordingly, the court of appeals erred in

striking the determination of gestational age in section 188.029. That judgment should be reversed.

B. Fetal Weight Is Directly Related to the Determination of Viability at Twenty or More Weeks Gestation and Can Be Determined By A Standard Ultrasound Examination.

Section 188.029 also provides that the physician "shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the . . . weight . . . of the unborn child . . . ." The determination of fetal weight is directly related to determining the viability of the unborn child at 20 or more weeks gestation.[6] For example:

> Antenatal prediction of birth weight has proven to be especially useful in the management of women at high risk for premature delivery. The reason is related to the fact that in approximately 35% of preterm infants exceeding 1000 g, clinical estimates of weight can be quite low, leading the physician to assume falsely that the chances of survival for the fetus are minimal. At present, accurate determination of birth weight even in the range of 750 g to 1000 g is important because the perinatal outcome of very low birth weight infants managed in modern intensive care neonatal centers has markedly improved.

Danforth at 274. *See also*, McCormick, *The Contribution of Low Birth Weight to Infant Mortality and Childhood*

[6] *See generally*, Verloove-Vanhorick, et al., *Neonatal Mortality Risk in Relation to Gestational Age and Birthweight*, Lancet 1:55 (Jan. 11, 1986); Kitchen, et al., *Outcome in infants of birth weight 500 to 999 gm: A continuing regional study of 5-year-old survivors* 111 J. Pediatr. 761 (1987); Shennan, et al., *Perinatal factors associated with death or handicap in very preterm infants*, 151 Am. J. Ob. Gyn. 231 (1985); Buckwald, et al., *Mortality and Follow-up Data for Neonates Weighing 500 to 800 g at Birth*, 138 Am. J. Dis. Child. 779 (1984); Kitchen, et al., *Outcome in infants with birth weight 500 to 999 gm: A regional study of 1979 and 1980 births*, 104 J. Pediatr. 921 (1984);

Morbidity, 312 N. Eng. J. Med. 82 (1985). This relationship is nothing new. "Estimating fetal weight and gestational age has been the subject of considerable investigative work for the past several decades in evaluating growth rate and development of the fetus at risk and when early termination of pregnancy is to be accomplished." Thompson & Makowski, *Estimation of Birth Weight and Gestational Age*, 37 Ob. Gyn. 44 (1971).

Several parameters are used in determining fetal weight by ultrasonography.[7] Generally, the same fetal parameters that are used to determine gestational age are used to determine fetal weight. With ultrasound, fetal weight may be estimated using a formula that "utilizes head circumference, abdominal circumference and femur length." Ott & Doyle, *Ultrasonically Estimated Weight and Gestational Age: Predictors of Neonatal Respiratory Distress Syndrome*, 32 J. Repro. Med. 915, 916 (1987). *See also* C. Pauerstein, ed. *Clinical Obstetrics* 268 (Ta-

[7] *See generally*, R. Creasy & R. Resnik, *Maternal-Fetal Medicine: Principles and Practice* at 218 (1984); Ott & Doyle, *Ultrasonically Estimated Weight and Gestational Age: Predictors of Neonatal Respiratory Distress Syndrome*, 32 J. Repro. Med. 915, 916 (1987); Ott, et al., *Accurate ultrasonic estimation of fetal weight: III. Prospective evaluation of new formulae*, 3 Am. J. Perinatol. 307 (1986); Chervenak, et al., *A comparison of sonographic estimation of fetal weight and obstetrically determined gestational age in the predication of neonatal outcome for the very low-birth weight fetus*, 152 Am. J. Ob. Gyn. 47 (1985); Guzick, et al., *Ultrasound prediction of fetal weight in prolonged pregnancy*, 151 Am. J. Ob. Gyn. 783 (1985); Hadlock, et al., *Estimation of fetal weight with the use of head, body, and femur measurements—A prospective study*, 151 Am. J. Ob. Gyn. 333 (1985); Patterson, *Estimation of Fetal Weight During Labor*, 65 Ob. & Gyn. 330 (1985); Sampson, et al., *Single Ultrasonic Estimation of Fetal Weight in Utero Compared with Birth Weight*, 30 J. Repro. Med. 28 (1985); Tahilramaney, et al., *Ultrasonic estimation of weight in the very low-birthweight fetus: A resident versus staff physician comparison*, 151 Am J. Ob. Gyn. 90 (1985).

ble 12-1) (1987). "Fetal length is one of the major determinants of fetal weight." Danforth at 272. A formula targeted to low birth weight and premature fetuses which incorporated fetal head circumference, fetal abdominal circumference, and femur length has considerable accuracy. Danforth at 273. Some physicians have found that "[a] single cross-sectional area of the fetal abdomen at the level of the insertion of the ductus venosus permits weight estimation to within 200 gm." Creasy & Resnik at 218.

Contrary to the lower courts' holdings, the requirement of a finding of fetal weight does not impose any undue burden on the physician or patient. A finding of fetal weight can be obtained from the same ultrasound test used to determine gestational age, which the district court found to be standard medical practice for women at 20 weeks gestation. 662 F.Supp. at 423 & n.45. In striking down the required finding of fetal weight, the district court (662 F.Supp. at 422) and the court of appeals (851 F.2d at 1074-75) relied on estimated costs of "$125-250" for tests to determine fetal weight. This finding is not supported by the record and the lower courts employed an erroneous standard of review in relying on this finding. The only basis for these costs in the record is the testimony of Dr. Crist. He attributed these costs to the work of a "paranatologist" [sic] for a "high-risk patient" later in gestation. (T.I-108)

Since medical testimony in this case—supported by abundant medical literature—indicates that the use of ultrasound is standard medical practice for a woman at twenty or more weeks gestation, any costs attributable to this standard medical practice cannot logically be attributable to Missouri's statute, nor do they support the claim that the statute imposes any burden on the physician or his patient. The same ultrasound test that

permits estimation of gestational age permits estimation of fetal weight. Thus, the district court and court of appeals applied an erroneous standard of review in disregarding the plain language of section 188.029 and in relying on such costs to strike it down.

C. Fetal Lung Maturity Is Related to the Determination of Viability At Twenty or More Weeks Gestation And Can Be Determined By A Standard Ultrasound Examination.

Section 188.029 also provides that the physician "shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the . . . lung maturity of the unborn child. . . ." At twenty weeks gestation, the fetal lung is maturing. All airways in the fetal lung are accompanied by pulmonary arterial branches and all of the preacinar veins are also present at 20 weeks gestation. Creasy & Resnik at 370.

> Therefore, by 20 weeks the development of the airways and pulmonary vessels is complete, and with the appearance of respiratory bronchioles and icini, the lung is prepared to support extrauterine life.

Id. This does not mean that fetal lungs are fully mature at twenty weeks gestation, but, by providing for a "finding" of fetal lung maturity when the physician "has reason to believe" that the fetus is at twenty or more weeks gestation, section 188.029 "reasonably furthers" Missouri's compelling interest in the viable unborn child. *Ashcroft*, 462 U.S. at 486.

Fetal lung maturity, like gestational age and fetal weight, is related to fetal viability. *See generally*, Danforth & Scott at 320; *Williams Obstetrics* at 154ff; Creasy & Resnik, at 369ff. This is because immature fetal lungs may lead to respiratory distress syndrome, or RDS, which may cause infant mortality. In recent years nearly 20% of all neonatal deaths in the United States

have been attributable to RDS. Tait, *Improved Fluroescence Polarization Assay for Use in Evaluating Fetal Lung Maturity I: Development of the Assay Procedure*, 32 Clin. Chem. 248 (1986). Morbidity, however, may not be severe. See Ludman, et al., *Birth Weight, Respiratory Distress Syndrome and Cognitive Development*, 141 Am. J. Dis. Child. 79 (1987) ("[no] significant difference [in cognitive development] was found at any age between children who had and did not have RDS during the neonatal period").

It was only thirty years ago that the cause of RDS was discovered to be the deficiency of pulmonary surfactant. *Williams Obstetrics* at 154, 769. Surfactant is a group of phospholipids (detergents) that lower surface tension in the alveoli (lung air sacs) and thus prevent complete collapse of the alveoli with expiration. In the absence of adequate amounts of surfactant, the alveoli collapse completely each time the infant exhales. As a result, each infant breath requires that as much intrathoracic pressure be generated as with the infant's first breath. This may lead to hyaline membrane (cartilage) formation in the alveoli and to exhaustion of the infant as she fights to take in air. Cruikshank, *Aminocentesis for Determination of Fetal Maturity*, 25 Clin. Ob. Gyn. 773 (1982). Maturity of the fetal lung, therefore, is reflected in the amount of surfactant produced; if there is not enough surfactant, or it is of poor quality, the alveoli collapse (a state called atelectasis) and inadequate oxygen exchange occurs, resulting in hypoxia (decreased oxygen) and cyanosis (bluish color).

The plaintiffs and the district court misread the plain language of section 188.029 as though it required a specific "test of fetal lung maturity." The plain language is actually much more flexible. It requires "such medical examinations and tests as are necessary to making a finding of . . . lung maturity. . . ." Based upon the district court's construction, the court found that it was "clearly established that the only method to evaluate

lung maturity is by amniocentesis, an expensive procedure which all witnesses agreed would be useless and contrary to accepted medical practice until at least twenty-eight to thirty weeks of gestation." *Id.* at 422.[8] This finding however, is immaterial.

There are a number of different methods in standard medical practice to determine fetal lung maturity at twenty or more weeks gestation. The most simple and most obvious is by inference. It is well known that fetal lungs do not mature until 33-34 weeks gestation. This obviously does not mean that no unborn child can survive if born at less than 33-34 weeks; it merely implies that an infant born before that time may suffer from RDS, which can lead to infant mortality. The finding of 33-34 weeks gestational age, from which this inference can be made, can be derived from an ultrasound test and the fetal parameters previously described. If an assessment of the gestational age indicates that the child is less than thirty-three weeks, a general finding can be made that the fetal lungs are not mature. This finding can then be used by the physician in making his determination of viability under section 188.029.

A second method of making a "finding" on fetal lung maturity at twenty or more weeks gestation is by ultrasound.[9] Ott & Doyle, *Ultrasonically Estimated Weight*

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[8] The court's statement earlier in the proceedings—which directly contradicts this later finding—more correctly construes the plain language: "I don't think this says they have to do that, this doesn't say anything about that." (T.I-121) Moreover, the finding is directly contrary to repeated testimony that amniocentesis would not be a "necessary" test to determine fetal lung maturity at 20-24 weeks gestation because amniocentesis would be futile to make a finding. (T.I-68-71 (Maulik), 117-118 (Crist), 136 (Pearman)).

[9] *See generally*, Kazzi, et al., *The relationship of placental grade, fetal lung maturity, and neonatal outcome in normal and complicated pregnancies*, 148 Am. J. Ob. Gyn. 54 (1984); Crawford, et al., *Ultrasonic tissue characterization of the placenta: Is it of, clinical value*, 13 J. Clin. Ultrasound 533 (1985); Gross, et al. *Sonographic*

and Gestational Age: Predictors of Neonatal Respiratory Distress Syndrome, 32 J. Repro. Med. 915 (1987) (hereinafter "Ott & Doyle"); Tahilramaney, et al., *Ultrasound in evaluation of fetal pulmonary maturity*, 10 Perinatol. Neonatal. 9 (1986); Garite, *Testing for fetal lung maturity*, 9 Perinatol. Neonatal 85 (1985); Mullin, et al., *Ultrasound screening for Free-Floating Particles and Fetal Lung Maturity*, 66 Ob. & Gyn. 50 (1985). With the use of ultrasound, several fetal parameters "such as placental grading, free-floating particles in the amniotic fluid, echogenicity of the fetal lung, fetal lung compressibility, and maturation of the fetal gastro-intestinal tract, have been proposed as rapid, non-invasive methods of evaluating fetal respiratory maturity." Ott & Doyle at 916. This method for determining fetal lung maturity involves an examination of the increase in free-floating particles and particulate matter in the amniotic fluid, which can be seen by ultrasound. The increase in this matter has been associated with lung maturity. Mullin, 66 Ob. & Gyn. at 50.

On the potential of using an ultrasound test, the district court's reasoning is inscrutable. The district court found:

> Medical experts for both plaintiffs and defendants concurred that it is standard medical practice to determine "gestational age" by ultrasound examination and fetal skull measurements whenever it appears that a woman is at least twenty weeks pregnant. Defendants have further acknowledged that no tests other than the ultrasound measurements pro-

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free floating particles (FFP) in amniotic fluid predict mature lecithin/sphingomyelin ratio (Paper Presented at the Third Annual Meeting of the Society of Perinatal Obstetricians, San Antonio, TX, Jan. 27-29, 1983); Fried, et al., *Echogenicity of fetal lung: Relation to fetal age and maturity*, 145 Am. J. Radiology 951 (1985); Farrell, et al., *A sensitive and specific ultrasonic sign of fetal lung maturation*, 4 J. Ultrasound Med. (suppl) 80 (1985); Zilanti, et al., *Assessment of maturity through the study of the ultrasonic image of the fetal intestine*, 4 J. Ultrasound Med. (suppl) 81 (1985).

> vide information necessary to determine viability prior to at least 30 weeks gestational age. Despite such concessions, the State defends this statutory language and maintains that the section demands only those examinations which are "necessary" to make the required findings. Thus, defendants insist that there is no duty to perform an amniocentesis for lung maturity or even a fetal weight determination if these tests would be futile. However, the ultrasound exam would be mandatory.

Id. at 422 n.44. The court then held that "[t]his evidence" must be evaluated in light of the dictum in *Colautti* that legislatures could not "proclaim one of the elements entering into the ascertainment of viability . . ." and concluded that the "State may not dictate either the tests *or* the findings which enter into a decision whether or not a fetus is viable." 662 F.Supp. at 423. Thus, according to the court, even if an ultrasound examination could yield a finding on gestational age, weight and lung maturity, it could not be required under the standard of review derived from *Colautti*.

By construing section 188.029 to require a specific test of lung maturity, the court read into the plain language a requirement of what is merely a third method of making "a finding" on fetal lung maturity at some points in gestation—amniocentesis—but is simply not required by either the plain language of section 188.029 or by standard medical practice. *See generally, Williams Obstetrics* at 268ff. Amniocentesis involves the insertion of a needle through the mother's abdominal wall into the amniotic sac, from which amniotic fluid is withdrawn (aspiration). A variety of tests to determine fetal lung maturity may be performed on amniotic fluid withdrawn by amniocentesis. These tests analyze the presence and strength of certain biochemicals in the amniotic fluid which are related to the development of the fetal lung. Among the available amniotic tests to predict fetal lung maturity, the lecithin/sphingomyelin ratio (L/S ratio) of amniotic fluid is perhaps the most widely used. As the fetal lung

matures, the amount of lecithin in amniotic fluid increases, both absolutely, and in relation to sphingomyelin. Above a certain L/S ratio, lung maturity is very likely.

However, given the availability of ultrasound to determine gestational age and fetal weight, aminocentesis would not be medically indicated to determine fetal lung maturity until approximately thirty-two weeks gestation, if then. The L/S ratio, which tests for surfactant, is not a dispositive factor for viability. It predicts the occurrence of respiratory distress syndrome (RDS), which is related to viability, but does not exactly predict viability, because an infant with RDS may nevertheless survive with good outcome. Moreover, although a "mature" L/S ratio predicts that RDS will *not* occur with 98% certainty, an immature ratio by no means ensures that RDS *will* develop. Although functional maturity of the surfactant system usually occurs between thirty-three and thirty-seven weeks gestation in normal pregnancy—thereby allowing the finding of a good L/S ratio—it is obvious that infants can survive before this time and therefore before a good L/S ratio can be found. As a result, of the three findings specified by section 188.029, although all are related to viability, fetal lung maturity is probably the least important of the three factors in making a determination of viability.

In addition to the fact that the fetus may well be viable several weeks, even months, before the fetal lung matures, various medical indications would justify delivery even though the fetal lung is technically immature as determined by the L/S ratio. For example, early delivery may be indicated if the mother is diabetic or suffers from severe hypertension or severe hydramnios. *Williams Obstetrics* at 603. "There are times when the risk to the fetus from a hostile environment will be greater than the risk of death from respiratory distress even though the L/S ratio is less than 2." *Williams Obstetrics* at 273-74. If the intrauterine environment of the pregnant mother with diabetes deteriorates, "the

fetus most often is better off being delivered even though premature." *Williams Obstetrics* at 602.

Abortion must be considered such a circumstance. When an abortion is induced with the usual intent to end the life of the fetus, the risk of death to the infant from respiratory distress will be less than the risk of certain death from abortion.

Finally, there may be several reasons why a physician would not want to administer amniocentesis to determine lung maturity under certain circumstances in pregnancy. Amniocentesis is associated with a small risk of maternal and fetal morbidity, including "(1) trauma to the fetus, to the placenta, or, less often, to the umbilical cord or to maternal structures; (2) infection; and (3) abortion or premature labor." *Williams Obstetrics* at 268; Mullin, 66 Ob. & Gyn. 50. Some of the examples of maternal morbidity can be discounted as a "risk" where an elective abortion is proposed as the outcome of the amniocentesis, because some of these risks (e.g., premature labor) are only "risks" when the mother intends to bear the child. On the other hand, the "risks" to the fetus from amniocentesis that are considered "risks" if the mother plans to carry the pregnancy to term are not "risks" if probable death for the child from abortion is the alternative. For this reason, it is difficult to follow the reasoning of the district court that amniocentesis would be contra-indicated because of risk to the *fetus*, rendering the statute unconstitutional. 662 F.Supp. at 423. Nevertheless, true "risks" of *maternal* morbidity from amniocentesis (which, as demonstrated above, would not be indicated until at least thirty-two weeks), would reasonably be weighed by the physician.

V. THE COURT OF APPEALS ERRED BY FAILING TO SEVER AND UPHOLD THE CONSTITUTIONAL PROVISIONS OF SECTION 188.029.

The courts below relied on the general severability provision in the Missouri statutes, Mo.Rev.Stat. section 1.140 (1986), to uphold and sever the first sentence of

section 188.029, but refused to sever and uphold any provisions of the second sentence, on the rationale that *Colautti v. Franklin* prohibited the state from designating "either the tests *or* the findings which enter into a decision whether or not a fetus is viable." 662 F.Supp. at 423. Because the dictum in *Colautti* does not extend that far, the lower courts erred by disregarding their obligation to separate constitutional provisions from unconstitutional provisions "and to maintain the act in so far as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). We submit that all provisions of § 188.029 are constitutional. However, because each of the discrete findings required in § 188.029 is an independent measure of viability, § 188.029 can "function in a *manner* consistent with the intent of" the Missouri legislature even if one or two findings is left standing. *Alaska Airlines, Inc. v. Brock*, 107 S.Ct. 1476, 1481 (1987). For this reason, the courts erred in failing to sever and uphold each of the three findings that are constitutional.

CONCLUSION

For the foregoing reasons, the judgment below, striking down the second sentence of Mo.Rev.Stat. § 188.029 as unconstitutional, should be reversed.

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February 23, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Act of July 26, 1881, N.Y. Pen. Code, ch. 676, tit. 9, ch. 2, secs. 191, 194, tit. 10, ch. 4, sec. 295, ch. 7, secs. 318-21, 3 N.Y. Rev. Stat., at 2478-80 (1881)	27
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Pa. Laws, No. 374, secs. 87-89 (1860) 1860 Pa. Laws 404-05	12
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Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858) 12, 24, 26, 27

Wyoming:

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Other Authorities:

Annot., *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony*, 34 A.L.R.3d 858 (1970) 25

W. Blackstone, *Commentaries On The Laws Of England* 6-8

H. Bracton, *The Laws And Customs Of England* (Twiss ed. 1879) 6

Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L. Rev. 807 (1973) 7

Century Digest (West) 9

J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980) 28

E. Coke, *Third Institute of the Laws of England* (1644) 6, 8

Decennial Digests (West) 9

Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975) 15

Fleta (Selden Soc. ed. 1955) 6

TABLE OF AUTHORITIES—Continued

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Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563 (1987) 7

J. Keown, *Abortion, doctors and the law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* (Cambridge University Press 1988) 7

L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* (1980) 10

S. Massengill, *A Sketch of Medicine and Pharmacy* (2d ed. 1942) 11

Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411 (1968) 8

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?* 17 N.Y.L.F. 335 (1971) 8

J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 10

New Perspectives on Human Abortion (T. Hilgers, D. Horan, and D. Mall, eds. 1981) 11

Note: *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. Ill. L. Forum 177 28

C. Scholten, *Childbearing In American Society 1650-1850* (1985) 10

J. Spruill *Women's Life and Work in the Southern Colonies* (1938) 10

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985) 2, 24, 27-28

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22 Trans. of the Am. Med. Assn. (1871) 23

BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI

Amici Curiae are more than 250 state senators and representatives.* *Amici* do not all share the same convictions regarding the manner and extent to which the practice of abortion should be regulated. But all are in agreement that the regulation of abortion is properly a matter for the legislative, not the judicial, branch of government, and that the States should have the constitutional authority to protect unborn human life throughout pregnancy. By virtue of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), however, that authority can no longer be exercised in any meaningful fashion.

The regulation of abortion poses difficult and complex legal, moral, social, medical, technological and political problems which the judiciary is uniquely ill-suited to resolve. From 1787 until 1973, these questions were raised, freely debated and answered in the public forums of the state legislatures, where the will of the people could be expressed through their popularly elected representatives. hat debate has been silenced and those forums have been closed for more than sixteen years. The voice of the people will not be heard until *Roe v. Wade* is overruled and the authority to regulate abortion is restored to the States.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. The Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones

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* See List of *Amici* in the attached Appendix.

of privacy, does exist under the Constitution." *Id.* However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.*

In determining that abortion is a "fundamental right," the Court in *Roe* discussed at length the treatment of abortion in English and American law. 410 U.S. at 129, 132-41, 147-52. Based upon that review, the Court came to the following conclusions:

> It is . . . apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id. at 140-41.

Amici Curiae respectfully submit that these conclusions, which are central to the Court's decision in *Roe*, are erroneous. The Court's historical excursus was seriously flawed and failed to take into account the medical and technological context in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American states, and the anti-abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the foundations of *Roe* and suggests that abortion has never been regarded as a "right" in English or American law. Accordingly, abortion cannot be considered a "fundamental right" under the Constitution.

ARGUMENT

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 at 796-97 (1986) (White, J., dissenting).

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has recognized that there are certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), and *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), for example, the Court, in holding that the right to jury trial is fundamental, emphasized the historical role of jury trials in the

"Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Id.* at 191. The Court has often recognized "rights that have little or no textual support in the constitutional language." *Id.* To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." *Id.*

Thus, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (Powell, J.). In *Roe v. Wade*, 410 U.S. 113 (1973), this Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152.

In responding to the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in *Bowers* noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill

of Rights." 478 U.S. at 192. The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Id.* at 192-93. Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 193-94. In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' is, at best, facetious." 479 U.S. at 194.

In *Bowers*, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

478 U.S. at 194-95

When the well-established principles of constitutional analysis enunciated by this Court in *Bowers v. Hardwick* are applied to the question of abortion, it becomes clear that *Roe v. Wade* was wrongly decided. Contrary to the Court's conclusion in *Roe*, there was no "right" to an abortion at common law or under the statutes enacted by the State legislatures in the nineteenth century. The uniform and consistent condemnation of abortion as a crime in English and American law contradicts the

critical historical findings on which *Roe v. Wade* was based and calls for reappraisal and rejection of the "abortion right."

II. THE COMMON LAW OF ENGLAND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the nineteenth century. Those statutes were enacted because the English common law, as received by the American states, was unable to keep pace with the medical and technological advances in the nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief, the following is offered as a summary.[1]

The thirteenth century commentators Bracton and Fleta classified abortion as homicide if the fetus was "formed and animated." 2 H. Bracton, *The Laws And Customs Of England* 279 (Twiss ed. 1879); 2 Fleta 60-61, Book I, ch. 23 (Selden Soc. ed. 1955). Neither Bracton nor Fleta expressly required that the child be born alive for the killing to constitute a homicide. The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that, while not "murder," abortion of a woman "quick with childe" was a "great misprision." E. Coke, *Third Institute of the Laws of England* at 50 (1644). If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.* In his *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be "*a reasonable creature in being and under the king's peace*," at the time of the killing . . . To kill a child in its mother's womb, is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On the Laws Of England* 198 (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone at 126.

"Quickening" (*i.e.*, the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live human being in the womb and whether the abortion had caused the child's death. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L.Rev. 807, 815-16 (1973); Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U.L. Rev. 563, 580-92 (1987). "[T]his evidentiary test was never intended as a judgment that before quickening the child was not a live human being." *Byrn* at 816.

In *Rex v. Bourne*, 1 K.B. 687 (1939), Justice Macnaghten recognized that "long before then [the enactment of the first English abortion statute of 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime . . . . The protection which the common law afforded to human life extended to the unborn child in the womb of its mother." 1 K.B. 687, 690. A recent review of the English cases and commentaries concludes that "the common law prohibited abortion and did so predominantly for the protection of fetal life." J. Keown, *Abortion, doctors and the law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* at 11 (Cambridge University Press 1988). This was the status of the common law crime of abortion in England at the time of the American Revolution.

[1] The Court is referred to the brief of Value of Life Committee, *et al.*, as *amici curiae* in support of Appellants, for a fuller presentation of this history.

III. THE AMERICAN COLONIES AND STATES ACCEPTED THE COMMON LAW OF ENGLAND AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

Notwithstanding the attempts of some scholars to disparage the authority of Coke and Blackstone (*see* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411 (1968); and Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971)), what is important is that their views were accepted by American courts in the nineteenth century as accurate statements of the common law regarding the criminality of abortion. *See, e.g., Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208 (1887); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); *State v. Cooper*, 22 N.J.L. 52, 53-58 (1849).

In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[2] At least two state courts determined

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[2] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *State v. Reed*, 45 Ark. 333, 334-36 (1885) (reversing dismissal of indictment charging defendant with post-quickening abortion); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (*dictum* in case decided under statute abolishing quickening distinction); *Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856) (*dictum* in slander case); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Smith v. State*, 33 Me. 48, 55 (1851) (*dictum* in case decided under statute abolishing quickening distinction); *Lamb v. State*, 67 Md. 524, 532-34, 10 A. 208, 208-09 (1887) (*dictum* in case decided under statute abolishing quickening distinction); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child"); *State v. Emerich*, 13 Mo. App. 492, 495-98 (1883) (*dictum* in case decided under statute); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute).

Four of these decisions acknowledged the arbitrary nature of the quickening distinction and recommended corrective legislative action. *See Mitchell v. Commonwealth*, 78 Ky. 204, 209-10 (1879); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 268; *State v. Emerich*, 13 Mo. App. 492, 495 (1883); *State v. Cooper*, 22 N.J.L. 52, 58 (1849).

that abortion at any state of pregnancy was a common law crime. *State v. Slagle*, 83 N.C. 630, 632 (1880) (*dictum*); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850) (indictment need not allege that woman had become quick). The Maryland Court of Appeals may have had these cases in mind when it recorded widespread abandonment of the medically obsolete quickening distinction:

> [A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime *at common law* without regard to the stage of pregnancy.

Lamb v. State, 67 Md. 524, 533, 10 A. 208, 208 (1887) (emphasis added).

These decisions, together with the dozens of abortion prosecutions reported in the Century Digest and each volume of the Decennial Digests, lay to rest the doubt expressed in *Roe* that "abortion was never firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. No

American court ever held that post-quickening abortion was not a crime at common law.

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." J. Spruill, *Women's Life and Work in the Southern Colonies* at 325-26 (1938). Another historian, Lyle Koehler, records the case of Deborah Allen, who was indicted on September 4, 1683, by the "Gen. Attorney . . . for, fornication, and for Indeavoringe the Dithruction of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329, n.132 (1980).

Admittedly, there are few reported cases of prosecutions for abortions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," (C. Scholten, *Childbearing In American Society 1650-1850* at 9 (1985)), and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 72 (1978). Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was a common law crime in the United States. *Id.* at 3. In *Evans v. People*, 49 N.Y. 86 (1872), the New York Court of Appeals confirmed the evidentiary basis of the quickening rule:

> But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life.

Id. at 90.

Prior to the codification of common law crimes in the nineteenth century, regulations on midwives prohibited abortions. In 1716, for example, New York City adopted an ordinance directed at midwives which provided:

> You Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.

Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 199 (T. Hilgers, D. Horan, and D. Mall, eds. 1981). Violation of this ordinance, which remained in effect at least until 1776, was punishable by fines, forfeiture or jail. *Id.* at 199-200. Virginia, in the seventeenth century, passed an ordinance by which "[m]idwives were pledged to expose infanticide, to summon other midwives in suspicious cases and not to induce abortion or charge exorbitantly." S. Massengill, *A Sketch of Medicine and Pharmacy* at 294 (2d ed. 1942).

The law could not prove pregnancy before quickening because of the primitive state of medical technology. But as a prophylactic measure it sought to prevent the induction of abortion throughout pregnancy by regulating the practices of midwives. This regulation is significant because well into the nineteenth century, midwives, not physicians, attended women during pregnancy and childbirth and performed most abortions. Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 200 (T. Hilgers, D. Horan, and D. Mall, eds. 1981).

Abortion was not a "right" at common law, either in England or America. Abortion was a crime and was punished accordingly.

IV. THE ABORTION STATUTES ENACTED BY THE STATE LEGISLATURES IN THE NINETEENTH CENTURY, WHICH ABOLISHED THE QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE INTENDED TO PROTECT UNBORN HUMAN LIFE.

In *Roe v. Wade*, the Court found that "the pre-existing English common law" of abortion remained in effect in this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law." 410 U.S. at 138-139. These findings do not appear to be supported by the historical record. By the end of 1849, eighteen of the thirty States had enacted statutes restricting abortion, and by the end of the Civil War, twenty-seven of the thirty-six States had done so.[3] By the end of 1868, the year in

[3] *See*, generally, Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 32 *et seq.* (1985). The following eighteen states adopted anti-abortion statutes before 1850: Alabama, Ala. Acts, ch. 6, sec. 2 (1840); Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Connecticut, Conn. Stat., tit. 22, sec. 14 at 152 (1821) (in 1860 this statute was replaced by Conn. Pub. Acts, ch. LXXI, secs. 1, 2, p. 65 (1860), which made abortion at any stage of pregnancy a crime); Illinois, Ill. Rev. Crim. Code, div. 5, sec. 46, p. 131 (1833) (this statute was replaced by a subsequent enactment in 1867, Act of Feb. 28, 1867, Ill. Pub. Laws, p. 89 (1867)); Indiana, Ind. Rev. Stat., sec. 3 at 224 (1838) (by 1859, this statute had been superseded by a subsequent enactment, Ind. Laws ch. LXXXI, sec. 2 at 130-31 (1958)); Iowa (admitted to statehood Dec. 28, 1846), Iowa (Terr.) Rev. Stat. ch. 49, secs. 10, 13 at 167 (1843 (an act of March 15, 1858, made abortion at any stage of pregnancy a crime, Iowa Rev. Stat., sec. 4221 (1860)); Maine, Me. Rev. Stat., ch. 160, secs. 11-14 (1840); Massachusetts, Mass. Acts & Resolves, ch. 27 (1845); Michigan, Mich. Rev. Stat., ch. 153, secs. 32-34, p. 662 (1846); Mississippi, Miss. Code, ch. 64, secs. 8, 9, p. 958 (1848); Missouri, Mo. Rev. Stat., art. II, secs. 9, 10, 36 at 168-69, 172 (1835); New Hampshire, N.H. Laws, ch. 743, sec. 1, p. 708 (1848); New Jersey, N.J. Laws, pp. 266-27 (1849); New York, N.Y. Laws, ch. 22, sec. 1, p. 19 (1846), N.Y. Laws, ch. 260, secs. 1-6 at 285-86 (1845); Ohio, Ohio Gen. Stat., ch. 35, secs. 111, 112 at 252 (1841); Vermont, Vt. Acts No. 33, sec. 1 (1846); Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); Wisconsin, Wis. Rev. Stat., ch. 133, secs. 10, 11 (1849) (by 1858, this statute had been superseded by a subsequent enactment, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858)).

The following nine states adopted such statutes between 1850 and 1865: California (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, sec. 45, p. 233 (1849-1850) (section 45 was amended by an act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588); Kansas (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, secs. 9, 10, 39 at 238, 243 (1855) (by 1859, this statute had been superseded by a subsequent enactment, Kan. (Terr.) Laws, ch. 28, secs. 9, 10, 37 (1859)); Louisiana, La. Crimes & Offences, sec. 24 at 138 (1856); Minnesota (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, secs. 10, 11, p. 493 (1851); Nevada (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); Oregon (admitted to statehood Feb. 14, 1859), Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws No. 374, secs. 87-89 (1860), 1860 Pa. Laws 404-05; Texas, Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1959); West Virginia (admitted to statehood June 20, 1863), *see* Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848), W. Va. Const., art. XI, par. 8 (1863).

[4] In addition to the twenty-seven states listed in note 3, the following three states adopted anti-abortion statutes between 1865 and 1868: Florida, Fla. Acts, 1st Sess., ch. 1637, No. 13, ch. 3, secs. 10, 11, ch. 8, secs 9-11 (1868), 1868 Fla. Laws 64, 97; Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Nebraska (admitted to statehood March 1, 1867), Neb. (Terr.) Stat., tit. 4, ch. 4, sec. 42 (1866). Of the thirty states ratifying the fourteenth amendment as of July 21, 1868, all but Georgia, North Carolina, Rhode Island, South Carolina and Tennessee had adopted such statutes.

which the Fourteenth Amendment was ratified, *thirty of the then thirty-seven States had enacted such statutes*, including twenty-five of the thirty-ratifying States,[4] to-

gether with six of the ten federal territories.[5] The territorial enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, sec. III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No abortion statute enacted by any territorial legislature was ever nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment in June 1866.

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As Justice Rehnquist observed in dissent, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting). After reciting the statutory history set out above, Justice Rehnquist stated:

> There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Id. at 177 (Rehnquist, J., dissenting).

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[5] The following federal territories adopted anti-abortion statutes by the end of 1868: Arizona, Ariz. Code, ch. 10, div. 5, sec. 45 (1865); Colorado, Act of Nov. 5, 1861, div. 4, sec. 42, 1861 Colo. Laws 296-97, Colo. Rev. Stat., ch. XXII, sec. 42 (1868); Idaho, Act of Feb. 4, 1864, ch. 4, sec. 42, 1864 Idaho Laws 443; Montana, 1864 Mont. Laws 184; New Mexico, Act of Feb. 15, 1854, No. 28, ch. 3, secs. 10, 11, 1854 N.M. Laws 88; Washington, Wash. (Terr.) Stat., ch. 2, secs. 37, 38 at 81 (1854).

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations. 410 U.S. at 151-52. Three reasons were offered in support of this conclusion, all of which have been shown by "the lessons of experience and the force of better reasoning," (*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandies, J., dissenting)), to be erroneous.

First, citing only one New Jersey decision, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus." 410 U.S. at 151 & n. 48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misread the holding in *Murphy* (*see* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1273-74 (1975)),[6] but also overlooked eighteen decisions from thirteen jurisdictions expressly affirming that protection of the unborn was a purpose of their nineteenth century statutes,[7] and

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[6] In *Murphy*, the court recited the common law rule that "the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman were quick with child." 27 N.J.L. at 114. The court noted that "[t]he act was purged of its criminality, so far as it affected the mother by her consent. It was an offence only against the life of the child. . . . [T]he *statute* does not make it criminal for the woman to swallow the potion, or to consent to the operation or other means to procure an abortion. . . . Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child." *Id.* at 114 (emphasis added). *See State v. Gedicke*, 43 N.J.L. 86 (1861), discussed in the text, and *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956).

[7] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Dougherty v. The People*, 1 Colo. 514, 522-23 (1872); *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); *Nash v. Meyer*,

twelve other decisions from ten additional jurisdictions strongly implying the same position.[8] In every decade since the 1840's, there has been at least one American state court decision recognizing this purpose.

Thus, in 1849, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the state's 1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1851, the Supreme Court of Maine explained that its 1840 abortion statute had abolished the common law quickening distinction:

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54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Alcorn*, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); *Joy v. Brown*, 173 Kan. 833, 839-40, 252 P.2d 889, 893 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State of Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Tippie*, 89 Ohio St. 35, 39-40, 105 N.E. 75, 77 (1913); *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *State v. Ausplund*, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). But see *State v. Carey*, 76 Conn. 342, 352-53, 56 A. 632, 636 (1904); *People v. Nixon*, 42 Mich. App. 332, 335-41, 201 N.W.2d 635, 638-41 (1972); *State v. Jordan*, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947); *Foster v. State*, 182 Wis. 298, 300, 196 N.W. 233, 234 (1923) (*contra*).

[8] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Montgomery v. State*, 80 Ind. 338, 345 (1881); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1866); *Abrams v. Foshee*, 3 Iowa 274, 278 (1856); *Smith v. State*, 33 Me. 48, 57-59 (1851); *Worthington v. State*, 92 Md. 222, 237-238, 48 A. 355, 356-57 (1901); *Lamb v. State*, 67 Md. 524, 532-33, 10 A. 208 (1887); *People v. Sessions*, 58 Mich. 594, 595-96, 26 N.W. 291, 292-93 (1886); *Edwards v. State*, 79 Neb. 251, 254-55, 112 N.W. 611, 612-13 (1907); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *State v. Powell*, 181 N.C. 515, 106 S.E.133 (1921); *State v. Crook*, 16 Utah 212, 216-17, 51 P. 1091, 1093 (1898).

> There is a removal of the unsubstantial distinction, that it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unseccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Smith v. State, 33 Me. 48, 57 (1851).

In 1868, the Supreme Court of Iowa affirmed a conviction of murder for causing the death of a woman by an illegal abortion under an 1858 anti-abortion statute, and approved of the following charge to the jury as an accurate statement of the law:

> To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother."

State v. Moore, 25 Iowa 128, 131-32 (1868).

In *Moore*, the court condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *Id.* at 136.

In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. The People*, 1 Colo. 514, 522.

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881). The court described abortion as "a heinous

crime, which in almost every case endangers the life and health of the woman, and the destruction of the foetus or child, which may be quickened or instinct with the beginning of life." *Id.* at 90.

In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 16 Utah 212, 217, 51 P. 1091, 1093 (1898).

In 1901, the Maryland Court of Appeals explained that American anti-abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer:

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered, by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life in her hands when she submits to an abortion . . . but her death is no necessary element in the procuring of an abortion, and the application of the harsh rule here contended for [that defendant should have been indicted for murder instead of manslaughter] would have no effect in the repression of that abhorrent crime, which can ony be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901).

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its anti-abortion statute, first adopted in 1840, was "to restrain *after conception* an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ." *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (emphasis added). Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'" *Id.* at 488, 73 So. at 836.

In a 1917 case, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well. The Legislature did not waste time with refinements about quickening. but applied the law to all stages of pregnancy, and we would usurp its prerogative

> if we read into the statute something not found there.

State v. Ausplund, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917).

In 1921, the Supreme Court of North Carolina held that "[t]he essential fact charged [under an 1881 statute], is that the defendant advised the woman to take the drug, or other substance, with intent thereby to destroy the child." *State v. Powell*, 181 N.C. 515, 515, 106 S.E. 133, 133 (1921). The court added that the act "denounced by the statute" is the administration of a drug with the intent "to destroy the child." *Id.*

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1854, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society." *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936). And in 1938, the Washington Supreme Court acknowledged that the state anti-abortion statute, first adopted in 1854, was "designed to protect the life of the mother as well as that of her child." *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

In 1942, the Supreme Court of Georgia declared that in enacting its anti-abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942). In 1950, the Virginia Supreme Court of Appeals, interpreting its 1849 abortion statute, explained that the "[t]he intention of the lawmakers was to protect the health and lives of pregnant women and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing

abortion and miscarriage." *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75.

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953). Rejecting the defendant's argument that the decendent's consent to an illegal act barred recovery, the court said, "[w]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892. And in 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960).

State court decisions affirming the protection of unborn human life as one purpose of their statutes prohibiting abortion continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe v. Wade* was decided, no less than six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.[9]

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[9] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 505 P.2d 580 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E.2d 265, 266-70 (1972), *cert. den. for want of standing of petitioner, sub nom. Cheaney v. Indiana*, 410 U.S. 991 (1973); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 900-04 (Ky. 1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Sasaki v. Kentucky*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Cr. App. 1971), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Thompson v. Texas*, 410 U.S. 950 (1973); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Munson v. South Dakota*, 410 U.S. 950 (1973). *But see People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969), *cert.*

In sum, more than thirty-five decisions from almost thirty States recognized that their abortion statutes were enacted primarily to protect unborn human life. These opinions forge an unbroken chain of precedent linking the 1840's to the early 1970's. Given this wealth of case authority, the Court's belief that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus," (410 U.S. at 151), is ill-founded.

Further evidence of the legislatures' intent to protect fetal life may be found in the report of the American Medical Association's Committee on Criminal Abortion to the Twelfth Annual Meeting of the AMA in 1859, from which the Court in *Roe* quoted extensively. 410 U.S. at 141-42. That report, and the subsequent action taken by the AMA, supports the view that in restricting the availability of abortions, the nineteenth century legislatures intended to recognize the humanity of unborn children and protect them from the violence of abortion.

The Committee on Criminal Abortion was appointed in 1857 to investigate criminal abortion "with respect to its general suppression." In its report, the Committee deplored abortion and its frequency and listed three causes of "this general demoralization":

> The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> The second of the agents alluded to is the fact that the profession[s] themselves are frequently supposed careless of foetal life . . . .
>
> The third reason of the frightful extent of this crime is found in the grave defects of our laws, both

den., 397 U.S. 915 (1970), and *State v. Barquet*, 262 So.2d 431 (Fla. 1972) (striking down abortion statutes on vagueness grounds); and *People v. Nixon*, 42 Mich. App. 332, 201 N.W.2d 635 (1972) (holding that statute could not constitutionally be applied to a licensed physician performing an abortion before quickening in an antiseptic clinical environment).

> common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowleges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

12 Trans. of the Am. Med. Assn. 75-76 (1859).

The American Medical Association adopted resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.* at 28, 78. The Committee submitted another detailed report in 1871 which concluded with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). In *Roe*, the Court acknowledged that "the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period." 410 U.S. at 141.

That the nineteenth century abortion statutes were enacted, at least in part, to protect the lives of unborn children is evident from the therapeutice exception to the absolute ban on abortions. Almost all of the States prohibited abortions except those that were necessary to save the life of the mother. 410 U.S. at 139. Abortions were not allowed for health reasons, unless the life of the mother was endangered. This narrow exception, which was consistent with the common law rule (*People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886)) suggests that the laws were not designed solely to guard women against the dangers of unsafe medical and surgical procedures:

> By prohibiting all abortions except those necessary or thought to be necessary to preserve the life of the mother, the state legislatures manifested their belief that no lesser beneficial consequence could justify the destruction of the unborn child. If the legislatures did not consider the child to be a person in the whole sense, undoubtedly they would not have required the mother to bear serious health risks and heavy burdens in order to preserve the life of the child. Furthermore, if the legislatures had not considered the child to be a "person," surely their overriding concern in regulating abortion would have been to protect the health of pregnant women. Legislatures would have defined the thereapeutic exception so as to minimize the number and gravity of injuries to women resulting from pregnancy, childbirth, and induced abortion. If it would have *reduced* the number and severity of such injuries to permit physicians, after due consultation, to perform abortions found necessary to prevent serious health injury to the woman, and not just those necessary to save her life, the legislatures would have done so.

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 45-46 (1985) (emphasis in original).

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to protect maternal health and not prenatal life, the Court in *Roe* observed that "[i]n many States . . . by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. The Court, however, failed to note that at least seventeen states enacted statutes which expressly incriminated the woman's participation in her own abortion.[10]

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[10] Arizona, Ariz. Pen. Code, sec. 455 (1887); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Act of February 14, 1872, Cal. Pen. Code, sec. 275 (1872); Connecticut, Conn. Pub. Acts, ch. LXXI, sec. 3, pp. 65-66 (1860); Idaho, Idaho Rev. Stat., sec. 6795 (1887); Indiana, Act of April 14, 1881, ch. XXXVII, sec. 23, 1881 Ind. Laws 177; Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Montana, Mont. Rev. Code, sec. 94-402 (1947); Nevada, Act of Feb. 16, 1869, ch. 22, sec. 1, 1869 Nev. Laws 64-65; Nev. Rev. Stat., sec. 200.220 (1959); New Hampshire, Act of Jan. 4, 1849, ch. 743, sec. 4, 1848 N.H. Laws 708-09; New York Act of May 13, 1845, ch. 260, sec. 3, 1845 N.Y. Laws 285-86; Act of April 6, 1872, ch. 181, sec. 2, 1872 N.Y. Laws 509-10; North Dakota, Dak. Pen. Code, sec. 338 (1877); Oklahoma, Okla. Stat., sec. 2188 (1890); Okla. Rev. Laws, sec. 2437 (1910); South Carolina, Act of March 24, 1883, No. 354, 1883 S.C. Acts 547-58; South Dakota, Dak. Pen. Code, sec. 338 (1877); Utah, Utah Code Ann., sec. 86-2-2 (1953); Wisconsin, Wis. Rev. Stat., ch. 169, sec. 59 (1859); Wyoming, ch. 73, sec. 32, 1890 Wyo. Laws 131.

Moreover, with respect to those States that did not criminalize the woman's conduct, the Court did not consider the reasons why the woman was exempt from prosecution. Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 82 Ore. 211, 217, 161 P. 417, 419 (1916). As a result, the woman was seen as a victim, rather than an accomplice in, the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, as a practical matter, conviction of the abortionist often depended upon the testimony of the aborted woman. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. *People v. Nixon*, 42 Mich. App. 332, 343, 201 N.W.2d 635, 646 (1972) (opinion of Burns, J., concurring in part and dissenting in part). In most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for both principled and practical reasons, the woman who underwent an abortion was considered a victim, not a perpetrator, of the offense. *See*, Annot., *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony*, 34 A.L.R.3d 858 (1970).

Finally, the Court stated that "most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. The Court concluded that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. Again, the history of the nineteenth century statutes restricting abortion calls this conclusion into question.

As of the end of 1868, thirty of the then thirty-seven States had enacted anti-abortion statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortions *at any stage of pregnancy.* Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortions equally, regardless of the stage of pregnancy.[11] By the end of 1883, twenty-seven of the thirty-six States that had enacted anti-abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[12]

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[11] The statutes are set forth in notes 3 and 4, *supra.*

[12] Alabama, Ala. Code, sec. 3605 (1867); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Colorado, Colo. Rev. Stat. ch. XXII, sec. 42 (1868); Connecticut, Conn. Gen. Stat., tit. XII, ch. II, sec. 22-25 (1866); Delaware, Act of February 13, 1883, ch. 226, secs. 1, 2, 1883 Del. Laws 522; Georgia, Act of February 25, 1876, ch. CXXX, sec. I-III, 1876 Ga. Laws 113; Illinois, Act of February 28, 1867, sec. 1, 1867 Ill. Pub. Laws 89; Indiana, Ind. Laws, ch. LXXXI, sec. 2; Iowa, Act of March 15, 1858, sec. 1, Iowa Rev. Stat., sec. 4221 (1860); Louisiana, La. Crimes & Offences, sec. 24 at 138 (1856); Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8, at 685 (1857); Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Massachusetts, Mass. Gen. Stat., ch. 165, sec. 9-11 (1860); Minnesota, Act of March 10, 1873 Minn. Laws 117-19; Nebraska, Neb. Rev. Stat., tit. 4, ch. 4, sec. 42 (1866); Nevada, Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); New Jersey, N.J. Laws 266-67 (1849); North Carolina, Act of March 12, 1881, ch. 351, 1881 N.C. Laws 584-85; Ohio, Act of

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 36 (1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child.[13] This con-

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April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of October 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); South Carolina, Act of December 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883, ch. CXL. 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code arts. 531-536 (1856), 1858 Tex. Gen. Laws 172; Vermont, Act of Nov. 21, 1867, No. 57, secs. 1, 3 (1867), 1867 Vt. Acts 64-66; Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); West Virginia, Va. Acts. tit. II, ch. 3, sec. 9, p. 96 (1848); W. Va. Const., art. XI, par. 8 (1863); Wisconsin, Wis. Rev. Stat. ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858).

[13] Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Act of Nov. 8, 1875, No. 4, 1875 Ark. Acts 5-6; Florida, Fla. Acts, 1st Sess., ch. 1647, no. 13, ch. 3, sec. 11, ch. 8, sec. 9, 1868 Fla. Laws 64, 97; Georgia, Act of Feb. 25, 1876, ch. CXXX, secs. I-III, 1876 Ga. Laws 113; Indiana, Act of April 14, 1881, ch. XXXVII, sec. 22, 1881 Ind. Laws 177; Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8 at 165 (1857); Michigan, Mich. Rev. Stat., ch. 153, secs. 33-34 (1846); Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Missouri, Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, secs. 10, 34 at 778-79, 781 (1866); Nebraska, Act of March 4, 1873, Neb. Gen. Stat., ch. 58, secs. 6, 39 at 720, 727-28 (1873); New Jersey, Act of March 25, 1881, CXCI, N.J. Gen. Pub. Laws, ch. CXCI at 240; New York, Act of July 26, 1881, N.Y. Pen. Code, ch. 676, tit. 9, ch. 2, secs. 191, 194, tit. 10, ch. 4, sec. 295, ch. 7, secs. 318-21, 3 N.Y. Rev. Stat., at 2478-80 (1881); Ohio, Act of April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws, No. 374, tit. 6, secs. 87-88, (1860), 1860 Pa. Laws 404-05; South Carolina, Act of Dec. 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code, arts. 531, 535 (1856), 1858 Tex. Gen. Laws 172; Virginia, Act of March 14, 1878,

tradicts the theory that the laws were passed only for reasons of maternal health.

> The death of the fetus is totally irrelevant to the health of the mother. If the state antiabortion statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus.

Id. at 36.

Witherspoon concludes that "[t]he only explanation of this element of these statutes is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion can be regarded as a "fundamental right" only if it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade* was decided. Jesse Choper has noted that "[a]s recently as 1967, just six years before the foundational ruling in *Roe v. Wade*, no state in the nation permitted an abortion except to save the life of the mother." J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* at 118 (1980). Although, prior to *Roe*, fourteen States had relaxed their restrictions on abortion and had adopted some form of the American Law Institute's Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n.37), a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*,

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ch. 311, ch. 2, sec. 8, 1878 Va. Acts 281-82; West Virginia, ch. 118, sec. 8, 1882 W. Va. Acts; Wisconsin, Act of May 17, 1858, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, sec. 58 (1858). Of these states, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

1972 U. Ill. L. Forum 177, 179-80 & nn. 21-30. And no State had adopted the "trimester" approach enunciated in *Roe*.

In his dissent in *Roe v. Wade*, Justice Rehnquist noted the significance of this uniform and consistent condemnation of abortion:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

410 U.S. at 174 (Rehnquist, J., dissenting).

Abortion is not mentioned in the Constitution and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment intended to incorporate a right of abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick*, abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and the authority to regulate the practice of abortion should be returned to the States.

CONCLUSION

Amici respectfully submit that *Roe v. Wade* was an unfortunate venture in substantive due process which should be recognized and discarded as constitutional error. By its decision, the *Roe* Court, without textual or historical support, reached out and struck down the abortion laws of all fifty States, thereby establishing as a constitutional right what had long been regarded in English and American law as a serious crime—the intentional destruction of unborn human life. The *Roe* Court misapprehended the development of the common law on abortion and, as this brief has attempted to demonstrate, misinterpreted the reasons underlying the enactment of the nineteenth century statutes prohibiting abortion. Those laws were passed to protect unborn human life. The Constitution does not deprive the people of their rightful authority, acting through their State legislatures, to restrict the practice of abortion. That authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

Respectfully submitted,

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February 23, 1989

APPENDIX

APPENDIX

LIST OF *AMICI*

Delaware

Sen. Robert T. Connor	(R)	12th District
Sen. Ruth Ann Minner	(D)	18th District
Rep. Al O. Plant, Sr.	(D)	2nd District
Rep. Joseph G. DiPinto	(R)	4th District
Rep. Jeffrey G. Mack	(R)	17th District
Rep. Terry A. Spence Speaker of the House	(R)	18th District
Rep. Robert F. Gilligan	(D)	19th District
Rep. Steven C. Taylor	(R)	21st District
Rep. Richard F. Davis	(R)	26th District
Rep. G. Wallace Caulk	(R)	33rd District
Rep. Gerald A. Buckworth Majority Whip	(R)	34th District
Rep. V. George Carey	(R)	36th District
Rep. Clifford F. Lee	(R)	40th District
Rep. Charles P. West	(D)	41st District

Illinois

Sen. Forest D. Etheredge	(R)	21st District
Sen. Richard F. Kelly, Jr.	(D)	39th District
Sen. George Ray Hudson	(R)	41st District
Sen. William L. O'Daniel	(D)	54th District
Sen. Frank Watson	(R)	55th District
Rep. Ralph C. Capparelli	(D)	13th District
Rep. Jeremiah E. Joyce	(D)	14th District
Rep. John P. Daley	(D)	21st District
Rep. Andrew J. McGann	(D)	29th District
Rep. James R. Stange	(R)	44th District
Rep. Kathleen L. Wojcik	(R)	45th District
Rep. Donald N. Hensel	(R)	50th District
Rep. Bernard E. Pedersen	(R)	54th District
Rep. Penny Pullen	(R)	55th District
Rep. E.J. "Zeke" Giorgi	(D)	68th District
Rep. Marcel "Bob" DeJaegher	(D)	72nd District
Rep. Robert P. Regan	(R)	80th District
Rep. Thomas J. McCracken, Jr.	(R)	81st District
Rep. Edward Petka	(R)	82nd District
Rep. Larry Wennlund	(R)	84th District

Rep. Gerald C. "Jerry" Weller	(R)	85th District
Rep. J. Philip Novak	(D)	86th District
Rep. Gary Hannig	(D)	98th District
Rep. Michael D. Curran	(D)	99th District
Rep. Charles A. Hartke	(D)	107th District
Rep. Ron Stephens	(R)	110th District
Rep. David D. Phelps	(D)	118th District

Indiana

Sen. Richard W. Worman	(R)	14th District
Sen. Thomas J. Wyss	(R)	15th District
Sen. Richard A. Thompson	(R)	24th District
Sen. Joseph V. Corcoran	(R)	44th District
Sen. Lindel O. Hume	(D)	48th District
Rep. Philip T. Warner	(R)	4th District
Rep. Michael A. Dvorak	(D)	8th District
Rep. John S. Matonovich	(D)	11th District
Rep. Paul J. Hric	(D)	11th District
Rep. Jerome J. Reppa	(R)	15th District
Rep. Robert K. Alderman	(R)	19th District
Rep. Claire M. Leuck	(D)	25th District
Rep. Richard M. Dellinger	(R)	38th District
Rep. Frank Newkirk	(D)	65th District
Rep. David G. Cheatham	(D)	69th District

Kansas

Sen. James Francisco	(D)	26th District
Sen. Eric Yost	(R)	30th District

Kentucky

Sen. William L. Quinlan	(D)	7th District
Sen. Delbert S. Murphy	(D)	8th District
Sen. Arthur L. Schmidt	(R)	11th District
Sen. H. Edward O'Daniel, Jr.	(D)	14th District
Sen. David Williams	(R)	16th District
Rep. Louis E. Johnson	(D)	13th District
Rep. Richard A. Turner	(R)	22nd District
Rep. Mark O'Brien	(D)	31st District
Rep. Bob Heleringer	(R)	33rd District
Rep. Carl A. Nett	(D)	35th District

Rep. Tom Riner	(D)	41st District
Rep. James B. Yates	(D)	44th District
Rep. John Harper	(R)	49th District
Rep. Kenneth F. Harper	(R)	63rd District
Rep. Tom Kerr	(D)	64th District
Rep. James P. Callahan	(D)	67th District
Rep. Bill Donnermeyer	(D)	68th District
Rep. Tommy Todd	(R)	83rd District

Massachusetts

Sen. Francis D. Doris	(D)	Suffolk, Essex, Middlesex Counties
Rep. Marie J. Parente	(D)	10th District
Rep. Gregory W. Sullivan	(D)	12th District

Michigan

Sen. Jack Welborn	(R)	13th District
Sen. Ed Fredricks	(R)	23rd District
Sen. Fred Dillingham	(R)	30th District
Sen. James Barcia	(D)	34th District
Rep. Joseph Palamara	(D)	30th District
Rep. Michael Grffiin	(D)	50th District
Rep. Margaret O'Connor	(R)	52nd District
Rep. William VanRegenmorter	(R)	55th District
Rep. Joanne Emmons	(R)	99th District

North Carolina

Rep. Frank Sizemore III	(R)	27th District
Rep. Paul Stam, Jr.	(R)	62nd District

Ohio

Sen. Ben M. Gaeth	(R)	1st District
Sen. Robert R. Cupp	(R)	12th District
Sen. Richard P. Schafrath	(R)	19th District
Sen. Robert Ney	(R)	20th District
Sen. Grace Drake	(R)	22nd District
Sen. Gary C. Suhadolnik	(R)	24th District
Sen. Scott W. Oelslager	(R)	29th District

Rep. William Thompson	(R)	1st District
Rep. William G. Batchelder	(R)	4th District
Rep. Randall Gardner	(R)	5th District
Rep. Rocco J. Colonna	(D)	7th District
Rep. Patrick A. Sweeney	(D)	9th District
Rep. Ronald Mottle, Sr.	(D)	10th District
Rep. Troy James	(D)	12th District
Rep. Suzanne Bergansky	(D)	17th District
Rep. Ronald J. Suster	(D)	19th District
Rep. Thomas A. Pottenger	(R)	20th District
Rep. Jerome F. Luebbers	(D)	21st District
Rep. Louis W. Blessing, Jr.	(R)	22nd District
Rep. Jacquelyn O'Brien	(R)	26th District
Rep. Dale N. VanVyven	(R)	27th District
Rep. E. J. Thomas, Jr.	(R)	28th District
Rep. Bill Schuck	(R)	35th District
Rep. Robert E. Hickey	(D)	39th District
Rep. Russell E. Guerra, Jr.	(R)	40th District
Rep. Barney J. Quilter	(D)	47th District
Rep. Charles Red Ash	(R)	49th District
Rep. David W. Johnson	(R)	51st District
Rep. John V. Bara	(D)	54th District
Rep. John A. Boehner	(R)	57th District
Rep. Daniel P. Troy	(D)	60th District
Rep. Raymond Sines	(R)	61st District
Rep. Samuel T. Bateman, Jr.	(R)	66th District
Rep. James G. Bucky	(R)	73rd District
Rep. Robert W. Clark	(R)	74th District
Rep. Joseph E. Haines	(R)	75th District
Rep. Steven O. Williams	(R)	78th District
Rep. Larry W. Manahan	(R)	79th District
Rep. Lynn R. Wachtmann	(R)	80th District
Rep. James D. Davis	(R)	81st District
Rep. John P. Stozich	(R)	82nd District
Rep. Corwin M. Nixon	(R)	84th District
Rep. Larry J. Adams	(R)	86th District
Rep. Michael C. Shoemaker	(D)	88th District
Rep. Richard E. Rench	(R)	90th District
Rep. Paul P. Mechling	(D)	91st District
Rep. Ronald D. Amstutz	(R)	93rd District
Rep. Thomas W. Johnson	(R)	96th District
Rep. Jerry Krupinski	(D)	98th District

Texas

Sen. Ted Lyon	(D)	2nd District
Sen. Gene Green	(D)	6th District
Sen. Bob McFarland	(R)	10th District
Sen. John Leedom	(R)	16th District
Sen. J.E. "Buster" Brown	(R)	17th District
Sen. Ken Armbrister	(D)	18th District
Rep. Bill Hollowel	(D)	5th District
Rep. Jerry Yost	(R)	7th District
Rep. L.B. Kubiak	(D)	13th District
Rep. Keith Valigura	(R)	16th District
Rep. Billy Clemons	(D)	17th District
Rep. Mark Stices	(D)	21st District
Rep. John Willy	(R)	28th District
Rep. Tom Uher	(D)	29th District
Rep. Robert Saunders	(D)	30th District
Rep. Phyllis M. Robinson	(D)	31st District
Rep. Steve Holzheauser	(R)	32nd District
Rep. M.A. Taylor	(R)	55th District
Rep. Jim Horn	(R)	59th District
Rep. Ben Campbell	(R)	61st District
Rep. Sam Johnson	(R)	60th District
Rep. Pat Haggerty	(R)	71st District
Rep. Tom Craddick	(D)	76th District
Rep. Bob Hunter	(R)	79th District
Rep. Warren Chisum	(D)	84th District
Rep. John Smithee	(R)	86th District
Rep. Carolyn Park	(R)	92nd District
Rep. Kent Grusendorf	(R)	94th District
Rep. Kim Brimer	(R)	96th District
Rep. Anna Mowery	(R)	97th District
Rep. Ken Marchant	(R)	99th District
Rep. Glenn Repp	(R)	104th District
Rep. Bill Blackwood	(R)	105th District
Rep. Bill Hammond	(R)	109th District
Rep. Fred Hill	(R)	112th District
Rep. A.R. Ovard	(R)	113th District
Rep. Barry Connelly	(R)	126th District
Rep. Dan Shelley	(R)	127th District
Rep. Tony Polumbo	(D)	128th District
Rep. Mike Jackson	(R)	129th District

Rep. Erwin W. Barton	(D)	144th District
Rep. Talmadge Heflin	(R)	149th District
Rep. Paul Hilbert	(R)	151st District

Washington

Sen. Leo Thorsness	(R)	11th District
Sen. Linda Smith	(R)	18th District
Sen. Ellen Craswell	(R)	23rd District
Sen. Brad Owen	(D)	35th District
Rep. Bill Day	(D)	3rd District
Rep. Charles R. Wolfe	(R)	4th District
Rep. Mike Padden	(R)	4th District
Rep. Duane Sommers	(R)	6th District
Rep. Steve Fuhrman	(R)	7th District
Rep. Clyde Ballard	(R)	14th District
Rep. Glyn Chandler	(R)	13th District
Rep. Jeannette Wood	(R)	21st District
Rep. John Beck	(R)	21st District
Rep. James Hargrove	(D)	24th District
Rep. Jim Youngsman	(R)	40th District
Rep. Michael E. Patrick	(R)	47th District

Wisconsin

Sen. Alan J. Lasee	(R)	1st District
Sen. John R. Plewa	(D)	7th District
Sen. Lloyd H. Kincaid	(D)	12th District
Sen. Timothy Weeden	(R)	15th District
Sen. Richard Kreul	(R)	17th District
Sen. Carol A. Buettner	(R)	18th District
Sen. Donald K. Stitt	(R)	20th District
Sen. Marvin J. Roshell	(D)	23rd District
Sen. Walter J. Chilsen	(R)	29th District
Sen. Jerome VanSistine	(D)	30th District
Sen. Brian D. Rude	(R)	32nd District
Rep. Larry J. Swoboda	(D)	1st District
Rep. Dale J. Bolle	(D)	2nd District
Rep. Alvin R. Ott	(R)	3rd District
Rep. Richard Grobschmidt	(D)	21st District
Rep. Thomas A. Hauke	(D)	23rd District
Rep. Margaret Krusick	(D)	24th District

Rep. Vernon W. Holschbach	(D)	25th District
Rep. Wilfrid J. Turba	(R)	27th District
Rep. Thomas D. Ourada	(R)	35th District
Rep. Robert G. Goetsch	(R)	39th District
Rep. Robert T. Welch	(R)	41st District
Rep. Charles W. Coleman	(R)	43rd District
Rep. Wayne W. Wood	(D)	44th District
Rep. Dale W. Schultz	(R)	50th District
Rep. Joseph E. Tregoning	(R)	51st District
Rep. Judith Klusman	(R)	56th District
Rep. Steven Loucks	(R)	58th District
Rep. Michael A. Lehman	(R)	59th District
Rep. Susan B. Vergeront	(R)	60th District
Rep. Cloyd A. Porter	(R)	66th District
Rep. Leo Richard Hamilton	(D)	67th District
Rep. Heron A. VanGorden	(R)	69th District
Rep. Donald W. Hasenohrl	(D)	70th District
Rep. David J. Lepak	(R)	83rd District
Rep. Marc Duff	(R)	84th District
Rep. Robert J. Larson	(R)	87th District
Rep. John Gard	(R)	88th District
Rep. Cletus Vanderperren	(D)	89th District
Rep. Terry M. Musser	(R)	92nd District
Rep. John D. Medinger	(D)	95th District
Rep. DuWayne Johnsrud	(R)	96th District
Rep. Margaret A. Farrow	(R)	99th District

Wyoming

Sen. James Applegate	(D)	Laramie County
Sen. Elizabeth Byrd	(D)	Laramie County
Sen. Jim Geringer	(R)	Platte County
Sen. Winifred Hickey	(D)	Laramie County
Sen. Allan Howard	(R)	Laramie County
Sen. Kelly Mader	(R)	Campbell & Johnson Counties
Sen. James Norris	(D)	Laramie County
Sen. John Turner	(R)	Sublette-Teton County
Rep. Douglas Chamberlain	(R)	Goshen County
Rep. Rory Cross	(R)	Converse County
Rep. Richard Honaker	(D)	Sweetwater County

Rep. Bill McIlvain	(R)	Laramie County
Rep. Ron Micheli	(R)	Vinta County
Rep. Dorothy Perkins	(R)	Natrona County
Rep. Mary Kay Schwope	(D)	Laramie County
Rep. William Tibbs	(R)	Congress County
Rep. Clyde Wolfley	(R)	Lincoln County
Rep. Melvin L. ZumBrunnen	(R)	Niobrara County

AMICUS CURIAE

BRIEF

38

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In The

Supreme Court of the United States

October Term, 1988

**WILLIAM L. WEBSTER;
STATE OF MISSOURI,**

Appellant,

vs.

REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF GREATER KANSAS CITY; HOWARD I. SCHWARTZ, M.D.; ROBERT L. BLAKE, M.D.; CARL C. PEARMAN, M.D.; CARROLL METZGER, R.N.C.; MARY L. PEMBERTON, B.S.W.,

Appellees.

On Appeal From The United States Court Of Appeals, Eighth Circuit

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Consent

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of Appellee, Planned Parenthood Federation of America, Inc., was received from its attorney Mr. Roger K. Evans, Esq., and of Appellant, Attorney General, William L. Webster, from his attorneys Mr. Michael L. Boicourt, Esq. and Mr. Jerry L. Short, Esq.

American Family Association's Interest

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name of National Federation for Decency,

Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, American Family Association, Inc., has members in all 50 states; over 480 chapters of local citizens who are active in offering individuals alternatives to abortions; and over 360,000 subscribers to its monthly newsletter, AFA Journal. Amicus also provides a counseling and referral services to pregnant women who seek alternatives to abortion.

The ability of a state to protect the welfare of all its citizens, including the unborn, is vital to the efforts of the American Family Association membership. American Family Association, Inc., seeks to promote a healthful family environment for all Americans and it recognizes the need to

afford the unborn such an opportunity. The position of the American Family Association, Inc., will support the interest of the State of Missouri to protect the lives of the unborn and to use tax revenues in a manner which will support the interests of citizens within the state.

SUMMARY OF ARGUMENT

I. THE MISSOURI LEGISLATIVE FINDINGS IN THE PREAMBLE STATING THAT "THE LIFE OF EACH HUMAN BEING BEGINS AT CONCEPTION" AND THAT "UNBORN CHILDREN HAVE PROTECTABLE INTERESTS IN LIFE, HEALTH, AND WELL BEING" IS FACIALLY CONSTITUTIONAL

The findings made by the Missouri legislature to support the abortion statute now before this Court are consistent with the State's position in recognizing the rights of the unborn under other statutes. Specifically, the State has consistently recognized the rights of an unborn child in testamentary and common law inheritance actions.

In this preamble to the abortion statute, the Missouri legislature was merely articulating a standard that had

previously been in force, but unspoken, in other legal situations.

II. THE TRIMESTER APPROACH SET FORTH IN ROE V WADE, 410 U.S. 113 (1973), SHOULD BE SET ASIDE IN FAVOR OF A RATIONAL BASIS APPROACH

The decision in Roe v Wade, 410 U.S. 113 (1973), continues to stand as an aberration in the application of legal reasoning. The Court needlessly intruded upon a state's ability to protect its citizens. In doing so, the Court created new, previously unfounded rights, to reach a seemingly unprecedented result.

LAW AND ARGUMENT

I. THE MISSOURI LEGISLATIVE FINDINGS IN THE PREAMBLE STATING THAT "THE LIFE OF EACH HUMAN BEING BEGINS AT CONCEPTION" AND THAT "UNBORN CHILDREN HAVE PROTECTABLE INTERESTS IN LIFE, HEALTH, AND WELL BEING" IS FACIALLY CONSTITUTIONAL.

A. The Missouri Legislature Has Previously Recognized Legal Rights For Unborn Children

The recognition of legal rights for unborn children is not new to the Missouri statutory scheme. This concept is well rooted in the Missouri laws of testate succession. Specifically, §474.050 provides, in part, "All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate;. . . ." In Gates v Seibert,

157 Mo. 254, 57 S.W. 1065 (1900), the Missouri Supreme Court held that a child born to a widow within ten months of the decedent-father's death is entitled to inherit posthumously. In addition, §474.240 provides, in part, "If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate . . . ." Clearly, the State of Missouri has recognized certain potential property rights of the unborn child from the moment of conception. Additionally, the Court in Roe, although disclaiming any particular legal significance, recognized the historical legal rights of unborn children when it stated, "Similarly, unborn children have been

recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem." 410 U.S. at 162.

The recognition by the legislature of basic interests of an unborn child is merely a recitation of long held statutory and common law doctrine. This statute confers to an unborn child no rights that he had not previously had. The Missouri statutory scheme recognizes the unborn child's potential property rights and by implication the liberty and life interests necessary to the enjoyment of such property rights.

B. The State Has a Legitimate Interest in Favoring Childbirth Over Abortion

The State of Missouri has stated, by means of a legislative preamble, that it recognizes the value of life at conception implicitly in favor of abortion. In recognizing a state's right to make such value judgments, this Court in Maher v Roe, 432 U.S. 464, 473-74 (1977), stated that "Roe did not declare an unqualified 'constitutional right to an abortion', as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."

Additionally, this Court has recognized the federal government's rational interest in the protection of unborn children. In Harris v McRae, 448 U.S. 297, 325 (1980), the Court stated that "[i]t follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances is rationally related to the legitimate governmental objective of protecting potential life. * * *. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of potential life."

The recognition by this Court of the authority of states to place a greater

value on the protection of potential life supports the decision by the State of Missouri to make such legislative findings. Consequently, these findings are merely the expression of a legitimate interest on the part of the State in protecting life.

II. THE TRIMESTER APPROACH SET FORTH IN ROE V WADE, 410 U.S. 113 (1973), SHOULD BE SET ASIDE IN FAVOR OF A RATIONAL BASIS APPROACH

A. The Decision in Roe v Wade, Represents an Untenable Legal and Scientific Position With Respect To Abortion

The Court's decision in Roe v Wade, represents a quantum leap in the expansion of individual rights under the Fourteenth Amendment. In one fell swoop and without precedent, the Court stated that, "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's

decision whether or not to terminate her pregnancy." 410 U.S. at 153.

The foundation for this conclusion is the Court's recitation of cases that stand for the proposition that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', . . . are included in this guarantee of personal privacy." 410 U.S. at 152. Clearly, a woman's ability to procure an abortion is not "fundamental" nor is it "implicit in the concept of ordered liberty." In the case now before this Court, the Appellees are a group of medical professionals and abortion facility operators. The procedure contemplated and carried out by these individuals and facilities is by no stretch of the imagination "private." The abortions take place in a facility open to the public and often financed by

public monies, as was the case in Missouri.

The litany of privacy cases recited by the Roe Court each involved actions that were confined to the privacy of an individual's home. In a recent decision, however, this Court made clear that not all matters relating to sexual intercourse or even intimate relationships taking place within the home were constitutionally protected "private" actions. In Bowers v Hardwick, 478 U.S. 186, 191 (1986). the Court stated, "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." Clearly, the right to privacy is limited even when it involves the most intimate actions.

In circumstances that involve a commercial, often publicly financed, transaction any semblance of privacy evaporates. The actions of the pregnant woman seeking an abortion are taken from the home into the marketplace.

The identification of abortion as "fundamental" was also questioned by Mr. Justice Rehnquist in dissent in Roe, when he stated, "[t]he fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." 410 U.S. at 174. Clearly, abortion is a "right" created only by the Roe Court and unfounded on any legal or scientific evidence.

B. The Trimester Approach is Not Based Upon Credible Medical Evidence

The trimester approach developed by the Roe Court relies upon an arbitrary scale based upon the woman's fictitious right to privacy in obtaining an abortion. The trimester approach developed by the Court is less a recognition of medical discernment as to the quantitative identification of human life as it is a qualitative valuation of certain human beings. In the most simple terms, the Roe Court identified that particular human beings, selected because of their mothers' ability to quickly procure an abortion, are less valuable than those whose mothers are less informed or less decisive.

If all humans are, in fact, "created equal," then each has equal value from the point of creation and does not become

more or less valuable depending upon his or her identification at a particular point in the gestation period. The Missouri legislature should be free to recognize the value of each of the individuals created in Missouri. Consequently, the Roe notion of viability is misguided. In Thornburgh v American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Justice White, in dissent, stated, "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability." 476 U.S. at 795.

Roe prevents a state, such as Missouri, from recognizing medical

information supporting the position that life begins at conception and enacting legislation to preserve that life. As Mr. Justice White stated in Thornburgh, "Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. Roe v Wade implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never--not in 1787, 1791, 1868, or at any time since--done any such thing. I would return the issue to the people by overruling Roe v Wade." 476 U.S. at 797.

Mr. Justice White was precisely

correct in this analysis and Missouri has attempted to do just that. The decision in Roe, resulted in the usurpation of legislative authority in a majority of Statehouses. At best, Roe is based on tenuous legal and medical grounds. As technology advances, the sliding scale of "viability" is rendered meaningless.

CONCLUSION

The Court has before it a clear opportunity to recognize a state's ability to protect all human life. Missouri seeks to protect the life of all of the individuals within its state, even the unborn. There is no constitutional impediment to this legitimate exercise of state power.

In addition, this Court has the opportunity to articulate a discernible solution to the legal morass surrounding the abortion issue created in Roe. In reversing Roe, this Court will return to the states the authority they rightfully hold to enact legislation based upon the will of its citizenry.

For these reasons, in addition to

those urged by Appellant herein, the decision below should be corrected and reversed.

Respectfully submitted,
American Family
Association, Inc.

Peggy M. Coleman

Peggy M. Coleman
Legal Counsel
Attorney for Amicus

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this twenty-third day of February, 1989, to the following counsel of record:

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BRIEF

No. 88-605

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICI CURIAE OF FOCUS ON THE FAMILY, AND FAMILY RESEARCH COUNCIL OF AMERICA, IN SUPPORT OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976)	8, 10
Reproductive Health Service v. Webster, 662 F. Supp. 407 (D.C. Mo. 1987), *aff'd*, 851 F.2d 1071 (8th Cir. 1988)	4
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	5, 28, 30
Williamson v. Lee Optical, 348 U.S. 483 (1955)	29
Other Authorities:	
Letter from Surgeon General Koop to President Reagan (January 9, 1989)	13
S. Rep. No. 98-149, 98th Con. 1st Sess. 44 (1983)	24
W. Prosser, LAW OF TORTS (1971)	3
Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231	3
Books and Scientific Materials:	
Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 BR. J. OF OBSTETRICS AND GYNECOLOGY 1115 (1980)	20
Atrash, *Ectopic Pregnancy in the United States, 1970-1983*, 35 MORBIDITY AND MORALITY WEEKLY REPORT 225 (1986)	17

TABLE OF AUTHORITIES—Continued

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Barber, *Ectopic Pregnancy: A Diagnostic Challenge*, 9 THE FEMALE PATIENT 10 (1984)	16
Barron, *Sexual Activity in Girls Under 16 Years of Age*, 93 BR. J. OF OBSTETRICS AND GYNECOLOGY 787 (1986)	14
Burkman, *Culture and Treatment—Results in Endometritis Following Elective Abortion*, 128 AM. J. OF OBSTETRICS AND GYNECOLOGY 556 (1977)	15
Cavenar, Maltbie and Sullivan, *Psychiatric Sequelae of Therapeutic Abortion*, 39 N.C. MEDICAL J. 101 (1978)	27
Conger, *Cluster of Uterine Perforations Related to Suction Curettage*, 40 OBSTETRICS AND GYNECOLOGY 551 (1972)	15
Crell and Rabon, *The Effects of Sibling Death on Surviving Child, A Family Perspective*, 18 FAMILY PROCESS 471 (1979)	26
Ewing and Rouse, *Therapeutic Abortions and a Prior Psychiatric History*, 130 AM. J. OF PSYCHIATRY 37 (1973)	20
K. Franco, Dysphoric Reactions in Women After Abortion (1984) (unpublished paper, Medical College of Ohio)	21
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Gerrard, *Sex Guilt in Abortion Patients*, 45 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 708 (1977)	24
D. GOLD, THE ABORTION CHOICE: PSYCHOLOGICAL DETERMINANTS AND CONSEQUENCES (1984)	20
Gould, *Postabortion Depressive Reactions in College Women*, 28 J. OF AM. COLLEGE HEALTH ASSOC. 316 (1980)	21
Greenglass, *Therapeutic Abortion and Psychiatric Disturbance in Canadian Women*, 21 CANADIAN PSYCHIATRIC ASSOC. J. 45 (1976)	21

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Handy, *Psychological and Social Aspects of Induced Abortion*, 22 BR. J. OF CLINICAL PSYCHOLOGY 29 (1982)	20
Harlap and Davies, *Late Sequelae of Induced Abortion: Complications and Outcome of Pregnancy and Labor*, 102 AM. J. OF EPIDEMIOLOGY 217 (1975)	17
Hittner, *Feelings of well-being before and after abortion*, 9 AM. MENTAL HEALTH COUNSELOR'S ASSOC. J. 98 (1987)	20
Houge, Cates and Tietze, *Impact of Vacuum Aspiration Abortion on Future Childbearing: A Review*, 15 FAM. PLANNING PERSPECTIVE 119 (1983)	14
I. Kent, Emotional Sequelae of Therapeutic Abortion, presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon (September 1977)	19, 22
Kumar and Robson, *Previous Induced Abortion and Ante-Natal Depression in Primiparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 PSYCHOLOGICAL MEDICINE 711 (1978)	19-20
Leong, Duby and Kinch, *Fetal Maternal Transfusion Following Early Abortion*, 54 OBSTETRICS AND GYNECOLOGY 424 (1979)	17
Levin, *Ectopic Pregnancy and Prior Induced Abortion*, 72 AM. J. OF PUBLIC HEALTH 253 (1982)	17
Levin, Schoenbaum, Monson, Stubblefield and Ryan, *Association of Induced Abortion with Subsequent Pregnancy Loss*, 243 J. OF A.M.A. 2495 (1980)	14
Lyons, Larson, Huckeba, Rogers and Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966-1985*, in VALUES AND PUBLIC POLICY 77 (1988)	13
Mattinson, *The Effects of Abortion on a Marriage. Abortion: Medical Progress and Social Implications*, 115 CIBA FOUND. SYMP. 165 (1985)	25

TABLE OF AUTHORITIES—Continued

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McCoy, *Emotional Reaction of Women to Sterilization and Therapeutic Abortion*, 75 J. OF OBSTET. & GYN. OF THE BR. COM. 1054 (1968).. 26

Mester, *Induced Abortion in Psychotherapy*, 30 PSYCHOTHERAPY AND PSYCHOSOMATICS 98 (1978) 20, 22

E. Milling, *The Men Who Wait*, WOMEN'S LIFE, Apr. 1975 at 48 24

E. Moore-Caver, *The International Inventory on Information on Induced Abortion*, International Institute for the Study of Human Reproduction (1974) 19

Ney, *A Consideration of Abortion Survivors*, 13 CHILD PSYCHIATRY AND HUMAN DEV. 168 (1983) 26, 27

Ney, *Relationship Between Abortion and Child Abuse*, 24 CAN. J. OF PSYCHIATRY 610 (1979) 26, 27

P. Ney, Mental Health and Abortion (March 1988) (unpublished paper) 19, 20, 26, 27

Osofsky and Osofsky, *The Psychological Reaction of Patients to Legalized Abortions*, 42 AM. J. OF ORTHOPSYCHIATRY 48 (1972) 19

Pike, *Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women*, 43 BR. J. OF CANCER 72 (1981) 17

S. Plattner, Conceptual systems and sex role attitudes and beliefs and their effect on short-term abortion outcome (1979) (unpublished doctoral dissertation, Univ. of Colorado) 24

Ratten and Beischer, *The Effect of Termination of Pregnancy on Maturity of Subsequent Pregancy*, 1 MED. J. AUST. 479 (1979) 14

D. REARDON, WOMEN EXPLOITED: A NATION DECEIVED (1986) 23, 27

Roht, Fonner, Aoyama and Fonner, *Increased Reporting of Menstrual Symptoms among Women Who Used Induced Abortion*, 127 AM. J. OF OBSTETRICS AND GYNECOLOGY 356 (1977) 17

TABLE OF AUTHORITIES—Continued

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V. Rue, *Abortion in Relationship Context: How Abortion Affects Males*, ASSOC. FOR INTERDISCIPLINARY RESEARCH NEWSLETTER, Summer 1988 at 3 26

V. Rue, *Pelvic Inflammatory Disease and the Role of Induced Abortion*, ASSOC. FOR INTERDISCIPLINARY RESEARCH NEWSLETTER, Summer 1988 at 4 16

V. Rue, *The Impact of Induced Abortion on Surviving Siblings: Case Studies*, ASSOC. FOR INTERDISCIPLINARY NEWSLETTER, Fall 1988 at 2 ..... 26, 27

Schulz, Grimes and Cates, *Measures to Prevent Cervical Injuries During Suction Curettage Abortion*, LANCET, May 28, 1983 at 1182 17

Spaulding and Cavenar, *Psychoses Following Therapeutic Abortion*, 135 AM. J. OF PSYCHIATRY 364 (1978) 21

A. SPECKHARD, POST-ABORTION COUNSELING (1987) 22, 23

A. SPECKHARD, PSYCHO-SOCIAL ASPECTS OF STRESS FOLLOWING ABORTION (1987) 18, 19, 20, 24

Tietze and Lewis, *Joint Program for the Study of Abortion*, 3 STUD. FAMILY PLANNING 97 (1971) 15

Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981) 21

Trichopoulos, *Induced Abortion and Secondary Infertility*, 83 BR. J. OF OBSTETRICS AND GYNECOLOGY 645 (1976) 17-18

U.S. Dept. HHS, 15 MORBIDITY AND MORTALITY WEEKLY REPORT 33 (1984) 17

T. Wall, PSYCHOLOGICAL AFTER-EFFECTS OF ABORTION (1986) (Unpublished master's thesis, Wayne State University) 21

Washington, *The Economic Cost of Pelvic Inflammatory Disease*, 255 J. of A.M.A. 1735 (1986).. 16

W.H.O. Task Force, *Gestation, Birth Weight and Spontaneous Abortion in Pregnancy after Induced Abortion*, LANCET, Jan. 20, 1979 at 142.... 14

INTEREST OF *AMICI CURIAE* *

The issues in this case directly affect the physical, psychological and emotional health of unborn children, mothers, fathers and families in the United States. *Amici* Focus on the Family and Family Research Council of America, who work to preserve and protect the family, have particular knowledge about the impact of abortion that will be helpful to the Court in this case.

SUMMARY OF THE ARGUMENT

The Missouri General Assembly passed legislation to advance its interests in protecting the health and well-being of unborn children. One provision, applying generally to the laws of the state, included findings that human life begins at conception, and that unborn children have protectable interests in life, health and well-being. Another, applying when an abortion is considered, requires that physicians undertake tests that are necessary to make three specific findings about the development of the unborn child.

Both provisions legitimately implement the State's authority to protect its citizens. The former protects unborn children in areas of law that *Roe v. Wade* was never intended to influence. The latter protects the State's interest in the health of viable unborn children. Both were challenged in the hope that federal courts would draw yet two more lines originating from the *Roe* trimesters.

The trimester framework constitutionalized in *Roe* was based on the Court's 1973 belief that maternal mortality rates for abortion were better than those for childbirth. Safety of the fetus was not considered, since the Court decided not to recognize any state interest in protecting the life of unborn children until after viability. The scientific assumptions upon which the trimester framework was premised were fatally narrow, and do not reflect subsequent advances in medical science. Particularly, *Roe*'s reliance on mortality rate comparisons is unjustifiable, since mortality rates do not reflect the array of

---

* A description of the *Amici* appears at Appendix 1a. This brief is submitted with the written consent of both parties, filed with the Clerk of this Court.

serious psychological, physical, and familial harm caused by abortion. A significant body of scientific evidence, and the personal experiences of women who have suffered severe post-abortion trauma, show the extent of this harm.

Roe v. Wade embarked this Court on a road of legislative line drawing, scientific and medical review, and judicial rule-making unmoored to constitutional principle. This Court has long recognized that the state legislatures are constitutionally competent and better situated to protect the health and safety of all their citizens. *Amici* respectfully urge this Court to abandon the outmoded, unscientific and constitutionally unworkable trimester framework, or any other framework based on evolving scientific evidence. When there is a rational basis for a State abortion regulation, the States should be permitted to effectuate their interests in protecting the life and health of the unborn, their mothers, and their famiiles.

ARGUMENT

I. MISSOURI'S LEGISLATIVE FINDINGS THAT LIFE BEGINS AT CONCEPTION AND THAT UNBORN CHILDREN HAVE PROTECTABLE INTERESTS IN LIFE, HEALTH AND WELL-BEING ARE A CONSTITUTIONALLY LEGITIMATE EXERCISE OF STATE AUTHORITY.

The laws of the fifty states recognize that unborn children are deserving of protection throughout the spectrum of statutory and decisional law. While this Court has limited the implementation of the state interests in protecting unborn children in the abortion context, it only did so because *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny found a countervailing privacy right in a woman's choice of whether to have an abortion. This Court has not precluded the state legislatures from finding that life begins at conception and that unborn children have protectable interests where, as here, no constitutional interest is impinged.

The Missouri General Assembly made just such a finding in passing RSMo. 1.205.1 (1986). Rights of unborn

children have long been recognized in tort, criminal, inheritance, trusts, insurance, welfare, civil rights, and public health law, and laws protecting children from child abuse. *See* Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L.Rev. 231, 252-254. All fifty states recognize tort actions for injury to the unborn. *See generally* W. Prosser, *Law of Torts* 335-338 (1971). Causes of actions have been recognized for negligence occurring prior to conception as well as for prenatal personal injuries after conception. *See e.g., Bergstresser v. Mitchell*, 448 F. Supp. 10, *aff'd*, 577 F.2d 22 (8th Cir. 1977). It is against this backdrop of pervasive state activity that this Court's abortion decisions must be considered.

In *Roe*, the Court posed some of the medical, philosophical and legal questions surrounding the legal status of unborn children, but tried not to "resolve the difficult question of when life begins." 410 U.S. at 159.

Of course, *Roe* did effectively answer the question of when, in the abortion context, a protectable interest in unborn life begins. It did so, "in light of present medical knowledge," *id.*, at 163, by balancing the newly-recognized right to privacy with the State's compelling interests in the health and well-being of both the mother and unborn child. The Court found that, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling point' is at viability." *Id.* at 162-163. Prior to viability, the unborn child receives no protection when a woman and her doctor agree that an abortion will be performed.

In 1986 the Missouri General Assembly, having the benefit of the thirteen years of profound advances in medical knowledge since *Roe* was passed, made a determination about when life begins, and opted to recognize that unborn children have protectable interests in life, health and well-being. Although these findings did not alter the State's regulation of the performance of abortions, the court of appeals held that these provisions were unconstitutional. That court reasoned that "the statute

is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations", and that these findings could not be considered "abortion-neutral" as the State contends, since they were "contained in a bill that relates almost exclusively to abortion." *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988).

The holding of the court below was erroneous in a number of ways. First, the court did not show that the right to seek an abortion would be unduly burdened, or even burdened at all, by operation of the General Assembly's findings, although this Court has held that such a showing must be made before a state statute is held unconstitutional in the abortion context. *Maher v. Roe*, 432 U.S. 464, 473 (1977).

Indeed, no constitutional interest is impinged. Although the provisions in question were passed along with other provisions relating to abortion, *see* RSMo. 188.010, 188.029, 188.200, 188.205, 188.210, 188.215, 188.220, Jurisdictional Statement App. at A88-A91, none of these other provisions is affected by 1.205.1 (1) and (2). There are two reasons for this: (1) The abortion-related provisions deal with the viability determination and restrictions on state assistance for abortions, and thus have nothing to do with the question of when life begins; and (2) Sections 1.205.2 and 188.010 specifically recognize that the reach of *all* of these provisions are limited by the Constitution and the decisions of this Court.

Second, these findings clarify and extend protections for unborn children in areas of the law that *Roe* and its progeny never purported to affect, such as tort, criminal and property law. *Roe* noted that state law offers protection to the unborn in areas such as tort and probate, 410 U.S. at 161-162, but never suggested that those areas of the law would have to be conformed to its rulings on abortion. Neither do any other decisions of this Court suggest that in arriving at the balance it struck

in *Roe*, the Court intended to supercede the long-established right of the states to protect the health and well-being of unborn children in other areas of the law.

Finally, Missouri code sections 1.205.1(1) and (2) should be upheld as rational findings of the State legislature regarding the status of unborn children: [1]

> "[O]ne must recognize first, that the fetus . . . bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* . . . and second, that there is no nonarbitrary line separating a fetus from a child. . . ."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting).

II. MISSOURI IS NOT CONSTITUTIONALLY PROHIBITED FROM REQUIRING PHYSICIANS TO EVALUATE WHETHER A FETUS IS VIABLE, OR FROM REQUIRING PHYSICIANS TO MAKE SPECIFIC MEDICAL FINDINGS TO DETERMINE VIABILITY, SINCE THESE ACTIVITIES REASONABLY IMPLEMENT MISSOURI'S CONSTITUTIONAL INTERESTS IN PROTECTING VIABLE UNBORN CHILDREN.

This Court's abortion decisions have recognized the states' "unquestionably strong and legitimate interest in encouraging normal childbirth", and in "protecting the potentiality of human life", interests that exist "throughout the course of a woman's pregnancy". *Beal v. Doe*, 432 U.S. 438, 445-446 (1977) (*citing Roe*, 410 U.S. at 162). *Roe* and its progeny have thus far limited the effectuation of that right until the fetus is viable, the point after which *Roe* elected to recognize a "compelling" state interest in the right of the unborn child. *Roe, id.*, at 163.[2]

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[1] A videotape account of various stages of fetal development, and personal experiences of women who have had abortions, is provided in "Eclipse of Reason", filed with the lodging of Amici Curiae.

[2] The Court's election of viability as the compelling point to effectuate the states' interests in the unborn child is not challenged

The Missouri statute under consideration here is fully consistent with this Court's decisions concerning viability. Avoiding a fixed definition of viability, it requires a physician to determine viability before performing an abortion on a woman he has reason to believe is twenty or more weeks pregnant, and requires that:

> In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child. . . .

RSMo. 188.029 (1986).

The court of appeals, 851 F.2d at 1075, held that Missouri could not constitutionally require physicians to perform tests necessary to make findings of gestational age, weight, and lung maturity. The court relied on *Colautti v. Franklin*, 439 U.S. 379 (1979), which stated:

> "[N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus". *Id.*, at 388-389.

Colautti does not prohibit Missouri from requiring physicians to perform tests that are necessary to make the three listed findings. In *Colautti*, the Court found a Pennsylvania statute to be unconstitutionally vague, and therefore devoid of the scienter requirement necessary for imposing a criminal penalty. 439 U.S. at 390. In the civil case now before the Court, however, the district court upheld Mo. 188.029 against appellees' challenge that it was unconstitutionally vague. 662 F. Supp. 407, 422 (W.D. Mo. 1987).

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here, since the Missouri statute at issue is permissible under *Roe* and its progeny. In the discussion supporting reversal of *Roe*, *infra*, the basis of the viability standard is briefly discussed. *See* footnote 2, *infra* at 13.

The Missouri statute does not forbid physicians from reviewing these or any other factors, or from making other findings, to assess viability. It makes no attempt to proclaim or fix the elements of viability. The statute only requires physicians to perform tests that are necessary to make three specific findings, to ensure at least that something more than a conjectural attestation of viability is made. Hence, the statute is fully consistent with *Colautti*, and should be upheld by the Court.

Further, given the context in which abortions are provided in the United States, it is rational for the Missouri legislature to require specific findings to give effect to its compelling interest in protecting the life of viable unborn children. Abortion is big business. Abortions are conducted in the United States under conditions that may promote disinterest or even hostility toward an objective viability assessment. In 1982, abortions cost $484 million; in 1983, abortions of 1.068 million first trimester pregnancies averaged $200 per procedure. *See Appendix B.* The very individuals who must be relied upon by the State to make the viability determination may own or be paid for services by abortion clinics, and hence their income is adversely affected any time they find that a fetus is viable. Even assuming the good faith of the person who will perform the abortion, the State would be justified in ensuring that unconscious bias does not influence the viability determination.

Unfortunately, as the Court is aware, objectivity on the part of persons making the viability determination and performing the abortion cannot always be assumed. In *Planned Parenthood Association of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), the Court described the background of one abortion practitioner who served as a witness at trial in that case:

> He is a member of the National Abortion Federation, "an organization of abortion providers and people interested in the pro-choice movement." . . . His disinterest in protecting fetal life is evidenced by his

> agreement "that the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus." He also agreed that he "[n]ever ha[s] any intention of trying to protect the fetus, if it can be saved," and finally that "as a general principle" "[t]here should not be a live fetus."

Id., at 483, 484 n.7.

While this physician's background may not be generalizable to all physicians who perform abortions, it is highly significant to the case that is before the Court today. This same witness testified for appellees in the instant case, and claimed to have performed 50,000 abortions since 1969, 60% of which were in the second trimester. Trial Transcript at 1-80, 1-81.

This Court is also already aware that the settings under which many abortions are performed in the United States may not be conducive to an objective finding of viability:

> The abortion itself takes five to seven minutes. . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . .

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 91-92 (1976) (Stewart, J., concurring) (citations omitted). Such a setting is hardly conducive to a thorough, objective viability determination.

Given the financial stake and dominant business purpose of abortion centers, the bias that might reasonably be expected on the part of some of those performing abortions, and the settings under which abortions often occur, there is clearly a rational basis for Missouri to require minimal testing in making the viability determination.

Under these circumstances, it might be unreasonable for states *not* to require that some specific findings be made to ensure that the viability determination actually occurs.

III. SOUND CONSTITUTIONAL PRINCIPLES, A GROWING BODY OF SCIENTIFIC INFORMATION ABOUT ABORTION'S EFFECTS, AND INCREASINGLY ARBITRARY APPLICATION OF THE TRIMESTER FRAMEWORK REQUIRE THAT *ROE v. WADE* BE RECONSIDERED AND THAT STATE LEGISLATURES BE PERMITTED TO PROTECT THE PUBLIC HEALTH OF ALL THEIR CITIZENS.

Roe v. Wade decided that a woman's choice to abort in the first trimester could not be constrained by state abortion regulations. The Court premised this decision upon its 1973 understanding that mortality rates were more favorable for women aborting in the first trimester than for women whose pregnancies continue to term. This premise did not reflect the serious psychological, emotional and physical but non-fatal harm experienced by women who abort, and the harm suffered by their families. A significant body of scientific evidence calls into question the premise of *Roe*, and indicates that this Court should permit the states to legislate rational measures to protect women, unborn children, and their families.

A. The *Roe* Trimester Framework Is Based On An Arbitrary And Limited Review Of Outdated Scientific Information, Not Constitutional Principles, And Is Unrelated To The Constitutional Interests *Roe* Purported To Balance.

Roe v. Wade held that a woman has a right of privacy, founded in the Fourteenth Amendment, that is broad enough to encompass her decision whether to terminate her pregnancy, 410 U.S. at 153. That privacy right is not "absolute" or "unqualified." *Id.*, at 154.

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . . The situation therefore is inherently different from

> marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned."

Id., at 159.

Roe and its progeny confirmed that this newly-recognized privacy right must also "be considered against important state interests in regulation", *id.*, at 154, and that these state interests encompass an "important and legitimate interest in the health of the mother . . .", *id.* at 163, and the protection of "potential human life", *id.* at 159. The significant state interests in protecting potential life, and the states' "unquestionably strong and legitimate interest in encouraging normal childbirth", exist throughout the woman's pregnancy, *Beal v. Doe*, 432 U.S. 438, 446 (1977), just as they do where the state interests in protecting the mother's health is concerned. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80-81 (1976).

Rather than reviewing state abortion regulations to see if they were rationally related to a legitimate state purpose, the Court in *Roe* attempted to balance the new privacy right against the state interests in the health of the mother. To strike this balance, the Court focused only on its 1973 understanding of mortality rates:

> Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. *Consequently, any interest of the State in protecting the woman* from an inherently dangerous procedure, except when it would be equally dangerous for her to forgo it, *has largely disappeared.*

Roe, 410 U.S. at 149 (emphasis added).

Convinced that the mortality rate comparison had provided a clear point in pregnancy before which no state could logically claim a compelling interest in the health of the mother, the Court held that the state interest in the

health of the mother did not become "compelling" until approximately the end of the first trimester. *Id.* at 163. Prior to the second trimester, states are permitted only to retain "an interest in ensuring the validity of *Roe*'s factual assumption that 'the first trimester abortion [is] as safe for the woman as normal childbirth at term' ". *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 430, n.12 (1983) (discussing the State's right to regulate conditions and qualifications in first trimester abortion decisions) (*citing Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam).

Roe's reliance on maternal mortality, to the exclusion of other effects on the pregnant woman, in fashioning the trimester approach is completely unjustifiable. First, in conjunction with the Court's focus on "viability", the trimester framework completely discounted any state interest in protecting the unborn child for all of the first and most of the second trimester.[3] Second, having found that the compelling state interest in maternal health only arises at the second trimester, it failed to give effect to *any* state interest in the first trimester:

> The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest

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[3] When abortion occurs in the first, second or third trimester, *amici* believe two human beings are affected. For one, the pregnant woman, the Court has established a right of privacy, and has engaged in balancing complicated and often conflicting scientific evidence to protect her health. For the other, the unborn child, no right of privacy has been accorded, even though the outcome is, in the vast majority of cases, death. Although it recognized the state interest in protecting potential life, *Roe* foreclosed state implementation of this interest until late in the pregnancy. After providing a short review of the complex philosophical, medical, historical and legal questions posed on the issue of protectable life of unborn children, *Roe* arbitrarily fixed the "compelling" point for the state interest at viability. The only rationale *Roe* stated for this arbitrary decision was an assertion, without further explanation, that "State regulation protective of fetal life after viability has both logical and biological justification." *Roe*, 410 U.S. at 163.

> in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.

Akron, 462 U.S. at 460 (O'Connor, J., dissenting) (emphasis in original).

Third, the reliance on maternal mortality rates alone is unjustifiable because these rates do not reflect severe but non-fatal effects of abortion that are well within the constitutional ambit of state regulation to protect the health of their citizens. As *Roe*, its progeny, and other well-settled opinions of the Court agree, there are significant and wide-ranging *morbidity* effects of abortion, which are not reflected in mortality statistics, and which must be taken into account in evaluating the effects of abortion: "[M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient", *Doe v. Bolton*, 410 U.S. 179, 192 (1973). *See also Colautti v. Franklin*, 439 U.S. 379, 394 (1979), *H.L. v. Matheson*, 450 U.S. 398, 405-406 (1981). The Court's cognizance of the wide-ranging, complex effects of abortion that it deemed appropriate for consideration in the physician/client relationship reflects an understanding of the scientific evidence available at the time, and which has grown since *Roe* was decided. These "[h]ealth-related factors that may legitimately be considered by the State go well beyond what various medical organizations have to say about the *physical* safety of a particular procedure". *Akron*, 462 U.S. at 467 (O'Connor, J., dissenting) (emphasis in original). Yet this understanding was inexplicably ignored when *Roe* relied on mortality rates alone to establish the trimester framework.

B. A Substantial Body Of Scientific Data Exists That Concludes That Abortion Is Associated With Wide-Ranging Detrimental Effects On Women And Their Families, Effects That Are Not Reflected In The Morality Rates Relied Upon In *Roe v. Wade*.

The *Roe* focus on the relative maternal mortality rates in abortion and childbirth reflects only a narrow subset of the medical and health effects of abortion on the pregnant mother. Numerous studies by independent medical sources have concluded that abortion frequently results in significant, negative and often permanent physical, psychological, social and familial effects. The studies of abortion's effects often reach conflicting conclusions, and many suffer from methodological limitations.[4] However, these studies demonstrate that mortality rates alone do not reflect the scope of the negative health impact of abortion cognizable by the state. The Court need not find these studies conclusive to recognize the significant

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[4] Surgeon General Koop's January 9, 1989 letter to President Reagan laments the difficulty inherent in documenting the adverse physical effects of abortion for two reasons: (1) approximately half of the total abortions are done in free-standing abortion clinics where records are not kept, and (2) 50 percent of the women who have an abortion deny having one when questioned.

Collection of post-abortion morbidity data can also be flawed because it is obtained on a voluntary basis from abortion providers, whose business and reputation would be adversely affected by negative data. As the Court has noted, "Abortion clinics, now readily available in most urban communities, [are] operated on a commercial basis . . .". *H.L. v. Matheson*, 450 U.S. 418, 420 n.8 (1981). Abortion providers often conduct little follow-up of women having abortions, and physicians, mental health care providers and emergency room personnel often are not told of prior abortion experiences. C.f. Lyons, Larson, Huckeba, Rogers and Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966-1985* in VALUES AND PUBLIC POLICY 77 (1988). The incidence and severity of negative physical effects documented to date may thus be seriously under-reported.

[5] See *Appendix B*, Table 2: Adverse Physical Effects of Induced Abortion, and corresponding bibliography.

disagreement that exists over the validity of the scientific premise of *Roe*.

1. *Physical Impact on Women Having Abortions.*

The following physical reactions have been associated with abortion: hemorrhaging, subsequent fetal malformations, cervical trauma, ectopic pregnancy, breast cancer, pelvic inflammatory disease, infertility, RH isoimmunization, subsequent miscarriage and death.[5]

a. *Low Birth Weight, Pre-Term Deliveries and Spontaneous Abortion in Subsequent Pregnancies From Induced Abortion.* A 1980 study conducted by the World Health Organization in nine cities worldwide indicates a significant increase in these three areas among women whose only previous pregnancy ended in abortion. W.H.O. Task Force, *Gestation, Birth Weight and Spontaneous Abortion in Pregnancy After Induced Abortion*, LANCET, Jan. 20, 1979 at 142. Therapeutic abortions performed in the first trimester have been linked to a significant increase in second trimester spontaneous abortions in the next pregnancy. Ratten and Beischer, *The Effect of Termination of Pregnancy on Maturity of Subsequent Pregnancy*, 1 MED. J. OF AUST. 479 (1979). Women whose first pregnancies were terminated were reportedly 3.4 times more likely to have a mid-trimester spontaneous abortion during their second pregnancy than women whose first pregnancy had resulted in a live birth. Houge, Cates and Tietze, *Impact of Vacuum Aspiration Abortion on Future Childbearing: A Review*, 15 FAM. PLANNING PERSPECTIVE 119 (1983). Women who have had two or more abortions reported a two- to threefold increased risk in miscarrying a subsequent wanted pregnancy. Levin, Schoenbaum, Monson, Stubblefield and Ryan, *Association of Induced Abortion with Subsequent Pregnancy Loss*, 243 J. OF A.M.A. 2495 (1980). A perspective study of teenagers also found a high rate of fetal loss in pregnancies that followed abortion. Barron, *Sexual Activity in Girls Under 16 Years of Age*, 93 BR. J. OF OBSTET. & GYN. 787 (1986).

b. *Infections, Excessive Bleeding and Perforation of the Uterus From Induced Abortion.* Although claims have been made about the relative safety of the abortion procedure, medical problems can still occur. A 1971 study found that among immediate complications of induced abortion were hemorrhages, laceration of the cervix and perforation of the uterus; the three combined were found in 1-2 percent after eight weeks gestation, and in 3.6 percent after 15 weeks or longer. Tietze and Lewis, *Joint Program for the Study of Abortion*, 3 STUDENT FAMILY PLANNING 97 (1971). A study of over 1500 women in 1972 also found that almost 10 percent (96.8 per 1,000 abortions) at 15 weeks gestation or more had perforation of the uterus occurring using suction curettage. Conger, *Cluster of Uterine Perforations Related to Suction Curettage*, 40 OBSTET. & GYN. 551 (1972).

In 1985 the Center for Disease Control in Atlanta, Georgia, estimated that 13,000 post-abortion women per year developed post abortal upper genital tract infection, which is associated with long-term morbidity, including, occasionally, infertility and ectopic pregnancy. *Genital Tract Infection*, 20 OBSTET. & GYN. NEWS 42 (1985) (quoting Kenneth Schulz, Center for Disease Control). In a 1977 Johns Hopkins Medical University study, 5.2 percent of first trimester induced abortion patients and up to 18.5 percent of second trimester patients suffered subsequent genital tract infections. "Occurrence of genital tract infection following elective abortion is a well-known complication." Burkman, *Culture and Treatment Results in Endometritis Following Elective Abortion*, 128 AM. J. OF OBSTET. & GYN. 556 (1977).

Infection from induced abortion in the uterus and fallopian tubes can have severe and permanent effects. A typical infection involving these organs is pelvic inflammatory disease (PID). PID, which is an inflammation of the female genital tract, starts in the cervix and may spread to other female organs and pelvic cavity, and is a major direct cause of permanent sterility, chronic ab-

dominal pain and an increased risk of extra-uterine pregnancy. V. Rue, *Pelvic Inflammatory Disease and the Role of Induced Abortion*, ASSOC. FOR INTERDISCIPLINARY RESEARCH NEWSLETTER, Summer 1988 at 4. Induced abortion is responsible for an estimated 150,000 to 250,000 cases of the over 1 million PID cases occurring annually in the United States. *Id.*, at 4. The total cost of PID and PID-associated ectopic pregnancy and infertility in the United States exceeded $2.6 billion in 1984 and will exceed $3.5 billion by 1990. Washington, *Economic Cost of Pelvic Inflammatory Disease*, 255 J. OF A.M.A. 1735 (1986).

Numerous personal accounts received by *Amici Curiae* and others from abortion victims lend support to the above findings.[6]

> "I had to go into the hospital four days after my second abortion for acute Pelvic Inflammatory Disease (PID), a painful infection in my fallopian tubes. The infection spread into my ovary, and seven days after the abortion there was no way to control the infection. One tube and ovary, about to rupture, had to be removed . . . In February, 1978, at 19 years of age, my doctor performed a complete hysterectomy, taking all reproductive organs and cervix." L-1.1.

c. *Ectopic Pregnancies from Induced Abortions.* "Moreover, the increased incidence of PID—especially from chlamydia—in induced abortion appear to play a leading role in the dramatic rise in ectopic pregnancies." Barber, *Ectopic Pregnancy: A Diagnostic Challenge*, 9 THE FEMALE PATIENT 10 (1984). In 1970, the incidence of ectopic or tubal pregnancy was 4.8 per thousand live births; by 1980 it was 14.5 per thousand births, a 300

[6] For the Court's convenience, the personal accounts from which excerpts have been taken, together with other accounts, are reproduced in a volume lodged with the Court. Letters or documents that appear in this volume are designated as "L-1" and "L-2". The letters and excerpts have been quoted and reproduced as sent, without corrections in punctuation, grammar or spelling.

percent increase in only a decade. U.S. Dept. HHS, 15 MORBIDITY AND MORTALITY WEEKLY REPORT 33 (1984). Though the death rate from ectopic pregnancies has fallen during this time span due to medical technological advances, it still accounts for over 10 percent of all maternal mortality. Atrash, *Ectopic Pregnancy in the United States, 1970-1983*, 35 MORBIDITY AND MORTALITY WEEKLY REPORT 225 (1986). A 1982 study found that the crude relative risk of ectopic pregnancies after one prior induced abortion is 1.6 and after two or more induced abortions is 4, which was significantly higher than the control group. Levin, *Ectopic Pregnancies and Prior Induced Abortions*, 72 AM. J. OF PUBLIC HEALTH 253 (1982).

d. *Sterility and Other Physical Complications From Induced Abortion.* Out of 752 mothers interviewed during a subsequent pregnancy, a study revealed an excess in malformations in birth and other pregnancy complications, such as bleeding, low birth weight, manual removal of placenta, and a two- to threefold increase in neonatal deaths. Harlap and Davies, *Late Sequelae of Induced Abortions: Complications and Outcome of Pregnancy and Labor*, 102 AM. J. OF EPIDEMIOLOGY 217 (1975).[7] "A 1976 study showed that the relative risk of secondary infertility among women with at least one induced abortion and with no spontaneous miscarriages was three to four times that among non-aborted women." Trichopou-

[7] Other documented complications for induced abortion have been RH isoimmunization, breast cancer, cervical injuries, and a history of multiple menstrual problems. Leong, Duby and Kinch, *Fetal Maternal Transfusion Following Early Abortion*, 54 OBSTET. & GYN. 424 (1979); Pike, *Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women*, 43 BR. J. OF CANCER 72 (1981); Schulz, Grimes and Cates, *Measures to Prevent Cervical Injuries During Suction Curettage Abortion*, LANCET, May 28, 1983 at 1182; Roht, Fonner, Aoyama and Fonner, *Increased Reporting of Menstrual Symptoms among Women Who Used Induced Abortion*, 127 Am. J. OF OBSTET. & GYN. 356 (1977), respectively.

los, *Induced Abortion and Secondary Infertility*, 83 BR. J. OF OBSTET. & GYN. 645 (1976).

The following letters received by *Amici* recount the physical impact of abortion on two women:

> "Well, I can't have kids now. It's really hard at times to know I gave up my only chance of having a family of my own. At least two times a year I cry my eyes out all night long over that fact. I know that God has forgave me. But it's hard to forgive myself. Everytime I see a baby I want one. And I know I can't have one. Cause, I had a abortion when I was just 14 years old." L-1.2.
>
> "My post abortion trauma is as painful to me today as it was 13 years ago when I realized what I had done to a human life . . . . I am married and struggling to conceive. The abortion market has devastated the adoption market." L-1.3.

Medical complications from induced abortions thus can be severe and permanent and repeat aborters increase their risk of physical complications. Since 1972, the number of abortions has dramatically increased from 587,000 to 1,589,000 in 1985, a 260 percent increase. *See Appendix C.* If only a small percentage of women having induced abortions experience one or more of those physical problems, the overall effect on women is significant, and worthy of state regulation and protection.

2. *Adverse Psychological Effects of Induced Abortion.*

A significant number of women who have abortions experience one or more negative psychiatric sequelae. *See* A. SPECKHARD, PSYCHO-SOCIAL ASPECTS OF STRESS FOLLOWING ABORTION (1987) (hereinafter cited as SPECKHARD).

a. *Mental Illness Symptoms Following Abortion.* In the psychological studies enumerated (*Appendix B*, Table 1 at 1a-7a), the mental illness symptomology following abortion are quite varied. They range from adjustment reactions to grief reactions to anniversary reactions to

symptoms of guilt, anxiety, depression and psychoses. Approximately 20 percent of post-abortion patients in a 1972 study expressed immediate negative reactions which included guilt, depression, grief, anxiety, sadness, shame, helplessness, hopelessness, sorrow, lower self-esteem, distrust and hostility toward self and others. Osofsky and Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 AM. J. OF ORTHOPSYCHIATRY 48 (1972) (hereinafter cited as Osofsky) (73 of 742 studied expressed guilt feelings); *see also* I. Kent, Emotional Sequelae of Therapeutic Abortion, presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon (September 1977) (hereinafter cited as Kent) (43 percent expressed anxiety); and P. Ney, Mental Health and Abortion (1988) (unpublished manuscript) (hereinafter cited as Ney 1988).

Guilt is a frequently documented emotional reaction to abortion. A review of the abortion literature found severe guilt occurring in up to 23 percent of the post-abortion patients. E. Moore-Caver, *The International Inventory on Information on Induced Abortion*, International Institute for the Study of Human Reproduction (1974). "Clinicians have documented many cases of women who function well before their abortion, but subsequent to their abortion they experience severe psychological problems precipitated by guilt over the abortion." SPECKHARD at 5.

In a recent in-depth case identification study, "the emotional responses to abortion as a 'stressor event' were most dramatic, with grief, guilt, anger, fear and depression being most predominant, with a large portion (over 85 percent) of the sample reporting experience with all five of these emotions." SPECKHARD at 67. Dr. Speckhard, as well as many other researchers, found that the most serious psychological complications sometimes were delayed as much as 20 years post abortion. *Id.* at 101-103; *see also* Kumar and Robson, *Previous Induced Abortion and Ante-Natal Depression in Primiparae: Preliminary*

Report of a Survey of Mental Health in Pregnancy, 8 PSYCHOLOGICAL MEDICINE 711 (1978); Mester, *Induced Abortion in Psychotherapy*, 30 PSYCHOTHERAPY AND PSYCHOSOMATICS 98 (1978); Ashton, *The Psychological Outcome of Induced Abortion*, 87 BR. J. OF OBSTET. & GYN. 1115 (1980); and Hittner, *Feelings of Well-Being Before and After Abortion*, 9 AM. MENTAL HEALTH COUNSELORS ASSOC. J. 98 (1987). "[P]re-occupation with the characteristics of the aborted child (experienced by 89 percent of the subjects), along with nightmares, flashbacks, hallucinations and perceived visitations related to the abortion, were viewed in this research as indicators that subjects had a high degree of psychological presence regarding the aborted fetus." SPECKHARD at 101. "Although this grief process was often found to be delayed, *all* of the subjects reported having one or more symptoms of grief which occurred either immediately or in the long term." *Id.*

b. *Delayed Psychological Consequences of Abortion.* While a number of studies show immediate adjustment or mental illness reactions to induced abortions, most of the more serious effects were the long-term and delayed psychiatric symptoms. A study conducted four weeks after the termination found that abortion patients had much poorer psychological adjustments than maternity patients. D. GOLD, THE ABORTION CHOICE: PSYCHOLOGICAL DETERMINANTS AND CONSEQUENCES (1984). *See* Ewing and Rouse, *Therapeutic Abortions and a Prior Psychiatric History*, 130 AM J. OF PSYCHIATRY 37 (1973); Handy, *Psychological and Social Aspects of Induced Abortion*, 22 BR. J. OF CLINICAL PSYCHOLOGY 29 (1982). In one study 12 to 18 months after initial presentation, a significantly greater proportion of the women who had abortions were under psychiatric treatment, admitted to a greater increase in use of alcohol and tobacco, used more tranquilizers and experienced more adverse personality changes than those whose pregnancies were not terminated. Ney 1988 at 3.

Some of the long-term and delayed negative psychological effects for women who had abortion can also include severe grief, isolation from social settings, suicide attempts, abdominal pains and severe depression, especially on the abortion or birth anniversary dates. *See Greenglass, Therapeutic Abortion and Psychiatric Disturbance in Canadian Women*, 21 CANADIAN PSYCHIATRIC ASSOC. J. 45 (1976); Tischler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981); T. Wall, PSYCHOLOGICAL AFTER-EFFECTS OF ABORTION (1986) (unpublished master's thesis, Wayne State University); Spaulding and Cavenar, *Psychoses Following Therapeutic Abortion*, 135 AM. J. OF PSYCHIATRY 364 (1978); and Gould, *Post-Abortion Depressive Reactions in College Women*, 28 J. OF AM. COLLEGE HEALTH ASSOC. 316 (1980).

Reports of long-term guilt and grief, similar to the one quoted here, have been frequently received by *Amici*.

> "Little did I know at 19 years old that my abortion was the beginning of years of pain, heartache, guilt, such trama that led me to drinking and drug abuse to numb the pain, tnat I couldn't change what I did . . . The grieving process is undescribable. The mourning for a child you killed out of immaturity, fear, no where to turn. To block some thing like this out, you can't." L-1.4.

As repeat aborters show higher levels of medical sequelae, repeat aborters demonstrated significantly higher emotional distress scores in interpersonal relationships than other women. A study of 71 women with multiple abortions showed that they had more often considered suicide and scored higher on borderline personality pathology and depression than the comparison sample. K. Franco, Dysphoric Reactions in Women After Abortion (1984) (unpublished paper, Medical College of Ohio). Forty percent of the women reported anniversary reactions and half of the women aborting sought psychotherapy months or even years after the procedure. *Id.*

Although some psychotherapists may be minimizing the impact of abortion's stress, Mester, *Induced Abortion in Psychotherapy*, 30 PSYCHOTHERAPY AND PSYCHOSOMATICS 98 (1978), many describe findings of women who did not enter psychotherapy on account of any perceived emotional after-effects of abortion but who were suffering from post-abortion trauma. *See* Kent at 2. Once alerted to the abortion history, psychotherapists found that a high percentage of these patients had many emotional symptoms due to an induced abortion. *Id.*

c. *Post-Abortion Stress Including Post-Abortion Syndrome.* Some clinicians are now using the term Post-abortion syndrome (PAS) to describe a family of psychiatric symptoms related to abortion. PAS is being discovered in a significant percentage of women who have had abortions, especially multiple abortions. The symptoms of PAS fall primarily into three main categories of response: (1) re-experience of the abortion trauma, (2) avoidance behaviors, (3) associated symptoms not present prior to abortion. A. SPECKHARD, POST-ABORTION COUNSELING 3-4 (1987). Clinicians, counseling those with past abortions, often equate PAS with a type of the well-recognized post traumatic stress disorder (PTSD). *Id.* "Like the Vietnam veterans who returned from their military experiences severely scarred psychologically, post-abortive women have experienced an event that they perceive to be both traumatic and outside the realm of general experience." *Id.* at 4.

A central component of long-term development of PAS is a woman's reliance upon the emotional defenses of denial and repression, alongside the use of avoidance behaviors, to cope with the post-abortion stress. A. SPECKHARD, POST-ABORTION COUNSELING at 2, 9-10. In time, the symptoms cannot be repressed, denied or avoided and PAS will become apparent. *Id.* at 11. Many women who experience PAS present themselves for therapy on the anniversary due date of the aborted child. *Id.* Of 230 women studied, 80 percent suffered chronic

negative psychological sequelae which clearly could be classified as severe post-abortion stress. D. REARDON, WOMEN EXPLOITED: A NATION DECEIVED (1986) (hereinafter cited as REARDON). Post-abortion stress (PAS), if not adequately treated, may evolve into a disabling mental illness of chronic and long-term duration. A. SPECKHARD, POST-ABORTION COUNSELING at 11.

Recently *Amici* received the following letter:

> "About Post-Abortive Stress. It is *real.* Like a person who goes to war and comes home only to have people tell him, 'Oh. That's behind you. You have to go on and forget about it.' A woman who undergoes an abortion can no more follow that kind of shallow advice than a veteran suffering from post-war stress. You don't just 'put' the taking of a human life from inside your womb, 'behind you.' It never leaves your memory. No matter how hard you try you don't forget. No one told me that I would experience the guilt and sadness that I do now, at the time of my abortion. I get depressed more than I ever have before, especially when the anniversary of my pregnancy, abortion and the time when my child would have been born, comes around. I always think about my baby. Even if the Lord grants me another child, it will never replace the child I carried for 11 weeks or more." L-1.5.

A psychiatrist and abortion doctor who has performed over 20,000 abortions describes the psychological effects of induced abortion as follows:

> " 'There is no question . . . about the emotional grief and mourning following an abortion. It shows up in various forms. I've had patients who had abortions a year or two ago—women who did the best thing at the time for themselves—but it still bothers them. Many burst out crying . . . . There is no question in my mind that we are disturbing a life process . . . . A psychological price is paid . . . . Something happens on the deeper levels of a woman's consciousness when she destroys a pregnancy. I know that as a psychiatrist.' " *The Washington Post*, Feb. 14, 1989 at F2.

Both physical complications like PID, miscarriage and sterility, and psychological effects such as PAS, guilt, depression and suicidal tendencies, have one overriding similarity: unless treated effectively, they will have profound and lasting adverse effects on the women and quite probably her family.

3. *Adverse Effects of Abortion on the Family.*

Large-scale negative psychosocial effects of abortion often become more visible when attention shifts from the pregnant women herself to relationshps with others, especially those family relationships, which comprise the basic unit of American society. S. Rep. No. 98-149, 9th Cong., 1st Sess. 44 (1983). *See Appendix B*, Table 3 and accompanying bibliography. Abortion and a stable marriage seem particularly incompatible: marriage status makes the abortion decision even more difficult and according to the research, abortion seems to signal the beginning of the end for many conjugal relationships.

a. *Abortion's effects on spousal relationship.* In a 1979 study, nearly half of the 150 women who elected abortion ended their relationships with the putative father. S. Plattner, Conceptual systems and sex role attitudes and beliefs and their effect on short-term abortion outcome (1979) (unpublished doctoral dissertation, Univ of Colorado). Interviews with over 400 men at an eastern abortion clinic also revealed that most of their relationships (70 percent) with the aborting women failed within one month after the abortion. E. Milling, *The Men Who Wait*, WOMEN'S LIFE, Apr. 1975 at 48-71. Many researchers identified serious sexual problems experienced by women who had abortions. *See* Gerrard, *Sex Guilt in Abortion Patients*, 45 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 708 (1977). In a recent study, "many (69 percent) of the subjects reported becoming sexually inhibited, and having feelings of sexual anxiety (35 percent) following their abortions." SPECKHARD at 103.

Two women's personal stories bring these findings into focus:

> "At the time of my pregnancy I thought that the councel I received was easiest to believe—which was 'that the contents of my uterus was only tissue and that aborting the product of our conception was the best choice for my life.' . . . The death of my child created intense relational problems with the baby's father and within one year our relationship ended. The end to our love did not end the pain, the nightmares, the emotional tie with the baby's father, the extremes of drug and alcohol use, the guilt and regret and the confused running from the tragic murder." L-1.6.
>
> "Jeff reacted to it by trying to commit suicide. Later, when I became pregnant again, he didn't want to feel the baby kick or anything. He said that it reminded him too much of the baby that was aborted and five days after I gave birth to our son, Jeff left and I divorced him. He has only seen Jason once since he was born." L-1.7.

Many of the married couples in a recent clinical report showed that many years after the abortion they were still troubled by a past abortion, and were largely unaware at the time of the abortion of the intensity of their feelings and personal meaning of this death experience. Mattinson, *The Effects of Abortion on a Marriage. Abortion: Medical Progress and Social Implications*, 115 CIBA FOUN. SYMP. 165 (1985). "Sometimes, apparently having been unable to mourn the loss of a child at the time of the abortion, the spouses show a delayed grief reaction, maybe mild, but persistent, or may occur in more extreme form only many years later when a subsequent loss of a different nature triggers off repressed or conflicting feelings related to the earlier loss of the baby." *Id.* at 165. "Because of the basic inequality between partners in the abortion decision, the capacity to develop trust, enhance communication and problem solving skills, and to build intimacy, honesty and companionship is severely handicapped and restricted."

V. Rue, *Abortion in Relationship Context: How Abortion Affects Males*, ASSOC. FOR INTERDISCIPLINARY RESEARCH NEWSLETTER, Summer 1988 at 3 (hereinafter cited as Rue 1988).

b. *Abortion's effects on "surviving children".* Approximately 50 percent of children in North America are or soon will be abortion survivors, i.e., children who have had siblings terminated by induced abortion. Ney, *A Consideration of Abortion Survivors*, 13 CHILD PSYCHIATRY AND HUMAN DEVELOPMENT 168, 169 (1983) (hereinafter cited as Ney 1983). "If abortion is selected as a solution to the immediate problem of unwanted pregnancy, older children in the family may misinterpret the act as a great threat and may require psychiatric treatment." McCoy, *Emotional Reaction of Women to Sterilization and Therapeutic Abortion*, 75 J. OF OBSTET. & GYN. OF THE BRITISH COMMONWEALTH 1054 (1968). Children are becoming increasingly aware when potential siblings are aborted that they are the survivors. Ney, 1988 at 15. "[K]nowing that the child is chosen to live makes life difficult for a child. He may feel tightly bound by obligations to the one who saved him from termination. Knowing that he was allowed to exist because he was desired may make him try too hard to stay desirable. If he becomes aware of the fact that siblings were terminated, and he is the survivor, he also may feel guilty for existence." *Id.* at 16. *See* Crell and Rabon, *The Effects of Sibling Death on Surviving Child, A Family Perspective*, 18 FAMILY PROCESS 471 (1979); V. Rue, *The Impact of Induced Abortion on Surviving Siblings: Case Studies*, Association for Interdisciplinary Research Newsletter, Fall 1988 at 2-6. Evidence indicates that post-abortion depression also hinders mother-infant bonding in a subsequent pregnancy and can lead to child abuse. Ney, *Relationship Between Abortion and Child Abuse*, 24 CAN. J. OF PSYCHIATRY 61 (1979).[8] The guilt and

[8] A 1979 report outlined eight methods of how an increasing rate of therapeutic abortion is leading to an increasing rate of child abuse. Ney, *Relationship Between Abortion and Child Abuse*, 24 CAN. J. OF PSYCHIATRY 610 (1979), 610-612. Ney's reports also underscore the fact that no evidence indicates elective abortions will reduce prevalence of child abuse, contrary to popular assertion that elective abortion decreases child abuse by making sure children are wanted. *Id.*, at 617.

depression following an induced abortion has been identified in many case studies as a factor in neglect and abuse of the subsequent child. Ney 1988 at 15.

For children who have siblings terminated by abortion, the children may have similar psychological conflicts to those children who survived disasters or illness which kill another sibling, such as unresolved guilt, fear of parents, obsession to please parents, blatant hostility. Ney, 1983 at 168.

c. *Abortion's effects on the family unit.* For women, abortion sometimes provides immediate relief, but generally guilt, secrecy, depression, denial and delayed psychological stress follow. For men, it increases masculine insecurity and promotes guilt, alienation, role conflict and lack of communication. *See* Rue, 1988 at 3. For children, abortions have been known to produce intrapsychic conflict, insecurity and mother-child bonding problems. *See* Cavenar, Maltbie and Sullivan, *Psychiatric Sequelae of Therapeutic Abortions*, 39 N.C. MED. J. 101 (1978); Ney, 1983 at 168; and REARDON, 1986 at 2. One particular result rises clearly from the studies and letters—*relationships end after abortions.* While other predisposing factors certainly affect some of these familial problems subsequent to abortions, abortions do not assist in strengthening the bonds of marriage and family. Indeed, it is a stressful precipitant and often leads to the unraveling of these important support systems.

While the claim that abortions are safer than childbirth is questionable at best when the focus is only on mortality rates (see *Amici Curiae* Brief of Feminists for Life, Women Exploited by Abortion *et al.*), it is particularly erroneous in light of the broad, adverse medical

complications, psychological effects and impact on the family that result from induced abortions. Conservatively, 22.5 million abortions have occurred since 1973. If only 10 percent of the women experience any one of these adverse effects, *2.25 million women* would be affected. Abortions harm women and families.

Any analytical framework, such as *Roe*'s trimester scheme, which seeks to balance the women's rights and the state's interests, must be capable of considering all health interests of the mother, including psychological, physical and psychosocial effects, as well as the important and legitimate state interests of protecting "familial integrity and health of the mother" in the abortion context, see e.g., *H.L. v. Matheson*, 450 U.S. 398, 411 (1981), *Roe*, 410 U.S. at 162, as well as of the "potential human life." *Id.* at 159-160. *Roe* and its progeny unfortunately ignore the serious but non-mortality impact of abortion on women. With 15 years of developing scientific evidence about the effects of abortion, the Court must, at this critical juncture, examine evidence of morbidity in its reconsideration of *Roe*'s trimester approach and its determination of who should draw the line to protect the health of the women along with the family—the state legislature or the courts.

C. *Roe v. Wade* Has Resulted In Arbitrariness And Disarray In Federal Law, Embarked This Court On A Course Of Inappropriate Legislative Oversight, And Denied Citizens The Ability To Decide Controversial Issues In The Democratic Process, And Should Be Overturned.

The trimester framework embraced in *Roe* and its progeny was rooted in science, not the Constitution. Having been a "major distortion in the Court's constitutional jurisprudence", this "unworkable scheme for constitutionalizing the regulation of abortion has . . . [an] institutionally debilitating effect", *Thornburgh v. American College of Obstretricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

The *Roe* line drawing contravenes this Court's long-standing recognition of State competence to regulate in the health arena. "We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts', *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (Holmes, J.)." *Maher v. Roe*, 432 US 464, 479-480 (1977) This recognition is particularly compelling in the context of abortion, where the analysis turns on a contemporary understanding of science: "[L]egislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts." *Akron*, 462 U.S. at 456, n.4 (O'Connor, J., dissenting).

Changes in understanding and medical science will always outpace the Court's ability to respond. When this Court's precedents are rooted in science and not in the Constitution, as was Roe's trimester framework, science is pitted against precedent, and the prestige of this honorable institution suffers.

Amici Curiae respectfully suggest that this Court can best protect the interests of our citizens by abandoning the trimester approach as outmoded, unscientific, and constitutionally unworkable, and by recognizing that the states have legitimate interests, existing throughout pregnancy, in protecting the life of the mother and the unborn child. Adoption of the "rational basis" standard of review, *Williamson v. Lee Optical*, 348 U.S. 483, 486 (1955), will ensure that State activities comport with a constitutional purpose. Where the Court recognizes a countervailing constitutional interest, a state may have to demonstrate that its regulation does not unduly burden another protected right. No constitutional interest is served, however, by arbitrarily severing the legitimate safety interests of the state legislatures and the electorate to whom they are responsible:

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people. . . . I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh, 476 U.S. at 796-797 (White, J., dissenting).

CONCLUSION

The portions of the court of appeals' judgments that invalidate appellants' abortion regulations should be reversed, and *Roe v. Wade* should be overruled.

Respectfully submitted,

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APPENDICES

APPENDIX A

DESCRIPTION OF *AMICI*

Amicus Focus on the Family is a Christian, non-profit organization that is committed to strengthening the emotional, psychological and spiritual health of families in the United States and throughout the world. *Amicus* believes that human life, from conception to death, is of inestimable worth. Its daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1300 stations. Its monthly magazine has a circulation of 1.7 million. It receives an average of more than 8000 letters daily, many of which describe the causes and results of past trauma, including the abortion experience.

Amicus Family Research Council of America, a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for Focus on the Family. As such, it studies matters affecting the family, including the effects of abortion.

This case raises questions about the extent to which all states can protect the health and well-being of unborn children, mothers, fathers, and all family members who may be affected by abortion. The Court will review whether state legislatures may make findings about when human life begins, findings which have an impact in many areas of the law other than abortion. This case also presents an opportunity for the Court to reconsider the basis and holdings of its previous abortion decisions. Because the Court's decision will have a significant impact on millions of American families, *Amici* wish to present their views to the Court.

APPENDIX B

TABLE 1

Adverse Psychological, Psychosocial and Social Effects of Induced Abortion (By Year)

Researcher(s)	Date	Major Findings
Jansson	1965	An analysis of numerous major studies, i.e. Ekblad (1955), Aren & Amark (1957), Hultin & Ottosson (1962), Lindberg (1948), Hook (1963), Jansson (1963) and Freundt (1964), showed mental insufficiencies strikingly more common after induced abortions than other abortions or delivery. Induced abortion adjudged fairly ineffective as a psychiatric therapeutic means.
Bracken and Suigar	1972	Self-reported negative abortion reactions were associated with being unmarried, young and lacking support from partner and parents.
Osofsky and Osofsky	1972	16% of abortion patients were judged unhappy and 25% expressed guilt.
Kaltreider	1973	Reported on the increased emotional difficulties in midtrimester abortion patients, noting that those women who perceived the fetus as a human being, i.e. baby, felt more guilty or sad.
Ewing and Rouse	1973	19% of post-abortion patients expressed immediate negative reactions, especially if there was a prior history of emotional disturbance.
Moore-Caver	1974	Review of abortion literature found severe guilt in 2 to 23% of patients.
Blumberg, Golbus and Hanson	1975	Selective abortions for genetic defects produced depression in 92% of women and 82% men and had severe psychological effects on families. Negative effects for selective abortions far greater than for delivery of stillborn.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Lask	1975	Of 50 abortion patients, 32% had adverse outcomes, reporting moderate to severe feelings of guilt, regret, loss and self-reproach.
Greenglass	1976	12% of aborted women experienced negative psychological reactions with 3% attempting suicide. Psychiatric patients pre-abortion were three times as likely to require therapy post-abortion.
Kent	1977	Abortions in patients' histories were major precipitants in seeking psychotherapy.
Gerrard	1977	Sexual inhibition and guilt was found to be significantly higher for women who have undergone abortions than for nonpregnant women.
Belsey, Greer, Lal, Lewis and Beard	1977	An emotional attitude study of 360 women before and three months after first trimester abortion revealed 161 women displaying one or more features of emotional disturbance. Degree of adjustment before pregnancy was the dominant influence and major factor in predicting emotional disturbances.
Bracken	1978	15% of the sample experienced a difficult abortion decision, anxiety, depression and pain.
Spaulding and Cavenar	1978	Reported significant post-abortion guilt, psychoses, consternation and anniversary reactions.
Brewer	1978	20% of sample reported negative psychic trauma from induced abortion.
Kumar and Robson	1978	119 primiparae were interviewed during the 12th and 36th week of pregnancy. In a significant proportion of these expectant mothers there was an association between depression and anxiety early in pregnancy and a previous history of induced abortion, suggesting a reactivation of mourning which was previously suppressed.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Mester	1978	Induced abortion is a stressing experience and for some women may be traumatic. Psychotherapists may be ignoring or minimizing the importance of the abortion experience for certain kinds of patients in pain.
Morrissey and Schuckit	1978	Problem drinkers and secondary alcoholics were more likely to have experienced an alcohol-related problem subsequent to an abortion.
Liebman and Zimmer	1979	Reported 24 immediate and long-term post-abortion abreactions affecting self image, relationships, and future coping abilities.
Proud	1979	Women who have aborted reported lower total self concept including moral ethical self, physical self perspective, social self and were significantly more defensive than those not aborting. In addition, post-abortion women had higher neurotic scores and lower personality integration. In short, in all areas except personal self, aborting women reported lower levels of self concept.
Somers	1979	Of 597 Denmark women, aborting women under 30 exhibited higher psychiatric admission rates than did women of this age in general. Teen aborters had the highest rate of psychiatric admission (2.9 times the rate of teenagers in general).
Adler	1979	Abortion is a stress experience. A sense of loss influences stressful, negative emotions. Responses to the experience will be a function of the nature and meaning of the pregnancy to the individual, her defensive and coping style, and her social environment.
George	1980	Women who sought abortions scored higher than controls on neuroticism and manifest anxiety.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Freeman, Rickels, Huggins, Garcia and Polin	1980	Study of 413 women revealed elevated stress levels prior to abortion, particularly depression, anxiety and somatization, and after abortion, *repeat* aborters continued to have significantly higher emotional distress scores in interpersonal relationships.
Ashton	1980	A study of 64 women after eight weeks and 86 women after eight months revealed short-term psychiatric disturbances, including guilt, regrets and sensitivity to comments about the abortion, and 5% suffered enduring severe psychiatric problems post-abortion.
Cates	1980	Relatively more teenagers than older women suffered anxiety, depression, sadness, guilt and regret.
Gould	1980	A study examining health experiences of Harvard women post abortion revealed post-abortion depression, anniversary reactions, guilt and despair.
David, Rasmussen and Holst	1981	In a nationwide hospital study in Denmark, psychiatric problems were significantly higher in women who had abortions than women who delivered or women in general. Negative post-abortion reaction worse for women not in a relationship.
Tishler	1981	Case studies of two adolescent females who had elective abortions illustrate increased psychosocial stress of adolescent abortion which could include suicide on the anniversary date the fetus would have been born.
Williams and Ventimiglia	1981	To minimize negative post-abortion reaction, women should seek support from significant others, be apprised of procedures, be familiar with alternatives and recognize medical and emotional costs.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Handy	1982	Women seeking termination demonstrated more psychological disturbance than other women. Few women found the decision to terminate easy.
Baker and Quinkert	1983	Data from 252 women who experienced reproductive problems (including abortion). Depression and increased stress were found which improved as the subjects learned more about the problem and drew closer to their families and others with similar problems.
Cohen and Roth	1984	From a study of 55 women, post-abortion stress was displayed at fairly high levels. Evidence revealed a "generalized stress response syndrome." "Avoiders" were found to experience more distress than "nonavoiders."
Bradley	1984	Women who had a prior abortion scored higher on levels of depressive effect in the third trimester of pregnancy and in the postpartum period.
Franco	1984	Women reporting multiple abortions had more often considered suicide and scored higher on borderline personality pathology and depression. 40% of the 71 women studied reported anniversary reactions. Half of the women aborting sought psychotherapy after the procedure.
Gold	1984	At the four-week follow-up, abortion patients had poorer psychological adjustment than maternity patients; married abortion group reported less satisfying relationships with their husbands, and also reported poorer psychological adjustment.
Frank	1985	Morbidity within 21 days after induced abortion which was related to that event was found in 10% of 6105 women who had induced abortions.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Jorgensen, Uddenberg and Ursing	1985	All women in study who had abortions because of fetal malformation experienced severe psychological trauma and about half suffered long-term inability to cope with their personal crises.
Lloyd and Laurence	1985	A retrospective study of 48 women who had abortions for fetal malformation revealed 77% experienced an acute grief reaction with 46% suffering psychiatric symptoms six months post abortion.
Reardon	1986	Of 230 women studied, majority felt "forced" to have abortion; 83% felt "rushed" to make decision; 71% believed their abortion counselors were biased; 80% suffered chronic negative psychological sequelae; 19% reported suicidal ideation; and 20% reported chemical dependencies.
Selby	1986	Study of 92 women who had past abortions who were treated on an in-patient basis revealed majority had been sexually abused in their past; post-abortion delayed reaction common; denial and depression experienced by most women; most had sexual adjustment issues and had experienced primary relationship terminated. Case studies identified post-abortion trauma and unresolved grieving such as denial, anger, bargaining, depression and guilt/shame.
Speckhard	1986	Found abortion a stressor event for most women interviewed and that delayed psychological complications occurred for most of the women studied 5-10 years post abortion. 85% were surprised by the intensity of their negative emotional reactions. 81% felt victimized by their abortions.

TABLE 1—Continued

Researcher(s)	Date	Major Findings
Wall	1986	Examined 34 women post abortion. Majority reported chronic emotional problems in the abortion aftermath, including guilt, depression, alcohol and drug abuse, difficulty in relationships, and anxiety in subsequent pregnancies. 26% reported making some suicidal gesture since their abortion.
Hittner	1987	Of 217 women studied, 30% reported one previous abortion. Women with children are more likely to be negatively affected by abortion. Delayed grief was found and nearly 1/3 reported post-abortion unhappiness. "The findings of this study should indicate to mental health counselors that women who choose to have an abortion are more likely to be depressed and lonely than are those in the general population, both before and immediately after the procedure. These findings raise questions about the beliefs that only a few women experience post-abortion emotional difficulties."
Lyons, Larson, Huckeba, Rogers and Mueller	1988	A systematic review of research on post-abortion psychological sequelae concluded that all studies suffer from significant methodological shortcomings but did reveal numerous studies showing negative psychological effects of abortion.
Ney	1988	A survey of psychosocial effects of abortion revealed no psychiatric indications for therapeutic abortions. Short and long term medical and psychiatric complications to abortion illustrate harmful effects of elective abortions.

TABLE 2

Adverse Physical Effects of Induced Abortion (By Year)

Researcher(s)	Date	Major Findings
Klinger	1971	After one legal abortion, premature births increase by 14%; after two abortions, it is 18%; and after three, it increases to 24%.
Tietze and Lewis	1971	Immediate complications of induced abortion (hemorrhage, laceration of the cervix and perforation) totaled 1-2% after eight weeks gestation and 3.6% at 15 weeks or longer.
Conger	1972	From a study of 1,668 women, perforation occurred using suction curettage in 96.8 per 1000 abortions at 15 weeks gestation or more.
Harlap and Davies	1975	752 mothers interviewed during subsequent pregnancy revealed an excess of malformations in births and pregnancy complications, such as bleeding, low birth weight, manual removal of placenta and two to threefold increase in neonatal deaths, following earlier induced abortions.
Roht, Aoyama, Leinen and Callen	1976	Prior induced abortions appear to be associated with excess prematurity and spontaneous abortions in subsequent pregnancies. Unfavorable subsequent pregnancy outcomes increase with frequency of induced abortions.
Trichopoulos	1976	"The relative risk of secondary infertility among women with at least one induced abortion and no spontaneous miscarriages was 3-4 times that among non-aborted women."
Burkman	1977	"Occurrence of genital tract infection following elective abortion is a well-known complication." John Hopkins University reports rates up to 5.2% for first trimester and up to 18.5% in second trimester.

TABLE 2—Continued

Researcher(s)	Date	Major Findings
Roht, Fonner, Aoyama and Fonner	1977	Survey of 3,222 showed a consistently reported excess of menstrual symptoms among women with history of induced abortion.
Bracken	1978	Abortion by dilatation and curettage (D&C) may increase the risk of subsequent spontaneous abortion, low birth weight and prematurity but these findings need further confirmation.
Cavenar, Maltbie and Sullivan	1978	Report of psychogenic abdominal pain after abortion and anniversary reactions.
Harlap, Shiono, Berendes and Pellegrin	1979	Study revealed 120% increase of mid-trimester spontaneous fetal losses among nulleparous women with previous induced abortions and the relative risk increased with the number of previous induced abortions.
Leong, Duby and Kinch	1979	A random survey/study of 75 women whose pre- and post-abortion smears were studied revealed therapeutic abortions to be a major potential source of RH isoimmunization.
Ratten and Beischer	1979	Therapeutic abortions performed in first trimester were linked to a significant increase in second trimester spontaneous abortions and premature labor in next pregnancy.
W.H.O. Task Force	1979	Significantly higher risk of mid-trimester spontaneous abortion, preterm delivery, or low birth weight among women whose only previous pregnancy ended in an induced abortion.
Levin, Schoenbaum, Monson, Stubblefield and Ryan	1980	Comparison of women who had multiple abortions and women who had term delivery revealed twofold-threefold increased risk of subsequent pregnancy losses for women with multiple induced abortions.

TABLE 2—Continued

Researcher(s)	Date	Major Findings
Brautigam and Wainke	1981	Induced abortion was statistically more frequent precedent to late complications, such as abdominal pregnancy, retarded abortion, cervical insufficiency or imminent premature births, than in the control group. Induced abortions beyond the 8th week involve even more frequent late complications of subsequent pregnancy.
Pike	1981	First trimester abortion before full term pregnancy showed a 2.4-fold increase in risk of breast cancer.
Slater	1981	Infants born following a previous induced abortion by D&C showed excessive low birth weight due to damage to cervix from D&C. The greater the degree of dilatation, the greater the cervix damage which leads to increase in low birth weight.
Levin	1982	Relative risk of ectopic pregnancy was 1.6 for women with one prior induced abortion and 4.0 with two or more, which is significantly higher than control group.
Qvigstag	1982	Patients harboring chlamydia trachomatis in the cervix at termination of pregnancy are at high risk of developing postoperative infections such as PID, salpingitis and detectable chlamydia antibodies. Chlamydia trachomatis was cultured from the cervix in 70 of 557 women admitted for therapeutic abortion. Among the 70, 22 developed acute PID postoperatively.
Westergaard	1982	Presence of chlamydia in the cervical canal at the time of an induced abortion in asymptomatic women increases risk of postabortal PID from 10% to 28% in 333 women studied.

TABLE 2—Continued

Researcher(s)	Date	Major Findings
Schulz, Grimes and Cates	1983	Cervical injury, which is one of the most frequent complications of suction curettage abortion, occurs in about 1 per 100 abortions in study of 15,438 women. Such microfracture of the cervix may lead to cervical incompetence, premature delivery and other pregnancy complications.
Tollefson and Garvey	1983	Case analysis of the evolution of a woman's conversion disorder (urinary retention) in response to a decision to terminate pregnancy. Concluded that a variety of psychological disorders may go undetected concerning abortion and present themselves as "unrelated" physical complaints without organic basis.
Dicker, Feldberg, Samuel and Goldman	1985	Association of cervical pregnancy and induced abortion with traumatic curettage damaging the endometrium, rendering it unsuitable for nidation, was well documented.
Heisterberg	1985	PID is major complication of induced abortion occurring in 2-20% of women who had an abortion.
Pickering and Forbes	1985	Women with previous induced abortions experienced significantly increased risk of pre-term delivery.
Wong, Wong and Chang	1985	A history of previous abortions was significantly more common in the group displaying meconium stained amniotic fluid diagnosed during labor.
Barron	1986	Compilation of data from British and American publications showed over half of the pregnancies in girls under 16 ended in induced abortion and a prospective study of teenagers found a high rate of fetal loss in pregnancies that followed abortions.

TABLE 2—Continued

Researcher(s)	Date	Major Findings
Darj	1987	Scandinavian studies reveal that PID following induced abortion ranges from 6-13%.
Rue	1988	Induced abortion is estimated to be responsible for 150,000-250,000 cases of PID in the U.S. annually. PID is a major direct cause of permanent sterility, chronic abdominal pain and increased risk of extra-uterine pregnancy.

TABLE 3

Adverse Familial Effects of Induced Abortion

Researcher(s)	Date	Major Findings
Calef	1972	Clinical study suggests post-abortion anxiety and disruption of marital sexual relations.
Perez-Reyes and Falk	1973	15% of post-abortion adolescents expressed adverse feelings of depression, guilt, anger and anxiety, some of which were related to family tensions.
Cavenar, Maltbie and Sullivan	1978	Described psychiatric sequelae of abortion in potential grandparents, intrapsychic conflict in children whose mother aborted a pregnancy known to them, and other family members. Case studies show significant physical and emotional sequelae from therapeutic abortions not attributable to environmental changes or other stresses. Case reports highlight post abortion psychogenic problems for some women for twenty years after the procedure.
Ney	1979	Outline of eight methods of how an increasing rate of abortion is leading to an increasing rate of child abuse. Evidence indicates that post-abortion depression hinders mother-infant bonding in a subsequent pregnancy whereas no evidence indicates elective abortions will reduce prevalence of child abuse.
Plattner	1979	Nearly half of 150 women who elected abortion ended their relationships with the putative father.

TABLE 3—Continued

Researcher(s)	Date	Major Findings
Deutsch	1982	Studied 96 pregnant teenagers. Never pregnant adolescents manifested significantly higher measurers for self-esteem than did first time and repeat abortion subjects. Repeat abortion adolescents showed significantly more signs of instability, personality conflict and sex guilt than the never pregnant group. Teen aborters were more likely to come from families with father absent, marital conflict, poor patterns of communication, family enmeshment or disengagement, and to have lower self concepts.
Ney	1983	Children who have siblings terminated by abortion may have similar psychological conflicts to those children who survive disasters or illness which kill another sibling. Unresolved guilt, fear of parents, obsession to please parents, latent hostility can all be signs of psychological effects of "abortion survivors."
Furlong and Black	1984	Young children may experience particular difficulties in coping with complex information of genetic indicated abortions and may show negative reactions to parents' distress and maternal absence.
Mattinson	1985	Unable to mourn the loss of the child at the time of the abortion, parents show a delayed grief reaction. It may be mild but persistent, or it may occur in more extreme form many years later when subsequent loss of a different nature triggers repressed grief. Many of the married couples in this clinical report are still troubled by an abortion of many years ago, and were largely unaware at the time of the abortion of the intensity of their feelings and the personal meaning of this death experience.

TABLE 3—Continued

Researcher(s)	Date	Major Findings
Rue	1985	Because of the basic inequality between the partners in an abortion decision, future marital skills and communication may be severely handicapped and restricted. "Some men view abortion as a destruction of man's seed—a death event."
Ney	1987	Parents have difficulty bonding with surviving children if the neonatal losses are not mourned appropriately, especially if the loss comes from elective abortion. Counselors must help parents and surviving children go through grieving process for neonatal deaths.
Reardon	1988	Summary of case reports of children from one year up to 21 years old suffering negative effects from mother's induced abortion. Children display fear that mother is "agent of death," hostility and agression toward siblings and peers, feeling neglect, anorexia, depression and withdrawal if not properly treated.

BIBLIOGRAPHY

Studies from Table 1

Adler, *Abortion: A Social Psychological Perspective*, 35 J. OF SOCIAL ISSUES 100 (1979).

Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 BR. J. OF OBSTETRICS AND GYNECOLOGY 1115 (1980).

Baker and Quinkert, *Women's Reactions to Reproductive Problems*, 53 PSYCHOLOGICAL REPORTS 159 (1983).

Belsey, Greer, Lal, Lewis and Beard, *Predictive Factors in Emotional Response to Abortion: King's Termination IV*, 11 SOC. SCI. AND MED. 71 (1977).

Blumberg, Golbus and Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 AM. J. OF OBSTETRICS AND GYNECOLOGY 799 (1975).

Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration Abortion*, 13 SOCIAL PSYCHIATRY 135 (1978).

Bracken and Suigar, *Factors Associated with Delay in Seeking Induced Abortions*, 113 AM. J. OF OBSTETRICS AND GYNECOLOGY 301 (1972).

Bradley, *Abortion and Subsequent Pregnancy*, 29 CANADIAN J. OF PSYCHIATRY 494 (1984).

Brewer, *Induced Abortion after Feeling Fetal Movements: Its Causes and Emotional Consequences*, 10 J. OF BIOLOGICAL AND SOCIAL SCIENCES 203 (1978).

Cates, *Adolescent Abortions in the United States*, 1 J. OF ADOLESCENT HEALTH CARE 18 (1980).

Cohen and Roth, *Coping with Abortion*, 10 J. OF HUM. STRESS 140 (1984).

David, Rasmussen and Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 FAM. PLANNING PERSPECTIVES 88 (1981).

BIBLIOGRAPHY—Continued

Ewing and Rouse, *Therapeutic Abortions and a Prior Psychiatric History*, 130 AM. J. OF PSYCHIATRY 37 (1973).

K. Franco, Dysphoric Reactions in Women after Abortion (1984) (unpublished paper, Medical College of Ohio).

Frank, *Sequelae of Induced Abortion*, 115 CIBA FOUND. SYMP. 67 (1985).

Freeman, Rickels, Huggins, Garcia and Polin, *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 OBSTETRICS AND GYNECOLOGY 630 (1980).

George, *An Empirical Study of Medical Termination of Pregnancy*, 25 PSYCHOLOGICAL STUDIES 211 (1980).

Gerrard, *Sex Guilt in Abortion Patients*, 45 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 708 (1977).

D. GOLD, THE ABORTION CHOICE: PSYCHOLOGICAL DETERMINANTS AND CONSEQUENCES (1984).

Gould, *Postabortion Depressive Reactions in College Women*, 28 J. OF AM. COLLEGE HEALTH ASSOC. 316 (1980).

Greenglass, *Therapeutic Abortion and Psychiatric Disturbance in Canadian Women*, 21 CANADIAN PSYCHIATRIC ASSOC. J. 45 (1976).

Handy, *Psychological and Social Aspects of Induced Abortion*, 22 BR. J. OF CLINICAL PSYCHOLOGY 29 (1982).

Hittner, *Feelings of well being before and after abortion*, 9 AM. MENTAL HEALTH COUNSELOR'S ASSOC. J. 98 (1987).

Jansson, *Mental Disorders After Abortion*, 41 ACTA PSYCHIATRICA SCANDINAVICA 87 (1965).

Jorgensen, Uddenberg and Ursing, *Ultrasound Diagnosis of Fetal Malformation in the Second Trimester—The Psychological Reaction of the Women*, 4 J. PSYCHOSOMATIC OBSTETRICS AND GYNECOLOGY 31 (1985).

BIBLIOGRAPHY—Continued

Kaltreider, *Psychological Factors in Mid-Trimester Abortions*, 4 PSYCHIATRY AND MED. 129 (1973).

I. Kent, Emotional Sequelae of Therapeutic Abortion, presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon, September 1977.

Kumar and Robson, *Previous Induced Abortion and Ante-Natal Depression in Primiparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 PSYCHOLOGICAL MEDICINE 711 (1978).

Lask, *Short-Term Psychiatric Sequelae to Therapeutic Termination of Pregnancy*, 126 BRITISH J. OF PSYCHIATRY 173 (1975).

Liebman and Zimmer, *The Psychological Sequelae of Abortion: Fact and Fallacy*, in THE PSYCHOLOGICAL ASPECTS OF ABORTION 127 (1979).

Lipper, *Obsessive-Compulsive Neurosis After Viewing the Fetus During Therapeutic Abortion*, 30 AM. J. OF PSYCHOTHERAPY 666 (1983).

Lloyd and Laurence, *Sequelae and Support after Termination for Fetal Malformation*, 290 BRITISH MEDICAL JOURNAL 907 (1985).

Lyons, Larson, Huckeba, Rogers and Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966-1985*, in VALUES AND PUBLIC POLICY 77, Family Research Council of America (1988).

Mester, *Induced Abortion in Psychotherapy*, 30 PSYCHOTHERAPY AND PSYCHOSOMATICS 98 (1978).

E. Moore-Caver, *The International Inventory on Information on Induced Abortion*, International Institute for the Study of Human Reproduction (1974).

Morrissey and Schuckit, *Stressful Life Events and Alcohol Problems Among Women Seen at a Detoxification Center*, 39 J. OF STUDIES OF ALCOHOL 1559 (1978).

BIBLIOGRAPHY—Continued

P. Ney, Mental Health and Abortion (March 1988) (unpublished paper).

Osofsky and Osofsky, *The Psychological Reaction of Patients to Legalized Abortions*, 42 AM. J. OF ORTHOPSYCHIATRY 48 (1972).

E. Proud, A comparison of the effects of anxiety on self-concept between pregnant women seeking an abortion and pregnant women not seeking an abortion (1979) (unpublished doctoral dissertation, U.S. International University).

D. REARDON, WOMEN EXPLOITED: A NATION DECEIVED (1986).

T. Selby, Post Abortion Trauma, presented at the annual meeting of the Association for Interdisciplinary Research in Values and Social Change, Denver, Colorado, 1986.

R. Somers, Risk of admission to psychiatric institutions among Danish women who experience induced abortions: An analysis based on national record linkage (1979) (unpublished doctoral dissertation, Univ. of California).

Spaulding and Cavenar, *Psychoses Following Therapeutic Abortion*, 135 AM. J. OF PSYCHIATRY 364 (1978).

A. SPECKHARD, PSYCHO-SOCIAL ASPECTS OF STRESS FOLLOWING ABORTION (1987).

Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981).

T. Wall, PSYCHOLOGICAL AFTER-EFFECTS OF ABORTION (1986) (Unpublished master's thesis, Wayne State University).

Williams and Ventimiglia, *Abortion or Birth? Discriminators in Problem Pregnancy Decisions*, 1 SOCIOLOGICAL SPECTRUM 115 (1981).

BIBLIOGRAPHY—Continued

Studies from Table 2

Barron, *Sexual Activity in Girls Under 16 Years of Age*, 93 BR. J. OF OBSTETRICS AND GYNECOLOGY 787 (1986).

Bracken, *Induced Abortion as a Risk Factor for Perinatal Complications: A Review*, 51 YALE J. OF BIOLOGY AND MED. 539 (1978).

Brautigam and Wainke, *Incidence Rate of Late Complications in Legally Induced Abortions in Germany*, 185 Z. GEBURTSHILFE-PERINATOL 193 (1981).

Burkman, *Culture and Treatment Results in Endometritis Following Elective Abortion*, 128 AM. J. OF OBSTETRICS AND GYNECOLOGY 556 (1977).

Cavenar, Maltbie and Sullivan, *Aftermath of Abortion: Anniversary Depressions and Abdominal Pain*, 42 BULLETIN OF MENNINGER CLINIC 433 (1978).

Conger, *Cluster of Uterine Perforations Related to Suction Curettage*, 40 OBSTETRICS AND GYNECOLOGY 551 (1972).

Darj, *The Prophylactic Effect of Doxycycline on Postoperative Infection After First Trimester Abortion*, 55 OBSTETRICS AND GYNECOLOGY 322 (1987).

Dicker, Feldberg, Samuel and Goldman, *Etiology of Cervical Pregnancy*, 30 J. REPRODUCTIVE MED. 25 (1985).

Harlap and Davies, *Late Sequelae of Induced Abortion: Complications and Outcome of Pregancy and Labor*, 102 AM. J. OF EPIDEMIOLOGY 217 (1975).

Harlap, Shiono, Berendes and Pellegrin, *A Prospective Study of Spontaneous Losses after Induced Abortions*, 301 NEW ENGLAND J. OF MED. 677 (1979).

Heisterberg, *Prophylaxis with Lymecycline in Induced First Trimester Abortion: A Clinical Controlled Trial Assessing the Role of Chlamydia Trachomatis and Mycoplasma Hominis*, 12 SEXUALLY TRANSMITTED DISEASES 72 (1985).

BIBLIOGRAPHY—Continued

Klinger, *Demographic Consequences of Legalization of Abortion in Eastern Europe*, 8 INT. J. OF GYNECOLOGY AND OBSTETRICS 691 (1971).

Leong, Duby and Kinch, *Fetal Maternal Transfusion Following Early Abortion*, 54 OBSTETRICS AND GYNECOLOGY 424 (1979).

Levin, Schoenbaum, Monson, Stubblefield and Ryan, *Association of Induced Abortion with Subsequent Pregnancy Loss*, 243 J. OF AMA 2495 (1980).

Levin, *Ectopic Pregnancy and Prior Induced Abortion*, 72 AM. J. OF PUBLIC HEALTH 253 (1982).

Pickering and Forbes, *Risks of Pre-Term Delivery and Small for Gestational Age Infants Following Abortion: A Population Study* 92 BR. J. OF OBSTETRICS AND GYNECOLOGY 1106 (1985).

Pike, *Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women*, 43 BR. J. OF CANCER 72 (1981).

Qvigstag, *Therapeutic Abortion and Chlamydia Trachomates Infection*, 58 BR. J. OF VENERAL DISEASES 182 (1982).

Ratten and Beischer, *The Effect of Termination of Pregnancy on Maturity of Subsequent Pregnancy*, 1 MED. J. AUST. 479 (1979).

Roht, Aoyama, Leinen and Cullen, *Association of Multiple Induced Abortions with Subsequent Prematurity and Spontaneous Abortion*, 23 ACTA OBSTETRICS AND GYNECOLOGY JAP. 140 (1976).

Roht, Fonner, Aoyama and Fonner, *Increased Reporting of Menstrual Symptoms among Women Who Used Induced Abortion*, 127 AM. J. OF OBSTETRICS AND GYNECOLOGY 356 (1977).

V. Rue, *Pelvic Inflammatory Disease and the Role of Induced Abortion*, ASSOC. FOR INTERDISCIPLINARY RESEARCH NEWSLETTER, Summer 1988 at 4.

BIBLIOGRAPHY—Continued

Schulz, Grimes and Cates, *Measures to Prevent Cervical Injuries During Suction Curettage Abortion*, LANCET, May 28, 1983 at 1182.

Slater, *The Effect of Abortion Method on the Outcome of Subsequent Pregnancy*, 26 J. OF REPRO. MED. 123 (1981).

Tietze and Lewis, *Joint Program for the Study of Abortion*, 3 STUD. FAMILY PLANNING 97 (1971).

Tollefson and Garvey, *Conversion Disorder Following Termination of Pregnancy*, 16 J. FAM. PRACTICE 73 (1983).

Trichopoulos, *Induced Abortion and Secondary Infertility*, 83 BR. J. OF OBSTETRICS AND GYNECOLOGY 645 (1976).

Westergaard, *Significance of Cervical Chlamydia Trachomates Infection in Post-Abortal Pelvic Inflammatory Disease*, 60 OBSTETRICS AND GYNECOLOGY 322 (1982).

W.H.O. Task Force, *Gestation, Birth Weight and Spontaneous Abortion in Pregnancy after Induced Abortion*, LANCET, 142, Jan. 20, 1979 at 142.

Wong, Wong and Chang, *Epidemiology of Meconium Staining of Amniotic Fluid in Hong Kong*, 25 AUST-NZ J. OF OBSTETRICS AND GYNECOLOGY 90 (1985).

BIBLIOGRAPHY—Continued

Studies from Table 3

Calef, *The hostility of parents to children: Some notes on infertility, child abuse and abortions*, 1 INT. J. OF PSYCHOANALYTIC PSYCHOTHERAPY 79 (1972).

Cavenar, Maltbie and Sullivan, *Psychiatric Sequelae of Therapeutic Abortion*, 39 N.C. MEDICAL J. 101 (1978).

M. Deutsch, Personality Factors, Self-Concept, and Family Variables Related to First Time and Repeat Abortion-Seeking Behavior in Adolescent Women (1982) (unpublished doctoral dissertation, American University).

Furlong and Black, *Pregnancy Termination for Genetic Indications, The Impact on Families*, 10 SOC. WORK IN HEALTH CARE 17 (1984).

Mattinson, *The Effects of Abortion on a Marriage. Abortion: Medical Progress and Social Implications*, 115 CIBA FOUND. SYMP. 165 (1985).

Ney, *Relationship Between Abortion and Child Abuse*, 24 CAN. J. OF PSYCHIATRY 610 (1979).

Ney, *A Consideration of Abortion Survivors*, 13 CHILD PSYCHIATRY AND HUMAN DEV. 168 (1983).

Ney, *Facilitating the Process of Grieving a Pregnancy; Helping Patients Cope Well with Pregnancy Loss*, CONTEMPORARY OBSTETRICS AND GYNECOLOGY (June 1987).

Perez-Reyes and Falk, *Follow-up after Therapeutic Abortion in Early Adolescence*, 28 ARCHIVES OF GENERAL PSYCHIATRY 120 (1973).

S. Plattner, Conceptual systems and sex role attitudes and beliefs and their effect on short-term abortion outcome (1979) (unpublished doctoral dissertation, Univ. of Colorado).

Reardon, *The Impact of Induced Abortion on Surviving Siblings: Case Studies*, ASSOC. FOR INTERDISCIPLINARY RESEARCH, Fall 1988 at 2.

Rue, *Abortion in Relationship Context*, INT. REV. OF NATURAL FAMILY PLANNING 95 (1985).

APPENDIX C[1]

ABORTION IN THE UNITED STATES

Year	Number of Abortions [a]	Abortion Rate * [a]	Abortion Ratio ** [a]	% Repeat *** [b]	% Under 19 Yrs. [b]	% Not Married [b]	Late **** [b]
1972	587,000	—	—	—	—	—	—
1973	745,000	16.3	193	—	32.8	71.0	14.6
1974	899,000	19.3	220	15.2	32.5	72.4	12.0
1975	1,034,000	21.7	249	21.5	32.9	73.7	10.8
1976	1,179,000	24.2	265	22.7	32.1	75.4	9.8
1977	1,317,000	26.4	286	26.6	31.3	77.2	9.0
1978	1,410,000	27.7	294	29.5	30.8	76.5	8.9
1979	1,498,000	28.8	297	31.7	30.8	78.5	8.8
1980	1,554,000	29.3	300	33.0	29.6	79.4	8.7
1981	1,577,000	29.3	300	35.1	28.5	81.1	8.8
1982	1,574,000†	28.8	299	36.8	27.5	80.9	8.1
1983	1,515,000‡	27.4	294	38.8	27.1	81.3	9.5
1984	1,577,000	28.1	297	—	—	—	—
1985	1,589,000	28.0	298	—	—	—	—
1986	—	—	—	—	—	—	—
1987	—	—	—	42.9	25.5	81.5	—

* Per 1,000 Women 15-44.

** Per 1,000 known pregnancies (live births plus abortions).

*** Women Having Second or More Abortion.

**** Thirteen or More Weeks from Last Menstrual Period.

[a] Center for Disease Control, Abortion Surveillance, Annual Summary, 1978, at Table 1 (1980) (for 1972); Henshaw, Forrest, Sullivan & Tietze, *Abortion in the United States, 1979 and 1980*, 14 Fam. Plan. Perspectives 1, 6 (1982) (for 1973-80) (est. 3%-6% shortfall in data); Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 Fam. Plan. Persepectives 119, 121 (1984) (for 1981-82); Henshaw, *Trends in Abortion, 1982-84*, 18 Fam. Plan. Perspectives 34 (1986); *Contraception and Abortion Costs Are Tiny Portion of U.S. Health Spending, id.* at 37; Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Perspectives 63 (1987) (for 1985).

[b] Forrest, Sullivan & Tietze, *Abortion in the United States, 1977-78*, 11 Fam. Plan. Perspectives 329 (1979) (for 1973-78); Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States, 1979 and 1980*, 15 Fam. Plan. Perspectives 5 (1983) (for 1979-80); Henshaw, Binkin, Blaine, & Smith, *A Portrait of American Women Who Obtain Abortions*, 17 Fam. Plan. Perspectives 90 (1985) (for 1980-81); Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 U.S. Fam. Plan. Perspectives 5 (1987) (for 1982-83); Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plan. Perspectives 158 (1988) (for 1987).

† Total cost for all abortions in 1982—$484 million. 18 Fam. Plan. Perspectives 37 (1986).

‡ Average amount paid for *1,068,000 first-trimester abortions* in 1983—*$200 per abortion*. 18 Fam. Plan. Perspectives 34 (1986).

[1] Prepared by LYNN D. WARDLE, J. REUBEN CLARK LAW SCHOOL, Brigham Young University, Provo, Utah 84602.

APPENDIX D

LODGING OF AMICI CURIAE FOCUS ON THE FAMILY, AND FAMILY RESEARCH COUNCIL OF AMERICA

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR FEMINISTS FOR LIFE OF AMERICA, WOMEN EXPLOITED BY ABORTION OF GREATER KANSAS CITY, THE NATIONAL ASSOCIATION OF PRO-LIFE NURSES, LET ME LIVE, AND ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Doe v. Bolton, 410 U.S. 179 (1973) 11, 12, 23, 24
Planned Parenthood of Central Missouri, et al. v. Danforth, 428 U.S. 52 (1976) 24
Planned Parenthood Assn. v. Ashcroft, 462 U.S. 365 (1983) 24
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Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 3, 6, 8, 20, 24, 25, 26
Manaskie v. Rosenblume, No. 15028-83 (N.Y. 1983) reported in 4 (2) Medical Malpractice Verdicts, Settlements and Experts (Feb. 1988) 9
McNair v. Rubin, No. 4492-81 (N.Y. 1988) reported in 4 No. 2 Medical Malpractice Verdicts, Settlements & Experts (Feb. 1988) 9

Other Authorities

A. Saltenberger, Abortion Choice or Chance? (1987) 8, 9
A. M. Kimball, *Deaths Caused By Pulmonary Thromboembolism After Legally Induced Abortion* 132 (2) Am. J. Ob. & Gyn. (Sept. 15, 1978) .. 10
Battlefield Conditions Reported at Hospital in Inglewood, Los Angeles Times, December 3, 1987, at pt. II, 3, col. 1 ..... 16, 17
Clinic Didn't Study Records Before Abortion, State Says, St. Louis Globe Journal, November 10, 1981, at 3A Col. 1 16
Clinic Declines Comment On Abortion Death Report, St. Louis Globe Democrat, November 11, 1981, at 6A 17
Cox, The Role of The Supreme Court in American Government 114 (1976) 7
D. Horan & T. Balch, *Roe v. Wade, No Justification in History, Law or Logic*, in Abortion and the Constitution (1987) 6, 8

TABLE OF AUTHORITIES—Continued

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D. Reardon, Aborted Women, Silent No More (1987) 3, 13, 22
Doctor's Abortion Business Is Lucrative, San Diego Union Oct. 12, 1980 ..... 18, 23, 24
E. Drogin, Margaret Sanger, Father of Modern Society (1986) 19
Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 7
For Three Women A Safe Medical Procedure Turned Deadly, Los Angeles Herald Examiner, February 22, 1988 ..... 19, 20
Frank, *Induced Abortion Operations and Their Early Sequelae*, 35 J. Royal College of General Practitioners 175-180 (April 1985) 9
G. Wulff, Jr. & S. Freimin, *Elective Abortion Complications Seen In A Free Standing Clinic* in 49 No. 3 Obstetrics and Gynecology (1976) 10
Hilgers & O'Hare, *Abortion Related Maternal Mortality*: An In Depth Analysis in New Perspectives on Human Abortion 69-91 (1981) 8
Hilgers & O'Hare, *Abortion Related Mortality Seen in Small High-Rick Group*, 16 No. 10 Ob. Gyn News 13 (May 15, 1981) 8
J. Wilke, M.D. & B. Wilke, Handbook On Abortion (1979) 21
Hospital Shut Down As Health Risk Will Reopen For Abortions Tomorrow, Los Angeles Herald Examiner, February 12, 1988 19
Kaunitz, Causes of Maternal Mortality in the United States, 65 No. 5 Obstetrics and Gynecology (May 1985) 9
Letter from Sue Liljenberg to Senator Gordon Humphrey dated June 6, 1986 ..... 13, 14
Letter from Elaine Blakely dated August 5, 1986 .. 15
On the Edge of the Racist Pit, The Daily Californian, October 14, 1980 at 4B 18
R. Castadot, *Pregnancy*, Termination: Techniques, *Risks, and Complications Seen In a Free-Standing Clinic*, in Fertility and Sterility (1986) 10

TABLE OF AUTHORITIES—Continued

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State Again Finds Violations At Inglewood Abortion Clinic, Daily Breeze, May 12, 1985, at 1B at col. 1 16
The Abortion Dilemma, Press-Telegram (Special Reprint of Articles appearing July 14-22, 1985).. 15
The Abortion Profiteers, Chicago Sun Times (Special Reprint December 3, 1987) 21
W. M. Hern, M.D., Abortion Practice (1984) 2

BRIEF AMICI CURIAE ON BEHALF OF FEMINISTS FOR LIFE ET AL.

INTEREST OF AMICI

Feminists For Life of America ("FFLA") Women Exploited By Abortion of Greater Kansas City ("WEBA"), The National Association of Pro-Life Nurses, Let Me Live and The Elliot Institute for Social Services Research file this brief under United States Supreme Court Rule 36, with the consent of the parties, as *amici curiae* in support of Appellant. These organizations, having seen the adverse physical and psychological effects of abortion on women, oppose the continued deregulation of the lucrative abortion industry, advocate the development of non-violent alternatives to crisis pregnancies and seek an end to the exploitation of women and the widespread destruction of preborn children which characterizes the current state of abortion on demand.

SUMMARY OF ARGUMENT

The decisions of the United States Supreme Court in *Roe v. Wade,* 410 U.S. 113 (1973) and its progeny have been based upon the assumption that legal abortion is safe and beneficial to women.[1] Many women who have had legal abortions, and who are purportedly the beneficiaries of the Court's abortion rulings maintain that the very heart of the decision in *Roe*—"safe, legal abortion" is a myth, and that women are being exploited at the hands of the lucrative, unregulated private abortion industry which has developed in the sixteen years since *Roe.*

Dr. Warren M. Hern, an abortionist and author of a leading text on abortion procedures has stated that "[i]n medical practice there are few surgical procedures given so little attention and so *underrated* in its potential haz-

[1] *Roe,* 410 U.S. 148-152, 163.

ards as abortion."[2] Grieving families expressing their pain and outrage at the unnecessary deaths of their mothers, sisters, daughters and wives at the hands of an abortion establishment which continues to make broad assurances regarding the safety of abortion are testimony to the accuracy of Dr. Hern's statement. Aborted women who have survived hasty transfers from private abortion clinics to hospital emergency rooms with life threatening medical complications and who have sustained serious, irrevocable physical and psychological damage as a result of legal abortion are testifying to the intense pain and suffering their legal abortions cost them.

Many women are seeking recompense for injuries sustained through legal abortion. Some have recovered large sums in malpractice suits against abortion profiteers, only to see those responsible for their injuries continue to victimize yet more women and girls, unhampered by any regulatory authority. Others who have brought actions for abortion deaths and injuries do not recover anything because the courts have determined that their deaths and injuries were caused not by a physician's malpractice, but are due to the *inherent dangers* of induced abortion, whether the procedure is legal or illegal.

Many aborted women have reported that their concerns about the potential dangers of abortion, or the ambivalence they expressed regarding the prospect of having their child killed, were simply dismissed as "irrational" by "counselors" who downplay the medical risks of abortion, and evade any real discussion of fetal characteristics or alternatives to abortion.

The self-serving silence of the abortion industry regarding the dangers to women of induced abortion has been bolstered by the Court's decisions holding that a physician may in his or her own discretion withhold information regarding the particular medical risks of

[2] W.M. Hern, M.D., Abortion Practice 101 (1984) (emphasis supplied).

abortion and other information relevant to an informed decision on the part of the woman considering an abortion.[3] Abortion is the only medical procedure known to *Amici* with respect to which the normal requirements for informed consent prior to undergoing a medical procedure are suspended.

There is ample evidence in the medical studies and public health statistics cited herein that the unfettered right of abortion on demand foisted upon our society by the Court and by abortion advocates is a public health disaster the proportions of which we are just beginning to uncover. Although medical experts acknowledge the inherent dangers of abortion, public health authorities rely in large part upon a voluntary reporting system to collect data regarding deaths and injuries from legal abortion. Thus the very clinics and physicians causing death and injury to women are expected to police themselves and to voluntarily report the damage abortion causes despite their vested financial and political interest in maintaining current state of *de facto* deregulation. *Amici* contend that the current reporting system is woefully inadequate and that it has contributed significantly to the gross underreporting of the actual deaths and serious injuries sustained by women undergoing legal abortions.

However, studies and statistics cannot adequately describe the tragedy of the abortion establishment's exploitation of women—only the families of abortion's victims and the surviving victims themselves can adequately describe the pain they have endured. Therefore, *Amici* have lodged with the Court a volume containing the testimonies of abortion's victims.[4]

[3] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

[4] A small sampling of these testimonies is included in this Brief. For the Court's convenience, *Amici* have compiled hundreds of additional testimonies of abortion victims in the volume lodged with

The young, childless women who wanted children "someday" but have been rendered sterile by their abortions cry out from the pages for the children they so desperately want but cannot conceive and for those destroyed in abortion. The parents who were not aware of their teenager's abortion until they were called to the bedside of their dying child rail in anger against a system which requires their consent for administration of an aspirin, but forbade their participation in their daughter's decision to obtain the abortion that cost her young life. The women who were told they would feel only relief after their abortion recount the agony of discovering that the memory of the child they were urged to kill still haunts them decades after their loss. Their stories speak for themselves.

Some of abortion's victims can no longer speak for themselves. Yet even the cold, impersonal jargon of police investigative reports and death certificates[5] cannot hide the suffering of those women and young girls who have lost their lives believing in the myth of "safe, legal" abortion. They are the victims of an abortion establishment that cares more about profits or population control than about the health and welfare of pregnant women, and their unnecessary deaths are an indictment of society's failure to protect them from abortion profiteers.

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this Brief entitled "Rachel Weeping". Testimonies of members of Women Exploited By Abortion are included in D. Reardon, Aborted Women, Silent No More (1987) copies of which have also been lodged with this Brief. Additional testimonies of aborted women are contained in Appendix D to the Brief Amicus Curiae of Focus on the Family and the Family Research Council.

[5] Documentation of legal abortion deaths has been included in the volume lodged with the Court under the caption "When Legal Means Lethal". *Amici* have documented only a small number of the legal abortion deaths which have occurred throughout the Nation, and have focused on a study of the abortion industry in one urban area, Los Angeles, California, which is thought to be representative of the manner in which abortions are performed in most other urban areas in the United States.

The Court's decisions in *Roe* and its progeny are one of the *primary reasons* why the abortion industry is able to operate in the virtually unregulated environment which resulted in such human tragedy. By arbitrarily striking down every conceivable type of abortion regulation and reporting requirement enacted by state legislatures both prior to and after *Roe*, the Court has placed itself in the position of a "national medical review board" which makes judgments on the questions of the safety (or lack thereof) of abortion, the existence and extent of adverse abortion sequalae, what types of relevant information can be withheld from women regarding the particular medical risks of abortion (and who has the power to dispense or withhold such information) and what constitute appropriate methods for compiling health statistics crucial to the development of sound national health policies. And because a "right of privacy" was the chosen vehicle for adoption of a policy of abortion on demand, the abortion industry and its practices have themselves been wrapped in a cloak of "secrecy" amounting to *de facto* deregulation of the industry. As a result, both the Court itself and the federal judiciary have been legislating health policy since *Roe* without reliable data concerning the dangers of abortion, and without the ability to engage in the kind of broad investigations and fact finding which legislatures can undertake prior to the enactment of legislation as important as abortion regulation.

To reaffirm *Roe* would be inimical to the interests of the very women whose "rights" are purportedly protected by *Roe* and its progeny. Therefore, *Amici* urge that the Court reconsider and overturn *Roe* and return to appropriate legislative bodies the power to regulate abortion. Otherwise, "the 'undesired and uncomfortable straitjacket' . . . [which] . . . the Court has tailored for the 50 States"[6] will most surely result in still more tragic losses of the lives and health of women and their pre-born children.

ARGUMENT

I. THE COURT'S TRIMESTER APPROACH TO ABORTION RIGHTS HAS RESULTED IN UNFETTERED ABORTION ON DEMAND.

A. The Supreme Court Acts As The Nation's Medical Review Board.

Roe purportedly allowed the States to regulate abortions in the furtherance of two legitimate state interests: protection of maternal health and protection of the fetus. *Roe*, 410 U.S. at 162. Yet it must be remembered that, in pronouncing its factual findings regarding the safety of abortion and the stage at which a preborn child becomes viable, the Court in a single, powerful stroke invalidated statutes regulating abortion in every single State in the nation.[7] Indeed, "[e]ven the law of New York, the 'abortion capital of the country,' which allowed abortion on request through the twenty-fourth week of pregnancy, was too protective of the unborn . . ." [8] to withstand scrutiny by the United States Supreme Court once it had decided to act as "the Nation's '*ex officio* medical review board, with powers to approve or disapprove medical and operative practices and standards throughout the United States' ".[9] A cursory review of *Roe*'s progeny reveals that the promise of even a modicum of regulatory protection for women and their preborn children has proven illusory, as even the most innocuous attempts at regulation by State legislatures have fallen victim to the Court's own assessment of its superior fact finding capabilities with respect to the safety of abortion and what constitutes accepted medical procedure.

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[6] *Thornburgh*, 476 U.S. at 833 (O'Connor, J., dissenting).

[7] D. Horan & T. Balch, *Roe v. Wade, No Justification in History, Law or Logic*, in Abortion and the Constitution 58 (1987) (hereinafter "Abortion and The Constitution").

[8] *Id.* (citations omitted).

[9] *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting) (citation omitted).

That the Court was promulgating legislation in *Roe* is apparent upon examination of the intricate scaffolding of medical theories and technological assessments upon which it was constructed. One critic of *Roe* aptly summarized the widespread reaction to this approach among constitutional scholars when he stated that "[n]either historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution." [10]

The majority in *Roe* purported to have conscientiously reviewed the medical "evidence" regarding the safety of various types of abortion procedures at various stages of pregnancy and discovered an incontrovertible medical "fact":

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical *fact* . . . that until the end of the first trimester mortality in abortion *may be* less than mortality in normal childbirth.[11]

Roe, 113 U.S. at 163 (emphasis supplied). Conversely, the Court's medical "finding" that second and third trimester abortions were statistically *more* dangerous for women than childbirth provided the rationale for its holding that "*from and after* [the end of the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." [12] *Id.* (emphasis supplied).

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[10] Cox, The Role of the Supreme Court in American Government 114 (1976).

[11] There was by no means unanimity of opinion in the medical community regarding this "fact" in 1973. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 942 n.117.

[12] As Justice O'Connor's powerful dissents in *Akron* and *Thornburgh* point out, even the types of regulation supposedly permitted in *Roe* failed to pass constitutional muster as new medical "findings"

While the Court's medical findings regarding the relative safety of abortion as compared to childbirth have been widely criticized as being both inaccurate [13] and an inappropriate standard [14] upon which to construct the trimester approach on which *Roe*'s holding depends, perhaps the most important question is why such findings are relevant at all. The Court's medical findings, even assuming they were correct "provide no basis for concluding that there is no state interest in health regulations during the first trimester. 'The Court gave no reason why it should make a difference whether it is safer to undergo an abortion or carry the pregnancy to full term. . . . [T]hough it may be safer for a particular patient to undergo open heart surgery than to forego the operation and do nothing, the state still has an interest in ensuring that if the patient chooses to have the operation, it is performed as safely as possible.' " [15]

The Court ignored the well-established principle that the States, in the exercise of their police powers and in

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by the Court invalidated regulations previously thought to have been constitutional. Thornburgh, 476 U.S. at 828-33 and Akron, 462 U.S. at 452-72.

[13] Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in New Perspectives on Human Abortion 69-91 (1981).

[14] While there are certain medical risks associated with pregnancy and childbirth, studies examining maternal mortality and morbidity "arise primarily from a small group of high risk patients". A. Saltenberger, Abortion Choice or Chance? 62 (1987) *citing Most Mother Child Mortality Seen in Small High-Risk Group*, 16 Ob. Gyn. News *13, May 15, 1981*. Yet, the vast majority of abortions are performed on young women who are *not* aborting due to medical risks. Thus the women and young girls who are *most likely* to obtain an abortion are those *less likely* as a group to be at risk for medical complications associated with pregnancy and childbirth. See Appendix C "Abortion In America" in Brief Amicus Curiae of Focus on the Family and the Family Research Council.

[15] Abortion and The Constitution, *supra* at 77 *quoting* Comment, *Technological Advances and Roe v. Wade: The Need To Rethink Abortion Law*, 29 U.C.L.A.L. Rev. 1194, 1199 n.41 (1982).

the interest of their citizens' health and safety, regulate medical and surgical procedures as a matter of course. Therefore, unless it can be established that there are *no dangers of any kind* to women inherent in the abortion procedure itself, or in the manner in which it is carried out, regulation of abortion by the States should be allowed even in the first trimester of pregnancy.

B. The Inherent Risks of Abortion Justify Regulation of The Abortion Procedure.

It is irrefutable that there are a number of known medical risks associated with abortion, regardless of its "legality" or "illegality",[16] and while there is debate regarding the true complication rate [17] there is a well established pattern of potentially lethal complications of abortion, including cardiac arrest, hemorrhage, infection, inflammation of the heart, water intoxication, septic shock, disseminated intravascular coagulation, amniotic fluid embolism [18], pulmonary embolism, salt poisoning, and swelling of the brain.[19] Despite these dangers, legal abor-

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[16] Kaunitz, *Causes of Maternal Mortality in the United States*, 65 Obstetrics and Gynecology (May 1985); *see, e.g. Manaskie v. Rosenblume*, No. 15028-83 (N.Y. 1983) in 4, No. 2 Medical Malpractice Verdicts, Settlements and Experts (Feb. 1988) ($75,000 verdict for 24 year old woman who suffered a vaginal tear and a ruptured cervix during a first trimester abortion and suffered two miscarriages thereafter) and testimonies of women included in this Brief.

[17] One study has indicated that the medical risks of abortion taken together produce an immediate complication rate of ten percent—that is, physical complications of abortion in 300,000 women annually. Frank, *Induced Abortion Operations and Their Early Ssequelae*, 35 J. Royal College of General Practitioners 175-180 (April 1985).

[18] See e.g. *McNair v. Rubin*, No. 4492-81 (N.Y. 1988) reported in 4, No. 2 Medical Malpractice Verdicts, Settlements & Experts (Feb. 1988) ($701,500 verdict for estate of 24 year old mother of two who died of amniotic fluid embolism after a second dose of saline solution to induce abortion).

[19] A. Saltenberger, What Every Woman Should Know About Legal Abortion 28-32 (1982) (hereinafter "Legal Abortion"). See

tions can be performed in hospitals, doctors' offices, storefront clinics or virtually any place an abortionist chooses to perform the procedure. In 1982, 82% of abortions took place in nonhospital facilities.[20]

It is well recognized that the risks associated with late abortions are much greater than those associated with abortions performed in early pregnancy, one researcher having calculated that "between 16 and 20 weeks gestation, the risk of death is 25 times greater than before 8 weeks gestation." [21] Yet the post-*Roe* decisions consistently thwart attempts by the State to impose requirements that abortions performed after a particular point in pregnancy take place in hospitals.[22] Notwithstanding *Roe*, which reserved to the States the authority to promulgate reasonable regulations of second-trimester abortion in the interest of maternal health, the Court has

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R. Castadot, M.D., M.H. P., *Pregnancy Termination: techniques, risks, and complications and their management* in Fertility and Sterility 5 (1986) (hereinafter "Castadot"); G. Wulff, Jr. M.D. FACOG and S. Freiman, M.D., *Elective Abortion Complications Seen In a Free-Standing Clinic*, 49, No. 3 Obstetrics and Gynecology 351 (1976); A. M. Kinball, *Deaths Caused By Pulmonary Thromoembolism After Legally Induced Abortion*, 132(2) Am. J. Ob. & Gyn. 169-74 (Sept. 15, 1978).

[20] Castadot, supra at 13.

[21] Castadot, *supra* at 10, citing C. Tyler, Jr., *Epidemiology of Abortion*, 26 J. Reprod. Med. 459 (1981).

[22] Some critics of non-hospital abortions maintain that because a free-standing clinic may lack blood banks, a staff skilled in resuscitation, and surgical facilities to deal with emergencies that the risk of death and morbidity may be higher in non-hospital abortion. Legal Abortion, supra at 39. Lack of adequate resuscitation equipment may contribute to a greater number of anesthesia and analgesia deaths outside a hospital setting. *Id. citing*, D. A. Grimes, *Comparative Risk of Death from Legally Induced Abortion in Hospitals and Non-Hospital Facilities*, 51 Ob. & Gyn. 323-326 (March 1978). Query whether some of the legal abortion deaths at the Inglewood Abortion Clinic and Hers Medical Clinic in Los Angeles discussed below might have been prevented if they occurred in a fully equiped medical center?

invalidated provisions requiring hospitalization for such abortions.[26]

In *Akron* the Court invalidated as unreasonable a municipal ordinance requiring hospitalization for second-trimester abortions because the State failed to show that "accepted medical practice" at the time the decision was rendered called for hospitalization for all abortions after the first trimester. 462 U.S. at 435-37.

Thus, the Court declared essentially that States would be permitted to regulate the abortion industry only to the extent that such regulations coincide with he most recently revised minimum standards of the industry itself. Therefore, the standard of reasonableness is the standard set by those who perform abortions. However, abortion deaths in freestanding clinics and complications of abortion requiring hospitalization clearly demonstrate that it may be reasonable for a State to require hospitalization as an extra measure of protection as the line approaches that at which the safety of hospitalized, as opposed to unhospitalized, abortions becomes less clear.

Perhaps the most serious flaw in the Court's trimester approach as it relates to maternal health concerns is that the Court's "abortion safety" data focused upon the *deaths* of aborted women, *without even considering the morbidity* (medical complications short of death) of abortion. This is astonishing in light of the fact that the Court adopted an extremely broad definition of "health of the mother", for purposes of determining when a *viable* preborn child could be aborted. The Court stated that the physician's medical judgment concerning the "health of the mother":

> . . . may be exercised in light of *all factors—physical, emotional, psychological, familial, and the woman's age*—relevant to the well-being of the patient.

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[23] *Doe v. Bolton*, 410 U.S. 179, 193-95 (1973) (striking down a Georgia statute requiring hospitalization for all abortions.)

> *All these factors may relate to health.* This allows the attending psysician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage of the pregnant woman.[24]

The Court thus appears to set a "double standard" for its definition of "health of the mother". When the question is what latitude should be given in the decision to abort, the definition is extremely broad. However, when the question is how "safe" abortion is for women, the only standard which the Court finds relevant is how many women *die* from abortion at a particular stage of pregnancy. No assessment is made of the impact of abortion on the mother's overall physical, psychological and emotional health. In light of the fact that one million five hundred thousand abortions are performed *annually* in the United States, an assessment of the overall impact of induced abortion upon a woman's health is crucial. *Amici* contend that abortion on demand has not produced the health bonanza proclaimed by its proponents, but rather has created a public health hazard the scope of which is just beginning to come to light. There are other inherent risks of induced abortion which damage women's health and may affect a woman's ability to bear children in the future, including cervical trauma resulting in incompetent cervix and subsequent miscarriage, pelvic inflammatory disease, RH isoimmunization, subsequent fetal malformations and a substantially increased risk of potentially lethal ectopic pregnancy. See the Brief Amicus Curiae of Focus on the Family and the Family Research Council which contains an extensive discussion of the physical complications of induced abortion, including citations to studies which have established the existence of such adverse abortion sequelae.

In addition to the obvious physical complications, abortion has a profound psychological impact upon many

[24] *Doe v. Bolton*, 410 U.S. at 19-92 (citation omitted (emphasis supplied).

women [25] that can be seen in the testimonies of women who have undergone abortion. Since the *absolute safety* of abortion, whether in the first trimester or thereafter, cannot be established, there is no justification for complete deregulation of the procedure. Therefore, the States should be allowed to regulate abortion throughout pregnancy.

C. The Aftermath of "Safe, Legal" Abortion—The Survivors.

Sue Liljenberg, who was a teenager when she obtained a "safe, legal" abortion, had no immediate physical complications. The passing years have revealed the self-destductive behavior and sterility that are the price she paid for exercising her "right to choose."

> . . . I'm a victim of abortion and, even if it takes until my last breath, I must be heard.
>
> When I was 17 I found myself in a crisis pregnancy. . . . When I went to the local family planning clinic, I sought guidance and wanted to know what I could do about my situation. I wanted a helping hand. When I walked into the clinic, I trusted the nurses and doctors, and thought they were concerned about my health enough to help me make a decision, not make my decision for me.
>
> Only one solution was strongly recommended that day. When I questioned the development of my baby, I was told it wasn't a baby yet, and that it looked like a tadpole. Since that day I have learned differently. . . . *I was told that abortion was simple and safe and that I could go and live the rest of my life and have children* when I was in a position to provide for them. I heard no scientific facts that day, only biased opinions. I was not told what abortion itself could do to me in the years to come, only that it was "safe and simple". I was not told that I would *abuse myself with alcohol, try to kill myself,*

[25] See D. Reardon, Aborted Women, Silent No More (1987) (the culmination of three years of research and interviews with aborted women).

> *develop an eating disorder, and have terrible dreams.* Worst of all, I was not told that I might never have another child. It has been 14 years since my "safe and simple" abortion and *I have never been able to have another child.*

Letter from Sue Liljenberg to Sen. Gordon Humphrey, dated June 6, 1986 (emphasis supplied). Can it be doubted that a young woman who was told she could have the children she wanted "someday," and yet will never hold her own child in her arms, is harmed irrevocably by abortion on demand? What about the impact of abortion upon *her* physical, psychological and emotional health?

Another woman, Elaine Blakely of Hunstville, Alabama describes the "safe, legal" abortion she had in 1976:

> I am a woman who was exploited by abortion ten years ago. My abortion was free, legal and by no means performed in a "back alley" facility. In fact, the abortion facility was recommended by Planned Parenthood. Since I was not working at the time, Planned Parenthood happily gave me a "free pass" for the abortion. I didn't even have to pay for the abortion.
>
> . . . .
>
> At the Kansas City abortion clinic, I was given a pelvic exam . . . Contrary to what I was told, the abortion hurt very much and it led to severe complications. *The "doctor" who performed my abortion perforated my uterus, cut an artery, and traumatized my colon. The doctor left me alone there with the "counselors" and one "nurse" for one and a half hours.* After all of the other patients had left the abortion facility, I was rushed by ambulance to a hospital across the state line for observation and blood transfusions. The ambulance rushed me to the hospital with lights flashing and sirens blaring in an attempt to save my life. The complaint that back alley abortions kill girls must be seen in light of the fact that girls are dying today from LEGAL abortions.

> In order to save my life, a few hours later a hysterectomy was performed at the Kansas City, Missouri hospital. I am telling you this because I am an adult. I was misled into believing it was a simple procedure with no complications. Since then I have had eighty percent of my colon removed.

Letter to Gordon Humphrey from Elaine Blakely dated August 5, 1986.

Are Sue Liljenberg, Elaine Blakely and tens of thousands of women who have also suffered the physical and psychological, and emotional trauma of legal abortion entitled to protection by their "health" by State legislatures or are their lives and health expendable in the quest for unfettered abortion on demand?

D. When Legal Means Lethal.[26]

Abortion proponents' claims regarding the safety of legal abortion lead one to believe that there is virtually no risk of injury, let alone death, from legal abortion.[27] Yet, the discussion below of a few of the twenty-nine legal abortion deaths in Los Angeles County, California alone belies the assertion that abortion is "safe" simply because it is legal,[28] and reveals the horrendous practices

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[26] Adapted from A. Saltenberber, The Threat of Abortion: When Legal Means Lethal (1978).

[27] The Center For Disease Control has made some sweeping claims for the "safety" of legal abortion. One spokesman for the CDC was quoted as saying that [i]t is one of the safest surgeries performed." *The Abortion Dilemma*, Press-Telegram (Special Reprint of Articles appearing July 14-22, 1985) at 10, col. 1.

[28] Other legal abortion deaths are also described herein and in the volume entitled "Rachel Weeping" which has been lodged with this Brief. The inherent dangers of death from legal abortion are also demonstrated by the death of Diane Boyd in October 1981 after an abortion performed at Reproductive Health Services, one of the named plaintiffs in the instant case. Diane Boyd, a 19 year old retarded black woman who underwent a court ordered abortion at the plaintiff clinic died of cardiac arrest after the administration of the drugs Sublimaze and Valium. *Clinic Didn't Study Records Before Abortion, State Says*, St. Louis Globe Journal, Nov. 10,

and substandard medical care provided in freestanding clinics which are largely unregulated by public health authorities.

Inglewood Women's Hospital, which performed approximately 1000 abortions a month in its single operating room was the site where several young women met their deaths obtaining "safe, legal" abortions. The substandard conditions at the clinic came to light in 1985 when it was reported that, for the second time within a year, county health officials had cited the abortion facilities for deficiencies in more than 20 areas.[29] In response to both inspections, hospital officials said steps would be taken to correct the deficiencies. However, by the time the horrendous conditions at the abortion clinic were again acknowledged by public health officials,[30] it was too late to save 37 year old Belinda Byrd, a mother of three who underwent an abortion at Inglewood on January 24, 1987 and died three days later.[31] A suit filed in Los Angeles Superior Court alleges that Belinda Byrd's uterus was lacerated and that she lay bleeding and unattended for hours in a hospital bed at the abortion facility until she suffered a heart attack. Paramedics were summoned and Belinda was rushed to Centinela Medical Center in Inglewood where she died.[32] Yet another "deficiency report" was issued by county health officials which described patients being rushed through abortions performed in an operating room where the tables and floors were stained with the blood of previous patients. The report stated that some patients "were encouraged to leave the facility before they were comfortable doing so" and some were not examined at all after surgery although the physicians signed paper work approving their discharge. The abortion facility, which had been cited twice in 1986, had in response to each inspection submitted a "correction plan" which was invariably accepted by the county health officials.

1981 at 3A; *Clinic Declines Comment On Abortion Death Report*, St. Louis Globe Democrat, Nov. 11, 1981, at 6A.

[29] These included the dispensing of medication not ordered by physicians, failure to sanitize reusable items between uses, not following proper infection control techniques, failure to keep an operation register that would detail complications suffered by patients, and overcrowding in the recovery room which allegedly often held four patients when there was only enough equipment to monitor two patients. *State Again Finds Violations At Inglewood Abortion Clinic, Daily Breeze*, May 14, 1985, at 1B, col. 1.

[30] *'Battlefield Conditions' Reported at Hospital In Inglewood*, Los Angeles Times, December 3, 1987, at pt. II, 8, col. 4.

[31] At least two other young black women died after abortions at Inglewood—23 year old Cora Mae Lewis in 1983 and 22 year old Yvonne Tanner in 1984.

The years of bureaucratic delays in taking action to close the facility, and the lack of prosecution of the physician who had performed Belinda's abortion added to the anguish her family felt over her death. Her mother, in desperation, finally wrote to a Los Angeles district attorney:

> I am the mother of Belinda A. Byrd, victim of abortionists at 426 E. 99th Street in Inglewood. I am also the grandmother of her three young children who are left behind and motherless. I cry every day when I think how horrible her death was. She was slashed by them and then she bled to death, taken from this world on January 27, 1987. She has been stone dead for two years now, and nobody cares.

[32] 'Battlefield Conditions' Reported at Hospital in Inglewood, Los Angeles Times, December 3, 1987 at pt. II, 8, col. 4. A complaint was made by County-USC Medical Center that the abortion clinic had transferred its patients in unstable condition and without notice to the Medical Center's emergency room, in violation of a federal law against "dumping" patients in emergency rooms.

[33] See "When Legal Means Lethal" in the volume lodged with this Brief.

[34] *Ibid.* It is common practice for abortionists to "rush" through abortions in two to five minutes, despite the increased risk of cervical trauman and uterine lacerations resulting from such practices. See note 43 *infra*.

I know that other young black women are now dead after abortion at that address—Cora Mae Lewis and Yvonne Tanner.

Where is [the abortionist] now? Has he been stopped? Has anything happened to him because of what he did to my Belinda? Has he served jail time for any of these cruel deaths?

People tell me nothing has happened, that nothing ever happens to white abortionists who leave young black women dead. I'm hurting real bad and want some justice for Belinda and all other women who go like sheep to slaughter.

Sincerely,
Mrs. Mattie Byrd [35]

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[35] See, "When Legal Means Lethal" in the volume lodged with the Court. The highly inflammatory remarks attributed by several newspapers to Dr. Edward Allred, owner of the largest chain of abortion clinics in California, had caused some to attribute the abortion deaths of several Black and Hispanic women to racial prejudice. *On The Edge of the Racist Pit,* The Daily Californian, October 14, 1980, at 4B col. 1. *Doctor Labeled 'Racist' In Abortion Suit,* at B-1, col. 1 (describing a $14 million lawsuit filed against Dr. Allred in connection with the abortion death of 16 year old Patricia Chacon in which it was alleged that Chacon had "received substanard medical treatment as a result of her race and ancestry, rather than medical treatment based on her . . . condition and needs". *Id.* at col. 2, *quoting* Jack Schuler, attorney for Patricia Chacon's parents). The following remarks upon which the allegation was made had been attributed to Dr. Allred in a story which appeared in the San Diego Union:

> Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem that tide; I'd set up a clinic in Mexico for free if I could. Maybe one in Calexico would help. The survival of our society could be at stake. . . . The Aid to Families With Dependent Children program is the worst boondoggle ever created. When a sullen black woman can decide to have a baby and get welfare and food stamps and become a burden to all of us it's time to stop. In parts of South Los Angeles having babies for welfare is the only industry the people have.

Doctor's Abortion Business Is Lucrative, San Diego Union, B-1, col. 1 (October 12, 1980). Dr. Allred's aversion to government

Belinda Byrd's mother has resorted to putting up posters in the neighborhood asking the women of Watts to urge the district attorney to take action against Inglewood's abortionists. An isolated case of the one "bad apple"? Unfortunately not.

The license which allowed Inglewood to receive Medicaid and Medi-Cal was ultimately revoked. The abortionits reopened their abortion business as West Coast Medical Group, an unlicensed clinic not subject to state scrutiny or regulation.[36]

Three young women brought to the emergency room at California Medical Center in critical condition after undergoing abortions at Her Medical Clinic in Los Angeles have died since August 1986.[37] Donna Heim, a 20 year old pre-school teacher, who was 5½ months pregnant went to the clinic and received anesthesia despite having noted on her medical forms that she had asthma. According to the coronor's report, approximately 10 minutes into the procedure, the nurse-anesthetist told the physician performing the abortion that Donna was hav-

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subsidies did not prevent him from collecting approximately $3 million in public subsidies in 1980 for performing abortions. Dr. Allred's statements reflect the same philosophy as demonstrated by Margaret Sanger, the founder and heroine of Planned Parenthood when she said "[t]he most successful educational approach to the Negro is through a religious appeal. We do not want the word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members." E. Drogin, Margaret Sanger, Father of Modern Society 33 (1986), citing Gordon, Woman's Body, Woman's Right: A Social History of Birth Control in America 33 (1976).

[36] *Hospital Shut Down As Health Risk Will Reopen For Abortions Tomorrow,* Los Angeles Herald Examiner, February 12, 1988 at A-1, col. 1 and A-15, col. 1 (quoting Los Angeles County's supervisor of hospital inspections as saying "It does seem sort of silly though doesn't it? If they're so unsafe they can't keep their [hospital] license, why should they be able to operate as a clinic?").

[37] *For Three Women A Safe Medical Procedure Turned Deadly,* Los Angeles Herald Examiner, February 22, 1988, at 1 col. 3.

ing difficulty breathing, but the physician ignored her and continued the abortion for another five minutes before turning his attention to Donna. After an emergency tracheotomy failed, the abortion clinic then called paramedics who rushed Donna to the California Medical Center. She was unresponsive and comatose upon arrival, and was pronounced dead the following day.[38] One month later, 22 year old Liliana Cortez also died after suffering cardiac arrest during an abortion at Her Medical Center. And one year later, 18 year old Michelle Thames, died at California Medical Center after an abortion at the same freestanding abortion clinic.[39]

Because Her Medical Center is run as a private physician's office it is not open to inspection by public health thorities, and it is continuing to perform abortions.

E. Buttressing The Myth Of Safe, Legal Abortion—Underreporting of Maternal Mortality and Morbidity.

Maintaining the myth of "safe, legal" abortion is crucial to supporters of abortion on demand. Anxious to convince women, politicians and the public at large that abortion is safe, they repeatedly cite statistics regarding abortion mortality and morbidity which, for the reasons described below, represent a gross underreporting of deaths and complications of abortion. The Court's post-*Roe* decisions concerning recordation and reporting of abortion-related information have made it virtually impossible for those States seeking to obtain even a minimum of information regarding the mortality and morbidity of abortion to tailor recordkeeping requirements to the exigencies of the Court's constitutional tests.[40]

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[38] *Id.*, at A-7 cols. 2-3.

[39] *Id.*, at A-7, cols. 4-6.

[40] *Thornburgh*, 476 U.S. at 765-68 (refusing to recognize that the information which the Pennsylvania legislature required be reported to Pennsylvania public health officials concerning physical complications of abortion serves the legitimate goal of advancing the state of medical knowledge concerning maternal and fetal health.)

By striking down the minimal recordkeeping requirements fashioned by the Pennsylvania legislature, the Court assured that the "system" of collecting data concerning abortion morbidity and mortality would continue to rely solely upon the cooperation and self-policing of the clinics and physicians involved in abortion deaths or complications.

That the abortion industry is not policing itself in *any regard*, let alone in the reporting of abortion deaths and complications, is apparent from interviews with and testimonies of aborted women and former abortion providers, the abortionists' own descriptions of their "assembly line" procedures, and from the horrifying practices uncovered in the few investigations of the abortion industry undertaken by newspaper reporters and others.[41] To contend that all abortionists supply relevant information concerning the mortality and morbidity of abortion given such practices is disingenuous.

The unreliability of abortion safety data on which the medical profession and public health authorities depend can be illustrated most easily by comparing the number of maternal deaths from abortion reported annually for the State of California, with the number of deaths from legal abortion which have been documented herein and in the volume lodged with this Brief under the caption "When Legal Means Lethal". The State of California Yet there is incontrovertible evidence from death certifi-

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[41] *See* the discussion of exploitive practices by the abortion industry in Section II *infra*, J. Wilke, M.D. & B. Wilke, Handbook On Abortion 78-80, 89 (1979). *See also* Pamela Zekman and Pamela Warrick, *The Abortion Profiteers*, Chicago Sun Times, special reprint December 3, 1978 (original publication November 12, 1978) Zekman and Warrick reveal how undercover investigators in abortion clinics found that clinic employees routinely checked off "no complications" before the surgery was even performed.

reported *no deaths* from abortion during 1983 and 1984.[42] cates, police reports, coroner's reports and other sources that *at least* four women and teenage girls have died from legal abortion in Los Angeles County *alone* during 1983 and 1984—23 year old Cora Mae Lewis, 16 year old Patricia Chacon, 43 year old Mary Pena, and 22 year old Yvonne Tanner. The stories of these women and others who have met their deaths and suffered physical and psychological injury in abortion clinics throughout the Nation provide a brief glimpse of the exploitive nature of the abortion industry.

II. ABORTION ON DEMAND—ABANDONMENT AND EXPLOITATION OF WOMEN.

When the Court made its initial foray into the business of formulating the Nation's abortion policy, it did not even remotely envision the surgical "assembly line", commercialization, and exploitation which many aborted women say characterize their experiences with the abortion industry. Rather, the majority in *Roe* apparently envisioned a reasoned, one-on-one consultation [43] between

[42] State of California, Department of Vital Statistics, Death Records, Table A-2, Maternal Deaths By Selected Causes of Dealth, California, 1960-1984 (By Place Of Residence) in California Vital Statistics (1986). It is clear that the Department of Health Services either knew nothing of the deaths which occurred in 1983 and 1984 when it issued its report, or for some other reason simply did not report them as abortion deaths. In either case, this is but one example of the underreporting of deaths from legal abortion which takes place across the Nation, and is illustrative of why conclusions drawn from the current data cannot be relied upon. Failure to report abortion deaths is not limited to California. In an investigation of only four abortion clinics of the twenty operating in Chicago in 1979, the Chicago Sun Times uncovered 12 unreported abortion deaths. Aborted Women at 109 (citation omitted). Even when previously unreported abortion deaths such as those that occurred in Chicago and Los Angeles are uncovered, they are generally not included in the 'official' total since they were not reported as such on the original death certificate. *Id.* at 109 citing Wilke, Handbook on Abortion 81-92 (1979).

[43] Roe, 410 U.S. 163-166 (stating that the abortion decision was to be made "by the physician after consulting with the woman consid-

the pregnant woman and a physician who took the time to become familiar not only with the woman's medical history, but who knew the woman well enough to take into consideration "all of the factors—physical, emotional, psychological, familial, and the woman's age—relevant to . . . [her] well-being . . ." [44] when discussing the relative risks and benefits of abortion and childbirth.

However, the Court's vision of how a decision to abort would be reached and effectuated bears no resemblance to the reality which many women have experienced at the hands of an abortion industry some segments of which appear to be maximizing profits at the expense of women's lives and health.

Abortion is a lucrative business [45] the profitability of which depends upon speed, efficiency and minimizing contact between the physician and the pregnant woman.[46] Dr. Edward Allred, whose chain of abortion clinics was said to have grossed $12 million annually as of 1981, and performs approximately 60,000 abortions each year, has stated that "[v]ery commonly we hear patients say they feel like they're on an assembly line. We tell them they're right. It is an assembly line. . . We're trying to be as cost effective as possible, and speed is important". Indeed, Allred has stated that "[w]e try to use the physician for his technical skill and reduce the one-on-one relationship with the patient. We usually see the

ering an abortion" . . . the abortion decision is inherently, and primarily a medical decision and basic responsibility for its must rest with the physician.")

[44] *Doe v. Bolton*, 410 U.S. 179, 191-192 (1973), *citing United States v. Vuitch*, 402 U.S. 62, 71-72 (1971).

[45] See statement of former abortion provider appearing in the Appendix at p. 27a.

[46] Allred "likes to spend no more than five minutes on each abortion," and "is proud of having eliminated needless patient-physician contact". *Doctor's Abortion Business Is Lucrative, The* San Diego Union, A-3, col. 6 and A-14, col. 4 (October 12, 1980). See statement of former abortion provider appearing in the Appendix at p. 27a.

patient for the first time on the operating table and then not again. . ." [47] Dr. Allred's abortion clinics do not differ from others in this respect, and it is clear that the "consultation" between the physician and the pregnant woman which *Roe* envisioned simply does not exist.

A. A Physician's Right To An Ignorant Patient.

The Court has recognized that "[t]he decision to abort, indeed, is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."[48] But subsequent decisions have made a mockery of the requirement of informed consent.[49]

In *Thornburgh*, *supra*, the Court struck down a provision requiring that women undergoing abortions be informed of the name of the physician performing the abortion, the fact that there may be unforseeable "detrimental physical and psychological effects" of the abortion, the "particular medical risks associated with the particular procedure to be employed," the fetus's probable gestational age, the medical risks associated with carrying the child to term, the fact that there may be medical assistance benefits available for prenatal care, childbirth and neonatal care, and that fact that the father is required by law to assist in the child's support. In addition, the provision required that the woman be offered the *opportunity* to examine printed materials describing the fetus and its development, and listing agencies offering alternatives to abortion which opportunity she could, of course, decline. The Court struck down these provisions, in their entirety, holding that despite the Court's previous decisions that the government might further its legitimate public policy interests in preferring childbirth over abortion, the information on abortion alternative agencies was impermissible because it "contains names of agencies that well *may* be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities." 476 U.S. at 763. Thus, despite the fact that the woman was *not required* to review these materials, information on fetal development was struck as "not medical information that is always relevant to the woman's decision, and it may serve only to *confuse* and punish her and to heighten her anxiety, (emphasis supplied) contrary to accepted medical practice" 476 U.S. at 762.[50] Incredibly, the Court found that even the information regarding "detrimental physical and psychological

[47] *Doctor's Abortion Business Is Lucrative*, The San Diego Union, October 12, 1980 at 3A, col. 5-6 at A-3, col. 5-6.

[48] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 (1976).

[49] *Thornburgh*, 476 U.S. 747 (1986) and Akron, 462 U.S. 416 (1983). *In Akron*, the Court struck down a provision requiring information regarding the status of the pregnancy and fetal development, holding that, although the States might legitimately further an interest in preferring childbirth over adoption, the *Akron* ordinance. by requiring specified information, restricted access to abortions. 462 U.S. at 444, n. 33.

[50] Information regarding fetal development is clearly within the scope of the medical information to which women should have access in order to give their informed consent to an abortion. Logic, as well as attention to the testimony of countless women who have undergone abortions, dictates that severe emotional and psychological trauma may result when a woman undergoes an abortion without a clear understanding of the nature and development of the child to be aborted and discovers this information after the fact. Nonetheless the Thornburgh court obviously feel women have no right to know this information if its effect may be "inflammatory" 476 U.S. at 762, n. 10; if it may cause her "anxiety," 476 U.S. at 762 or horror of horrors, if it may "persuade her to withhold [her consent] to the abortion." 476 U.S. at 762. The essence of informed consent is the provision of precisely this kind of information, which has the capacity to influence a patient's decision regarding a proposed medical or surgical procedure. Many of the testimonies of aborted women set forth in this Brief, in the Appendix, in the volume lodged with the Court and in Aborted Women have a recurring theme—if only I had *known* that my baby was alive, what my baby *looked like*, I would never have chosen abortion.

effects" and all "particular medical risks" of the abortion must be struck as likely to "compound the problem of medical attendance, increase the patient's *anxiety*, and intrude upon the physician's exercise of proper professional judgment." 476 U.S. at 762 (emphasis added). To grant the physician complete control over whether to provide information to a woman regarding a surgical procedure portrays a patronizing attitude toward women —an attitude that assumes women are such poor decision makers, so fragile and so easily "confused" that abortionists need not provide them with information relevant to their future health or necessary to the exercise of a meaningful choice regarding elective surgery. After all, it might "increase their anxiety." Instead, the abortionist, who in a freestanding clinic generally first meets a woman when she is gowned and on the operating table, is entitled to withhold relevant information and make the abortion decision, *not* in consultation with the pregnant woman, but rather *for* her. The Court cloaks this paternalistic attitude in the mantle of protection of women's constitutional right to "choice," while it strips women of their right to information necessary for control of their bodies and their destinies, by empowering the abortionist to withhold information a woman needs in order to make an informed choice regarding her own medical care and the irrevocable decision to have her preborn child killed.

The common thread which runs through almost all testimonies of aborted women who have suffered psychological trauma and/or physical injury as a result of decisions such as *Akron* and *Thornburgh*, is the sense of anger and betrayal when they discover that they were not told of the possible consequences of a decision to abort, and often were fed outright lies when asking questions regarding the procedure, particularly when the questions involved fetal developmental characteristics.

The following are examples of the effect of nondisclosure such as the *Thornburgh* decision endorsed an aborted women:

Being a woman who experienced an abortion, I can tell you that withholding information from women that may affect them for the rest of their lives is both dangerous and demeaning. Doctors may explain more to their patients about tonsillectomies or appendectomies that they do about abortions. I really believe that if I had been fully informed, both medically and as to my options, I would have chosen not to abort my baby.

I was given a saline abortion at four months and I never once was told of the pain involved during the injection of the saline solution into my womb. Neither was I told of the pain involved in labor, nor even that my body would go into labor to reject the struggling, dying baby that was being burned alive in my uterus. Over four hours after the injection, I gave birth to my dead son. I knew he was my son because I asked the nurse what it was as she removed the bedpan and she said, "It's a boy."

> Then began the horror that I have lived with for years afterward, the horror of the certainty that I had killed my own son in a moment of confusion and, I believe, the omission of basic information that would have changed the course of my life. I was twenty-one years old then. My son would now be fourteen.

Letter from Rosemary Gaston to Senator Gordon Humphrey dated August 4, 1986.

Another woman, who discovered the facts about fetal development only after her baby was aborted writes:

> In 1980, I aborted my first child. I was told at Planned Parenthood that this "little blob of tissue" would be as easily removed as a wart. Terminating a pregnancy, I was told, is no more significant than removing a tiny blood clot in my uterus. "Sounds harmless" I reasoned. Exercising my right, I opted for abortion. At that time, no other options, such as adoption or single parenting were explained.
>
> Following my abortion I became deeply depressed. suicidal and unable to hold a job. I never mourned

> the loss of my appendix, so why did I grieve over the passing of an enigmatic uterine blob? The answer is that it wasn't a mere "blob of tissue." It was a living baby. I realized it the moment I saw his dismembered body. I realized it too late.

Letter from Karen Sullivan Ables to Senator Gordon Humphrey dated May 23, 1986.

B. Abortion—The Unregulated Industry.

There are a number of instances in which abortions were attempted, but were not completed, and where the patient was either not given appropriate medical treatment by the abortion clinic, or was literally abandoned by the abortionist. Such women generally are treated in hospital emergency rooms within the vicinity of the free-standing facility. As was discussed in Section I, the documentation of death or injury causing hospitalization often does not include any reference to the fact that death or injury ensued upon performance of an induced abortion. While abortion injuries are rarely reported to the police, one case surfaced recently which graphically illustrates the horrendous practices engaged in by some abortionists in utter disregard for women's lives and health and the lack of either prosecution by police authorities or regulatory control of the industry. It involved an abortion of a 23 year old woman Mrs. Arias, by Dr. McMillan at Quality Medical Health Group. The Los Angeles Police Department investigative report attached to the death certificate of Baby Arias [51] states that after having paid $400 cash for her abortion:

> Ms. Arias was escorted into a room and placed on a table. The receptionist (unknown if a nurse) held her on the table and the doctor started the abortion. The patient was in extreme pain and was bleeding profusely. After crying and screaming, the

[51] See autopsy report, along with the follow up investigation into Baby Arias' mother's abortion in the volume entitled "Rachel Weeping" which has been lodged with this Brief.

> receptionist left the room and returned with a shot that was administered to the patient by the receptionist. *The doctor exited the room and never returned.* The receptionist told the patient she was going to take her to the hospital. The patient was placed in the receptionist's private vehicle for transportation. . . .
>
> The patient was given a note from the doctor explaining the complications during the attempt abortion. The patient was seated in the Emergency Room *and the receptionist departed without notifying anyone why the patient was present.* After a long period of time, one of the hospital personnel asked the patient why she was present. The patient showed the note from the doctor and the patient was immediately rushed to surgery where the abortion was completed and medical treatment was administered.
>
> When the surgeon operated, she removed half of the torso of a preborn child of 24 to 27 weeks gestation. The autopsy of the child indicated that the infant's left arm, leg and internal organs were missing, but the remainder of the child was intact.
>
> The police report concludes:
>
> > Deputy District Attorney Brian Kelberg was notified of the incident and advised that because of the consent by the patient for the abortion, that there is no criminal violation.
> >
> > . . .
> >
> > The incident was a therapeutic abortion of a second trimester fetus Constitutionally recognized as the right of the patient. *Id.* at p. 3.[52]

Ms. Arias must have been astonished to discover the breadth and depth of the fundamental rights visited upon her by *Roe* and its progeny. So too, must the families of the women and girls who were led to their deaths in Inglewood and Hers Medical Clinic by abortionists who

[52] *Id.*

continue to ply their trade unhampered by any regulatory authority.

CONCLUSION

Before *Roe* women died and were injured by illegally performed abortions. After *Roe*, women die and are injured by legally performed abortions. Whether pre-*Roe* or post-*Roe*, their deaths and the physical, psychological and emotional trauma caused by abortion are tragic. However, today, one and one-half million women each year are exposed to the risks of abortion, an astronomical increase over the numbers which were performed prior to *Roe*. Over twenty-two million preborn children have been killed, and respect for human life has been denigrated. This is an enormous price to pay for the current state of abortion on demand. *Amici* urge that the Court reconsider and overturn its ruling in *Roe* and return to the legislatures the power to solve the dilemma of abortion.

Respectfully submitted,

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APPENDIX

APPENDIX

LIST OF AMICI

Women Exploited By Abortion of Greater Kansas City is a local chapter of a national organization, Women Exploited By Abortion ("WEBA"). There are over one hundred chapters of WEBA across the nation, and its membership is comprised exclusively of women who have had abortions. WEBA serves as a source of healing for aborted women and educates the public about the adverse physical, emotional, and psychological consequences of abortion.

The National Association of Pro-Life Nurses is an association of registered and licensed practical nurses with state and local chapters throughout the nation. Its members, having seen the devastating effects of abortion on their patients and their profession, oppose abortion on demand.

Let Me Live is an organization based in Dallas, Texas which provides crisis pregnancy alternatives, post-abortion counseling, and education regarding the exploitation of women by the abortion industry. Its founder, Carol Everett, was formerly an administrator of four abortion clinics and a founder and owner of two abortion clinics.

The Elliot Institute for Social Sciences Research is an independent, not-for-profit research group committed to a program of original research in the areas of abortion, birth control, and population control. It is a leader in researching the long-term effects of abortion as reported by aborted women.

Letter to Senator Humphrey appearing at Cong. Record, S 12699 (September 16, 1986)

DEAR SENATOR: I am writing this letter as an encouragement to you in your fight to give women a real CHOICE by giving them "informed consent" prior to abortion.

I am a woman who experienced firsthand the turmoil of an unplanned pregnancy followed by the emotional and psychological trauma which accompanies abortion. I am able to say to you that after years of working through my abortion experience, I believe that had I been told the "choice" I was making would result in the painful death of my child as well as subsequent emotional and psychological problems that would require attention as a result of my "choice," I never would have had the abortion.

In my so-called counselling session, I was manipulated by carefully worded questions made to imply that I was not capable of mothering a child at that time; that there would be virtually no help from my family or friends; that my husband couldn't get a job and we'd never be able to pay the rising OB-GYN costs, let alone feed and care for an infant . . . etc., etc. NO INFORMATION was given about fetal development, possible physical complications or even the actual abortion procedure, NOTHING.

I am convinced after counselling with many other women in post-abortion trauma that abortion itself is completely alien to the thinking process of the female, and that we can not participate in any way in the death of our own children without suffering psychological problems.

Before a woman can be truly "free" to make her own "choice," she MUST make a decision based on factual

information about ALL the aspects of abortion, adoption and parenting as well.

Again, thank you, Senator Humphrey, for standing up for womanhood and our RIGHT to INFORMED CONSENT, which will truly give us the freedom of choice.

For the Children's sake and for mine.

Thank you.

LAUREN PLATZ,
Pinoio, CA

Letter to Senator Humphrey appearing at Cong. Rec., S13923 (October 8, 1987)

CINCINNATI, OH.
June 5, 1986.

SENATOR HUMPHREY: I wish to thank you for your support in the fight to stop abortion, and to bring to the floor of the Senate a bill to make them inform any women of its effects.

I've had an abortion! My husband was a drunk and I already had two children. I just couldn't think of having another baby. I didn't know anything about abortion. My friend took me to a doctor.

He gave me drugs and took my baby from me. I started to bleed to death. I had no help, no where to turn. I did get through that, but my health was never good again.

But this was not the worst. The psychological effects were the worse time of my life. There was guilt. I was suicidal. When I laid down at night I heard babies crying. I was full of anger and rage, and had no self esteem. Regret and remorse stayed with me.

Thank God for saving me. It breaks my heart to think how many girls are suffering the way I did.

So please see to it that they are informed, before the abortion procedure. I pray for all these girls each day and pray they will get help.

Sincerely,

CATE WEBSTER.

I HAD TWO ABORTIONS

I used to be one of those who argued that abortion was okay until I realized how much damage it did to my own life. It really wasn't long after I had the two abortions that I began having some difficulty both emotionally and physically.

Not long after the second abortion I got married and became pregnant again, because we wanted children. By this time, I realized I had been foolish to have decided on having those two previous abortions. I became aware that what was termed a "simple surgical procedure" was actually the taking of an innocent life from its mother.

I repented for my deeds and decided I wasn't going to let my mistakes affect the baby I was carrying for myself and my husband.

I carried our next baby for 5½ months before I went into premature labor. A tiny 2 pound baby girl was delivered and she was alive. We named her Elizabeth Kaye. They let me see her for a minute before they rushed her off to Children's Mercy Hospital.

One usually expects to see their newborn baby in a bassinet, wrapped in a warm pink or blue blanket. My baby was put in a clear plastic box-like incubator. There were tubes and wires inserted into her body that would become her life support for as long as necessary.

One can't put into words the agony felt as a parent waits to find out if their child is going to pull through.

After a week, the torturous waiting finally ended. Our baby girl died of heart failure. She was just too small and weak.

We lost our second child, a boy who was stillborn at 4½ months.

We lost our third child, a baby girl who lived for two days through a similar experience of our first baby.

Why was I losing my babies??? The answer is: because of the previous abortions.

And not one but two abortions in less than three years. I began reading up on the subject.

When a woman becomes pregnant, the cervix automatically tightens up to support the developing baby and prevents infection from entering the uterus.

It goes against nature to pry it open before it's ready to undertake natural processes.

When an abortion is being done, they pry the cervix open to make the procedure. I've read that the most time consuming part of abortion is dilating (prying open) the cervix because it's so tightly shut.

I was informed by my doctor of a medical complication which was preventing me from carrying a full-term pregnancy. He referred to it as an "incompetent" or weakened cervix.

Because of the previous abortions, my cervix had weakened to the point where it could no longer support all the weight of a living baby, its placenta and fluids. Eventually the cervix gave way to the weakness, resulting in premature labor and delivery of our babies.

I wasn't informed at the time of the abortions that these things could happen.

Nobody told me that what was growing inside of me wasn't a pile of cells going nowhere. That it was a living human being with its own identity.

I have fought with the unspeakable guilt. The guilt of having taken two lives. The guilt of being responsible for the deaths of three babies I desired so in my heart. The guilt of subjecting such terrible agony to the other people around me who had to deal with the pain—my husband (who had nothing to do with the abortions), grandparents, brothers and close friends when our babies

died. The guilt of being a failure as a woman, because I couldn't even do a simple thing like have a baby in the normal way.

The worst guilt of all was the terrible sin of murder committed against the Lord my God. I was responsible for destroying His precious children. Lives which He created and for which He had plans.

When I realized that the worst guilt was sinning against God, all I had to do was fall on my knees to Him and ask Him to forgive me for what I'd done. He did. He forgave me. He replaced all the guilt and shame with His love, joy and peace. The emptiness was gone. Now I walk in freedom from guilt. God is a miracle worker.

Through a surgical procedure, my cervix was tightened.

We now have a healthy, energetic two year old boy. He is a reminder of my reason for living, proof that God has forgiven me, forgotten my past and truly loves me—completely.

Love,
Vicki
[MEMBER OF WOMEN EXPLOITED BY ABORTION]

Monica Harshbarger

Monica had a legal abortion in Colorado in 1971. Though she was afraid that a baby would spoil her teenage fun, she soon found that the complications she suffered from the abortion weren't worth all the "fun" in the world.

In 1971, at the age of seventeen, I became pregnant. I had a been pretty rebellious teenager, and I went through a lot of emotional turmoil at that time. I now know that most of that was due to the fact that my parents divorced in my early teens. I lived with my mother, but I loved and missed my father more than I knew, or at least was willing to admit at the time.

I guess I fell in with the wrong group of kids when I was in junior high school and high school. We were experimenting with drugs and casual sex. Oh, we knew about birth control, thanks to our local Planned Parenthood. But it is my belief that teenagers are not responsible enough to handle any form of birth control. I now know that abstinence is the only sure form of birth control.

When I discovered I was pregnant, I was devastated, and could think of no one but me, and my life. No one else mattered because I was having fun, and I knew it all. A baby would have spoiled that. I didn't think I could give birth to a child and give it to someone else. I knew at seventeen that I was not capable of raising a child.

I had heard that abortions were safe and easy. My best friend had had one, and she was fine. She has since had four more; how sad. Needless to say, she is not my best friend now, but we are friends, and I felt terribly sorry for her. She tries so hard to bury her guilt, and justify them.

Anyway, I truly believed that what I was carrying at that point, the first trimester, was a blob of tissue. No one ever told me any different at any time before my

abortion. I went to my mother with the news of my pregnancy and told her that I wanted to have an abortion. She tried to talk me out of it, not because she knew how developed my baby was, but because she believed it was a life, and because of her love and concern for me. But I was determined, and no one was going to change my mind. Then, as now, a parent had no legal influence over their minor child when it came to abortion or birth control. My father was the one who paid for the abortion; my mother wouldn't.

My friend's sister was a nurse, and she gave me the name of her Ob/Gyn. Abortion was liberalized in Colorado several years prior to the 1973 Supreme Court decision, for the "health" of the mother. I now know what a generalization that is: it can mean anything. For me it meant a half an hour in a psychiatrist's office, telling him that I did not want to have a baby. He recommended in favor of the abortion.

I then had a physical examination by the Ob/Gyn. My mom went with me, I think in hopes of changing my mind. After the exam, we met with the man who called himself "doctor." He never informed us about the development of my baby. He never informed us of the dangers, the possible complications to me.

I returned the day before my abortion for the insertion of a laminaria tent to start dilation. I returned home, and the next morning I checked into a Denver-area hospital. (Before 1973, all abortions were done in a hospital.) Mine was a twelve-week suction abortion.

I remember lying on the stretcher outside the operating room, everything so sterile and so white. Everyone pretended to be so compassionate. You know, I believe I even had a crush on that man who took my baby, he was my savior! What a fool I was then. . . .

I believe I had a moment of hesitation: "Am I doing the right thing? I can't turn back now. And it really

is for the best." Then they came and rolled me into the operating room.

They put me to sleep. I spent the night, and then left the next morning. I was a bit numb, but relieved. It was over. Now I could get on with my life.

The next Friday night, I was out at a party, having a good time, when I went into labor. It was the most horrible pain I would ever experience. My mom picked me up and rushed me to the emergency room. There I underwent a second suction abortion to remove the parts left behind the first time. When the pain was gone, I was relieved. The doctor told me that either I had had twins, and he had only gotten one the first time, or that my uterus was tipped, and he hadn't reached all the fetal tissue. Whatever it was, I didn't care.

I'm sure I justified my abortion to other women after I aborted; I know I did. I was pro-choice, pro-abortion. Justification is where it's at for aborted women who refuse to admit their mistakes and accept the truth. I guess a lot of women are scared to admit their mistakes, or talk about it because they are scared of how it will affect them. Often, after telling my story to a group, I will have a woman come up to me with tears in her eyes, thanking me for having the courage to tell what she has been unable to tell. They are my sisters. And you watch us; pretty soon that fear and doubt will turn into strength and determination, and we will put an end to this degradation.

Anyway, I didn't think about that procedure consciously until six years later, when my daughter was born. I say "consciously," because when I met my husband-to-be, a couple of years later, at nineteen, I had a strong wish to have a baby. When we were married, I was twenty-two. I went off the pill immediately, in hopes of conceiving a child soon. After a year or so of trying to conceive, without luck, I went in for some rather uncomfortable fertility tests. We discovered that my fallopian tubes were blocked with scar tissue. My tubes were cleared, and then I became pregnant. How lucky I was!

During my prenatal visits I can remember crying each time I heard my daughter's heartbeat. But I still did not consciously recall my abortion. Finally, the time for delivery came, and my water broke. I was in labor for twenty hours, but my uterus did not dilate. They had to take her C-section.

When the nurse handed me my baby for the first time, that is where it hit me: what had I done when I was seventeen?! Danielle, my daughter, was such a beautiful miracle. From that day on I started to read and study about the unborn child and abortion. I have been a completely dedicated, pro-life activist ever since.

I will never know if my physical complications—blocked tubes, incompetent uterus, extraordinarily heavy menstrual periods, endometriosis (scar tissue in my uterus), pain in intercourse—were the result of that abortion. When I tried to recover the medical records of my abortion from that office, I was told that they had been destroyed in a fire in 1972, one year after my abortion. But I believe these are all abortion complications.

Emotionally I have felt a lot of guilt and remorse since finding out that my baby was completely formed at the time of the abortion, and I felt horrible pain. I have trouble telling my story; at times I will break down while telling it.

One other thing: only several years ago did my mother finally unburden herself to me. I wish she'd had the courage when I was seventeen to tell me her story. She had become pregnant when she was seventeen, also, and was taker by an uncle to an abortionist. She got up and ran out because she could not go through with it. She stayed in a Catholic convent home until she gave birth to a little boy, John. She kept him there for two years

in hopes that something would work out so that she could keep him. Knowing it was hopeless, she finally gave him up for adoption. We found him a couple of years ago. He's thirty-seven now, and his name is Jerry. This was really a thrill for me. I really wish that abortion did not hold such a stigma. It is the greatest show of a mother's love and the best alternative for a lot of young girls today.

Reprinted with permission from D. Reardon, Aborted Women, Silent No More (1987).

Carolyn Walton

When Carolyn became pregnant under difficult circumstances, she went into a state of "shock." She didn't know what to do. But her well-meaning relatives did. They took over her decision-making for her, and had her undergo an abortion at a Cleveland clinic. The trauma of her abortion made her lose complete control of her life. She found herself abusing drugs and alcohol, sterile from abortion complications, and dangerously suicidal.

Ten years ago I found myself pregnant, divorced, and virtually alone. The first emotion was that of sheer panic. I only had a small income and was working two jobs. I had a four-year-old daughter to support. The baby's father immediately retracted his mariage proposal as soon as he found out I was pregnant. I had no money, no medical insurance, and didn't realize that there were places to turn to for help.

As I turned to friends and relatives for advice, the whole matter became more confusing. Advice poured in from all sides. I felt like I was being put through the third degree. "What is a divorced women going to do with such a small income? You already have one child to feed. How will you pay the hospital bills?" As I think back, not once did anyone just put their arms around me and ask my feelings or allow me to even have time to have any. Just some positive love and support would have been a relief. A relative that had had an illegal abortion 25 years before talked to me about abortion. After all, it was now legal and "safe." She had never been able to have children because of her abortion, but strangely enough, advised me to have one anyways! I felt like I was in a tailspin. There was no time to think.

My relatives went about their business of making all the arrangements while I remained in a total state of oblivion. I felt like someone on the outside looking in. It was as if it was happening to someone else. I don't blame anyone, they only did what they thought was

right; that is why educating people about what's really right is so important.

Anyway, I was soon whisked off to Cleveland and dropped off at some friend's house. The next day I was again dropped off at the abortion clinic. My heart told me I was wrong, but my mind, like a robot, did what it was told. After I got inside (alone), I paid my $200 and was given a pregnancy test and given a locker (just like in a gym). I was given a paper gown and told to put it on. The place was cold and the people formal. No compassion, no understanding. It was like a busy assembly line.

I then waited in a small room until my name was called. I was taken to another room and told to get up on the table, put my feet in the stirrups and scoot down. It was so cold—I shivered and have never been so scared or felt so alone. I was soon to find out that the "painless" procedure I was promised was anything but painless. As my baby was ripped from my body, the pain became unbearable and tears streamed down by face. I was told to be still, it would soon be over. After the abortion, I walked to another room and was allowed to lie down for thirty minutes, after which I was told I could leave. I went to my locker, got dressed, and was told to see my family doctor in six weeks. I asked if I could use a phone to call my ride and was told they had no phones for public use, but there was a pay phone down the street I could use.

I walked down the street. It was November, and very cold. As I walked back to wait for my ride outside the clinic, I felt cold, nauseous, dizzy, alone and empty. When my ride picked me up, she had a friend with her. They were going to a steak house for lunch and I had to go along. You would have thought I had just gone to get my eyes checked for all anyone cared.

Later that day another relative took me home and dropped me off in front of my apartment. It's amazing

how everyone was there to give advice before the abortion, but afterwards I was on my own.

What was to follow was more like a nightmare than reality. I began having nightmares about my murdered baby. I began drinking more and more until I was up to five bottles of alcohol a week. I sometimes went so long without eating that when I would try to eat, I would vomit. I finally went to the doctor and found out that I had an infection from the abortion. He started treatment, but it didn't help. I told him about the nightmares and my nerves, and he gave me tranquilizers—no comfort, no counseling—just pills.

So I started taking tranquilizers to help me sleep, and pep pills to keep me going during the day. Four times I deliberately overdosed, trying to commit suicide. I don't think I really wanted to die, I only wanted someone to care, to help, to listen. I wanted the pain to go away. The doctor continued to try treatment after treatment on the physical problem. But to no avail. I finally changed doctors and had to have surgery because the infection caused by the abortion had destroyed the cervix and the uterus. This helped for a short time.

I finally met the man I am now married to; with his love and support, I started to put my life back together. We started to attend church and I came to find Christ as my Savior. I then knew I was forgiven, but it took time before I was able to forgive myself, I was finally alive after being dead and living in hell.

But the physical problems caused by the abortion started cropping back up. More infections and more damage. I changed doctors again. I had a D&C. I was filled with tumors by this time and had endrometriosis. A hysterectomy was inevitable, but we put it off as long as possible. But March 15, 1984 it finally came to pass. *Everything* had to be removed, for it was totally destroyed. It took ten years of constant problems, but the abortion finally took its final toll.

As I look back, if I had had love and support, and above all, the true facts, I would have never even considered an abortion. The pain never goes away; it's always there.

I really believe WEBA needs to be heard. We have a right to be heard. The thought of anyone going through what I went through (although I know that there are literally millions who have) is heartbreaking to me.

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Lorijo Nerad

Lorijo was a victim of pressure and deceit from her social worker, a Michigan state agent appointed to serve and protect the poor. The Nerads' caseworker implied that their welfare benefits would be cut off if Lorijo carried her third child to term. Now sterile due to abortion-related complications, Lorijo and her husband feel they were exploited because of their circumstances.

In January of 1974, my husband Jim lost his job when he injured his elbow. At that time we had one child already, and I was pregnant with our second. Since Jim was unable to find another job, we had to go on welfare.

After having our baby in May, our caseworker at the Department of Social Services made us feel like we had been irresponsible for having a second child. I remember her glaring at us like a disapproving mother who didn't trust her children. She lectured Jim, telling him, "You can't keep your wife barefoot and pregnant the rest of your life. You had better so something about it." She wanted us to stop having children and insisted on making an appointment for us to go to Planned Parenthood for counseling and birth control supplies—conveniently located right next door.

At the clinic I was examined and told that I had a bacterial infection. The doctor said, "I'm not going to touch her with a ten-foot pole." They decided that I couldn't have any kind of birth control, so my husband became the target. The counselor told us that Jim had to have a vasectomy. They really put the pressure on him, making him feel like he was under an obligation to be sterilized. Of course, Medicaid would pay for it. (They were willing to do anything to keep us "welfare folk" from reproducing.) We didn't want to do it, but they told us that there was a 50-50 chance the vasectomy could be reversed later when we wanted more kids *and* had more money. Afraid we would have our finances cut off if we had another child, we went along with it.

After this, I went to my doctor to be treated for the bacterial infection, and they ran a pregnancy test on me. We waited in the office for the results. I had missed a period, and I was secretly hoping that I was pregnant. With Jim sterilized, this was our last chance to complete our family. When the phone call from the lab finally came, the nurse talked for a moment, then hung the phone up by slamming it down rather hard. She turned to us and said in a *very* disgusted voice: "Well, it's positive."

I was happy immediately. "All right! I just knew it!" But my enthusiasm was dampened when I saw my husband fall against the wall and look at me with disgust as if it was all my fault. At this point, the nurse started telling us that it was much too soon for me to have another baby. "Either you could die, or the baby could die, or the both of you could die," she told us. The prospect of having me die and leaving him to care for two or three children alone had Jim really nervous. Later that same day my doctor said I could have the baby, but he didn't really offer any encouragement that I should. From all that the nurse had said, we left with the feeling that my life would be in danger if I was to carry the baby full term.

When our caseworker found out that I was pregnant with a third child, she was just disgusted with us. She couldn't believe that we had been "so irresponsible." She urged us to have an abortion, saying "You just can't go around having babies all the rest of your life." After making us feel like dirt, she reassured us that Medicaid would pay for the abortion and that we could always have children later.

From that point on, there was pressure from everyone around me to have the abortion. The only one that didn't want me to do it was my mother-in-law, who was herself a survivor of a failed abortion attempt.

Confusion mounted, tension and pressure took control, and I became another victim of "free choice." I agreed

to let them do the abortion, and immediately Medicare came through to prevent another mouth on the welfare roles. (The quick service for aborting my child was a sharp contrast to the six weeks I had to wait before Medicare would treat two rotting teeth.)

On August 18, 1975, I had an abortion. The doctor told me he would slowly dilate my cervix with a series of metal rods and suction out the "blob of jelly called fetal tissue."

I wasn't given anything for pain, the nurse had to hold me down. The nurse kept saying to me, "It will be over in a minute, honey. . . . Oh, come on now, it doesn't hurt that bad. Quit being such a baby!"

The doctor went on with the procedure. Once he stopped and wiped a piece of it on the sheet, showing me and telling me it was a piece of placenta, and saying this is a piece of this or that, using some medical terms.

Afterwards, our caseworker didn't ask about the abortion or how I felt, she just wanted to know that I had had it done.

Looking back, I think that some of the people working with welfare recipients do really want to help them; but when they find out that they can't really "get involved" and help, they buckle under the pressure and quit. Others, like the one who pushed us towards Planned Parenthood and the abortion, have a Margaret Sanger attitude, wanting to weed-out the "depraved," non-working class.

After the abortion, we lied to everyone about it, trying to hide from the guilt. We told my family that I had just had a D&C and that I just tried to forget about it, but never really could. He buried it really deep, and he still hurts today when he thinks what he put me and our child through.

As for me, I began to neglect my children, my husband, my home, and myself. I abused my children. I didn't hold

them or cuddle with them, because of the looks that they would give me. It was as if they knew what I had done and hated me for killing their brother or sister. The guilt and pain I felt in my heart made me feel so unworthy to even hold a child, let alone have my own. I heard voices saying, "Murderer, murderer, you've slaughtered an innocent baby, your own child."

To cover our guilt we started getting into drugs. We had parties galore. Smoked pot, drank senslessly, and experimented with hard drugs. We wanted to party until we dropped. I was trying anything and everything to get rid of the guilt that stabbed me in the heart every day.

We lived like this for three years after my abortion. Then in 1978 we decided the life we were living was a mess and was burning us out. We turned to our childhood days of churchgoing, and remembered the stories of how God forgave, but I was still in turmoil about my baby. I prayed that I would have another baby to replace it.

Seven years after my abortion, I went back to my doctor to see if all was well enough for me to have the baby I so desperately wanted. After tests, I was told that I had abnormal cells on my cervix, the kind that turn into cancer. Tests led to more tests, and in 1982, at twenty-six years of age, I had to have a hysterectomy. All my hopes of having another baby were ripped away from me.

One month later I got my monthly newsletter from Right to Life. Still a little out of it from my operation, I thumbed through the newsletter only to find a picture of an aborted baby. That did it! I snapped. I cried and screamed at God with my fist in the air, "Why don't you give me another chance?" Then I sat in shock just wondering why I get so hurt and depressed. God had forgiven me, but I didn't forgive myself. So that day, I forgave myself. I decided to take my self-pity and turn it over to God.

But it wasn't until I joined WEBA and saw other women with more problems than I could shake a stick at, that I received complete healing from my abortion. I still mourn the death of my child as anyone who has lost a child will. It is normal; it is what every woman who has had an abortion needs to do. And for the first time in my life, I have felt *normal*, after being told by counselors, friends, and even family that I was crazy for all those years after my abortion.

Reprinted with D. Reardon, Aborted Women, Silent No More (1987)

Debbie Nelson

Debbie chose abortion twice: the first time was in Washington, under pressure from her husband; the second was in California, because the child had been conceived during a rape. But as Debbie's story emphasizes, no matter what the circumstances, the physical and emotional aftereffects are traumatic.

I have had two abortions. The first was when I was sixteen years old. I had been married for three months when I realized I was pregnant. My husband was opposed for financial reasons to our having a baby, and said I should have an abortion. Being newly married and only sixteen, I felt that I had to prove I could hold my marriage together.

The abortion was one in a hospital, under general anesthesia. When I woke, I was crying. I didn't understand why, but I knew that I felt a tremendous loss. When I was taken back to my room, I began bleeding heavily. I told the nurse that I had never bled like that before, and she said, "Well, you've never had a baby before." At the time I didn't understand that comment. Now I know the point she was trying to make.

My second abortion was three years later. I was working in a hotel as a maid; and while at work, I was raped at gunpoint. I was taken to the emergency room immediately, but a D&C wasn't done, thus I conceived of that rape.

When I suspected that I was pregnant, I went back to the doctor who had tended me in the emergency room. I remember sobbing and crying so hard when he told me the pregnancy test results were positive. In that moment of shock, the doctor told me that my only choice in a situation such as this was abortion. He was very kind. He held my hand and comforted me, then made a phone call to make an appointment for me with an abortion clinic.

The feelings that I had experienced with my first abortion came back to me, but I thought that this would be different. After all, I had been raped and couldn't possibly love this child. The doctor told me abortion was safe, easy, and painless. Having been asleep the first time, I had no reason to dispute this.

When I got to the clinic (I think it was three days later), I was asked to sign a form releasing the doctor and clinic from any responsibility in the event of complications. I asked what complication this was referring to. I was told that as with any surgical procedure, there was always the slight chance of problems—but that this very rarely happened.

I was awake this time. They used the suction method to kill my baby, and the pain was horrendous. I hadn't expected to feel the emotional trauma this time, but it was worse than before. I was taken to a room to rest and couldn't stop crying. The "oh-so-rare" physical complications began immediately. I began hemorrhaging and cramping severely and was given an injection to lessen the bleeding, and I was told to go home to bed.

One week later, while at work, I began hemorrhaging again. I went back to the clinic and was told that I had probably retained some of the tissue, but that it would pass. After three months of bleeding off and on, I went to another doctor, who was outraged at my condition. He did an emergency D&C to remove the retained placenta, then he told me that my uterus had been significantly damaged by the abortions and their subsequent infections. He said there was much scar tissue in my uterus and that any future pregnancies would probably be difficult.

In the years to follow, I was divorced and remarried; and I became a Christian, a mother, and a nurse. It was when I went through nurse's training that the reality of what I had done became clear to me. While studying fetal development, I realized that I had been lied to. At

eight weeks, those "clusters of cells" had a remarkable resemblance to a baby. They had hands and feet, a heartbeat and brainwaves, which meant that those babies did indeed feel the pain of their horrible deaths.

I now have two little girls. During both of my pregnancies I had a condition known as placenta previa. Both were high risk pregnancies followed by very difficult labors and deliveries. Eight months after the birth of my second daughter, at the age of twenty-three, I had to have a hysterectomy. The damages done by my abortions were so severe that my childbearing days were over. All of this occurred because of my two "safe and legal" abortions.

Had I been told the truth about the risks that I was taking with my body and about the developing persons inside of me, I know that I would not have made the decision to destroy life. There are those people who can deliberately take the life of another person, but that is not my nature. Yet I must live with the truth, because that is what I have done.

I still feel that I probably couldn't have loved that child conceived of rape, but there are so many people who would have loved that baby dearly. The man who raped me took a few moments of my life, but I took that innocent baby's entire life. That is not justice as I see it. My first marriage ended in divorce, so the reality is that my first abortion was done for the convenience of two very selfish people.

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This letter is to inform you of the death of our daughter Donna and the hope that it can be prevented from happening to someone else.

Our 20 year old daughter Donna was pregnant without myself or my husband's knowledge. She had gone to a clinic in Pasadena, California where she found out she was 21 weeks pregnant. They told her she was too far along but told her about a clinic in Los Angeles that would do it. She had gotten an emergency 30 Medical Card without our knowledge.

She went to the clinic at 2700 South Figueroa St. the HER Medical Clinic. Donna has a history of asthma and the clinic was aware of this but they gave her general anesthesia without ventilating her properly. She stopped breathing during the abortion, but the doctor finished the abortion before he tried the Heimlich method on Donna without success. They did an incomplete tracheotomy with success, then tried C.P.R. with no success so they call paramedics, Donna's sister Ronda was with her at the clinic and she kept asking how her sister was and she was told that Donna was fine. She did not know that Donna had stopped breathing and that they had called the paramedics. Ronda happened to overhear one of the nurses on the phone to a hospital and she heard her sister's name mentioned. She then heard sirens and went outside and saw them putting her sister (already turned blue) in the paramedics' truck. She then went inside to get her sister's purse and belongings and went to the California Hospital on South Hope Street in Los Angeles where they took Donna. While they were taking care of Donna, a nurse from the hospital called me and my husband, we went right away to the hospital in the 4:30 afternoon traffic. When they got Donna's tracheotomy repaired and had an O.B. doctor examine her, they put her on a life support system and transferred her to C.C.U. unit at the hospital. My husband and I arrived before they had sent her to C.C.U. We were not aware that she was pregnant let alone in a clinic for an

abortion. We were upset and in a state of shock. The doctors told us that they felt Donna was 90% brain dead when she arrived at the hospital and she was also in a coma. They did everything they could possibly do for her and kept close watch over her on the life support system for approximately 12 hours before pronouncing her dead. They told my husband and me with tears in their eyes, please do not let them get away with this; get something done for they butchered your daughter.

We are writing this in hopes that something will be done so it will not happen ever again.

I have tried and tried to contact the proper persons so this situation can be thoroughly looked into. So far the only persons checking into it is the Board of Medical Quality Assurance, but they told me that there have been three other deaths at the same clinic and nothing has been done. I am in hopes that this will not be overlooked and will be resolved justly. I want the public to be aware that there are unsafe clinics out there and to be careful before making a deadly mistake. Young girls as well as women like our daughter are not aware that there are unclean, unsafe clinics that go unnoticed.

Please if you can help in any way to let the public know of this clinic and bring out the facts about it so we can warn the community, I would be very grateful.

Reprinted With Permission From Abortion Malpractice Reporter, Vol. 1, No. 1, p. 3-5.

I was involved in the abortion industry from 1977 until 1983. I was not an absentee owner; I ran a total of four clinics in the Dallas/Fort Worth area, coming to a ownership position in Dallas Medical Ladies Clinic and Women's Clinic of Mesquite in Dallas and Mesquite, Texas.

I assisted in abortions, particularly second and third trimester abortions. I saw death from legal abortions, as well as major complications; i.e. perforation of the uterus, repair of the urinary tract, repair of the colon resulting in colostomy. I saw abortions performed on women who were not pregnant at the time of the procedure, but were accomplished just for the money.

I saw women lied to about the development of her "product of conception"!

Doctors commonly rushed in the clinic, asking, "How many do we have today"—interested only in how much money they would make that day.

Doctors rush from room to room sometimes bragging about how fast they "could kill a baby". One doctor claimed to be able to do a two to three minute abortion, but missed one of each five. One patient of this particular doctor came in at six weeks for her abortion. She called back some time later to say she felt a "foot in her vagina". Upon arrival, she was examined by a physician who found her to be 20 weeks pregnant, an incomplete abortion, and the baby's foot was extended out of her cervix into her vagina.

I worked with physicians who were more concerned with their evening date than with checking a hemorraging patient.

I am sorry to report that it was more important to keep the doctor moving quickly than to clean the room. Many times blood was not cleaned up between patients, because the doctor was working too fast. Simply get one out, and rush the next one on to the table.

I believe I became involved in the abortion industry in an attempt to justify my own abortion. I believed I was "helping women" with the "safe, legal choice" of abortion. What I saw was that the women were being injured or died at alarming rates.

/s/ CAROL EVERETT 2-21-89

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, et al.,
Appellants

v.

REPRODUCTIVE HEALTH SERVICES, et al.,
Appellees

On Appeal from the United States Court
of Appeals for the Eighth Circuit

BRIEF OF CERTAIN MEMBERS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Thornburgh v. A.C.O.G., 476 U.S. 747 (1986) . *passim*

Tony and Susan Alamo v. Secretary of Labor, 471 U.S. 290 (1985)..... 11

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Ill. Rev. Stat. ch. 70, sec. 2.2 (1983)..... 24

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INTEREST OF THE AMICI CURIAE

Amici are members of the Pennsylvania General Assembly whose names are listed in Appendix A, hereto attached. They represent members of both the House and Senate and both the Democratic and Republican parties. Pennsylvania is one of many states which have taken seriously this Court's statements in *Roe v. Wade*, 410 U.S. 113 (1973), that the right to abortion is not absolute and that the states may regulate abortion in a manner which furthers their important and legitimate interests in preserving maternal health and protecting the unborn child.

In keeping with its duty to protect all human life, born and unborn, the General Assembly has grappled with the abortion issue for the past sixteen years. This is because of the conviction of its members that unborn children should possess the fundamental right to life to which all other human beings are entitled, since the unborn become human beings at conception. Indeed, that was the well-established state of the law in Pennsylvania prior to *Roe*. *Sinkler v. Kneale*, 401 Pa. 267 (1960).

It has been difficult for the General Assembly to comply with the rulings of this Court regarding abortion, given the inherent uncertainty regarding how far the *Roe* rationale may be expanded. It also has been distressing to see the General Assembly's motives for regulating abortion challenged, when it has consistently attempted to comply with this Court's own prior rulings. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 744, 764 (1986).

The Pennsylvania General Assembly has evidenced a commitment to regulate abortion to the fullest extent possible, consistent with this Court's decisions.[1] Some post-*Roe* decisions of the Supreme Court, however, have

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1. The General Assembly, in 1988, enacted its latest abortion legislation. See, Act of March 25, 1988, No. 1988-31 (P.L. ____).

increasingly undercut the power of state legislatures to deal with the problem of abortion — now one of runaway proportions.[2] This deprivation of the state's power to deal with a major social problem was said to be compelled by *Roe*. *Amici*, representing large constituencies in Pennsylvania, now urge the Court to reexamine *Roe* and to overrule it so that states may have greater flexibility in providing protections for pregnant women and unborn children. A right, on the part of states, must be recognized to deal with those interests according to values inherent in the fabric and traditions of American constitutional law.

SUMMARY OF ARGUMENT

It is now essential, in light of mounting social problems of unrestricted abortion and the development of new findings in fetology and other fields of research related to pregnancy, that *Roe v. Wade* be reexamined and overruled. *Roe* and successor decisions of this Court have provided a framework, both unscientific and unworkable, within which states may act in relation to abortion. The states, with their great fact-finding capacity, are well suited to deal with the social problem of abortion. The ruling here sought should significantly reduce public tension.

ARGUMENT

I. *ROE* STRIPPED THE STATES OF THEIR TRADITIONAL RIGHT TO PROTECT THE UNBORN AND ESTABLISHED AN EXTREMELY LIMITED AND UNWORKABLE FRAMEWORK WITHIN WHICH STATES MIGHT ACT. THIS HAS RESULTED IN ABORTION VIRTUALLY ON DEMAND THROUGHOUT PREGNANCY.

2. Since 1973, approximately 800,000 lives have been taken through abortion in Pennsylvania. This figure is derived from data contained in *Abortion Surveillance*, U.S. Department of Health, Centers for Disease Control 25 (1981).

A. *Prior to* Roe, *the States had the Right to Protect the Unborn and Were Active in Exercising that Right.*

In the 19th century, when states began codifying their laws, they frequently prohibited or limited abortion. *See e.g.*, Conn. Stat., Tit. 20, §§14,16 (1821); *Roe*, 410 U.S. at 175 n. 1 (Rehnquist, J., dissenting). As the *Roe* Court noted, a great number of anti-abortion laws were enacted in the late 1800's. The American Medical Association (AMA) played a "significant role" in the enactment of such stringent anti-abortion laws. *Roe*, 410 U.S. at 141. The AMA felt compelled to actively participate in a movement prohibiting abortion because of the "widespread popular ignorance of the true character of the crime — a belief, even among mothers themselves, that the fetus is not alive till after the period of quickening." *Id.* The AMA felt that the existing criminal abortion laws failed to recognize "the independent and actual existence of the child before birth, as a living being," and to adequately protect the unborn child. *Id.*[3]

3. Such statements about the actual existence of the child before birth, although made in 1859, have been borne out and scientifically verified over the years. Ultrasound imaging, *in utero* surgery on the fetus, and the wonders of prenatal and perinatal medicine have shown undeniably that we are dealing with a developing human life when dealing with the fetus. In their preface to the 1980 edition of *Williams Obstetrics*, Drs. Pritchard and MacDonald wrote:

> Happily, we have entered an era in which the fetus can be rightfully considered and treated as our second patient. . . . Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess. Moreover, the number of tools the obstetrician can employ to address the needs of the fetus increases each year. We are of the view that it is the most exciting of times to be an obstetrician. Who would have dreamed—even a few years ago—that we could serve the fetus as physician? Or, that the well-being and growth of the fetus could be monitored accurately and that the status of fetal health could be addressed?

J. Pritchard & P. MacDonald, *Williams Obstretics*, vii (16th ed.

As of 1966, virtually all of the 50 states prohibited induced abortion except when necessary to protect the life of the pregnant woman. J. Lampe, "The World in Perspective," in *Abortion and Social Justice*, 94 (T. Hilgers and D. Horan, eds. 1980). Between 1966 and 1972, approximately 20 states relaxed their abortion laws to some degree. *Id.* at 95-96. The vast majority of these new statutes were modeled on the American Law Institute's recommended legislation set forth in its Model Penal Code. *Id.* Those laws, such as that enacted by Georgia, generally allowed abortion only when: 1) a continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or 2) the fetus would very likely be born with a grave, permanent and irremediable mental or physical defect; or 3) the pregnancy resulted from forcible or statutory rape. *Doe v. Bolton*, 410 U.S. 172, 183 (1973). Only four states, Alaska, Hawaii, New York and Washington had more permissive abortion laws. Lampe, *supra*, at 96. Even in those states, however, abortion was prohibited after a set number of weeks (24 in New York, for example) unless such abortion was necessary to preserve the woman's life. *Id.* 96-97.

The trend toward liberalization of abortion laws, however, was not inexorable. Illinois, Minnesota and New Hampshire rejected attempts to pass versions of the Model Penal Code abortion provision. Lampe, *supra*, at 96. Also, attempts to bring about abortion on demand by way of state referenda were soundly defeated by voters in both North Dakota and Michigan in the 1972 general elections. *Id.* at 99. Finally, the General Assembly of New York voted in 1972 to repeal its 1970

NOTES (*Continued*)

1980). These major advances in medical technology have allowed us to view the unborn, monitor his or her heart rate and brain waves, and examine the fetus' responses to various external influences such as light, sound, and taste.

permissive abortion law and, but for Governor Rockefeller's veto, would have restored the law to its earlier position. *Id.* at 98.

B. Roe *Drastically Altered the Right of States to Protect the Unborn.*

The *Roe* Court held that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. In so holding, the Court, in one stroke, made what had been criminal activity in the majority of states for over a century into a fundamental right guaranteed by the Constitution. Any attempt by the states to regulate this new right of abortion, would be permissible only if supported by a "compelling" interest. *Id.* at 163. Two such state interests were recognized: 1) an interest in preserving maternal health; and 2) an interest in protecting "potential" life. *Id.* at 162.

The Court determined that the point at which the state's interests become "compelling" roughly correlates to "trimesters" of pregnancy. Therefore, the Court established a trimester system for regulating abortion. According to that system, the state's interest in maternal health is "compelling" after the first trimester, and its interest in potential life is "compelling" at viability. *Roe*, 410 U.S. at 163. During the first trimester the state has no compelling interest and the woman is free to obtain an abortion without interference from the state. *Id.* After the first trimester, the state may regulate on behalf of its interest in preserving maternal health, and after viability (roughly the third trimester) the state may regulate and even proscribe abortions except where necessary for the preservation of the life *or health* of the mother. *Id.*

C. The Roe *Trimester Approach is Unworkable and Has Been Abandoned by the Court in Favor of Concepts Related to Medical Technology and Accepted Medical Practice. But These Are Also Unworkable.*

The trimester system of *Roe* was based on arbitrary lines drawn by the Court which did not logically relate to the state's asserted compelling interests. As Justice O'Connor wrote, in dissent, in *Akron v. Akron Center for Reproductive Health*:

> The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the state has no interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.
>
> The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is not less potential in the first weeks of pregnancy than it is at viability or afterward.

462 U.S. 416, 460-461 (1983)(emphasis in original).

However erroneous the original trimester system was, it at least seemed to allow states to rely on some definite lines in order to legislate in furtherance of their compelling interests. Those who favored abortion on demand, however, challenged numerous state laws which were based on the lines established in *Roe* and were successful in convincing the Court to abandon the *Roe* trimester framework.

In *Roe*, the Court noted that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe*, 410 U.S. at 160. Thus, many states attempted to set viability at a definite stage in pregnancy so that enforcement of the laws applicable

after viability could be based on objective criteria. In *Colautti v. Franklin*, the Court categorically rejected the ability of states to rely on any set lines regarding "viability," stating:

> Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as the determinant of when the state has a compelling interest in the life or health of the fetus.

439 U.S. 379, 388-389 (1979).

In like manner, the Court also abandoned the trimester approach with respect to the state's compelling interest in protecting maternal health. In *Roe*, the Court had held that the state's interest became compelling "at approximately the end of the first trimester." 410 U.S. at 163. Accordingly, the Court stated:

> It follows that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

Id.

Although *Roe* had specifically suggested that states might require that abortions performed after the end of

the first trimester be performed in hospitals, the Court, in *Akron*, rejected that position. In *Akron*, the Court held that it was unconstitutional to require that all abortions performed after the first trimester be performed in hospitals. This change was due to recent medical advances, under which Akron's ordinance so requiring was no longer "reasonable" because it departed from "accepted medical practice." 462 U.S. at 436-438. Thus, the Court once again abandoned *Roe*'s trimester line of demarcation which would have provided at least some stable foundation upon which the states could rely in attempting to enact legislation consistent with *Roe*.

As Justice O'Connor correctly noted, such an approach is "compeletly unworkable." *Akron*, 462 U.S. at 454. It requires a state to determine what "acceptable medical practice" is, not only for each type of abortion performed, but also for each type of abortion at each week of pregnancy within each trimester. 462 U.S.456.[4] The undue burden which such a scheme places on state legislatures is amply demonstrated by the 1983 abortion decisions of this Court which involved provisions requiring that abortions performed after the first trimester be performed in hospitals. For example, in 1978, when Akron enacted such a requirement, it was in conformance with accepted medical practice and was, therefore,

4. It also has been argued that the states may only regulate according to the particular skill of the physician performing the abortion. Thus, it may not set blanket regulations governing all physicians, but rather, must allow skilled abortion providers more leeway in their practice than non-skilled abortion providers. See, *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988) (regulations governing all ambulatory surgical treatment centers, including those which perform abortions, were held unconstitutional as they applied to abortion clinics based on the testimony of highly skilled abortion providers that such regulations were not medically necessary to *their* practice of medicine).

constitutional. Its second trimester hospitalization requirement was also constitutional in 1979 when reviewed by the district court and in 1981 when reviewed by the court of appeals. In 1982, however, the American College of Obstetricians and Gynecologists (A.C.O.G.) changed its standards to provide that one type of abortion (D&E) could safely be performed in a non-hospital setting up until about the 18th week of pregnancy.[5] Thus, it was not until the challenged provision reached this Court in 1982 that it suddenly became unconstitutional. The same is true of the Missouri hospitalization provision which was struck down in *Planned Parenthood v Ashcroft*, 462 U.S. 476 (1983).

Such sliding standards make it virtually impossible for states to regulate. They, in fact, encourage total deregulation in an area of evident concern in many states.[6] As Justice O'Connor noted, such a scheme requires state legislators to "continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to 'depart from accepted medical practice' insofar as particular procedures and particular periods within the trimester are concerned." 462 U.S. at 456. It also requires that they predict what the "accepted medical practice" will be four or five years in the future when the case may ultimately reach the Supreme Court. Moreover, even if this can be done, and the provision is

5. It is now argued that some skilled physicians can perform abortions safely by dismemberment (D&E) up until 24 weeks in a clinic setting. See, *e.g.* W. Hern, *Abortion Practice*, at 154 (1984) (describing the techniques to be used in clinics when aborting fetuses between 21-24 weeks gestation).

6. In addition, the imposition of significant awards of attorneys fees against states in response to successful challenges of their laws may have a chilling effect on those and other states. *See e.g., Charles v. Daley*, 846 F.2d 1057, 1058-59 (7th Cir. 1988) (award of $100,000 against the state and more than $200,000 against private intervenors).

constitutional when enacted and is ultimately upheld by the Court, nothing would appear to prevent such a provision from being challenged a second time after a decision by this Court, based on new medical standards.

In effect, *Colautti* and *Akron* removed from the states any ability to regulate according to the lines established by the trimester system in *Roe*. By tying the state's ability to regulate abortion to ever-shifting medical technology and "accepted medical practice," the Court effectively removed from the states' elected representatives the ability to regulate abortion and placed such decisions within the hands of the medical profession.

Far from engendering stability in the law, tying constitutional rights to ever-shifting medical technology and "accepted medical practice" has led to extreme instability in the law. What was constitutional a year or two before may suddenly become unconstitutional. Similarly, whether a particular fetus is "viable" depends not only on the advances in neonatal care, but also on the advances in medical technology with respect to accurately determining fetal age, weight, and lung maturity, as well as the skill of those utilizing such techniques. In addition, viability presumably depends on the availability of such technology within a particular community.

Thus, two women carrying unborn children of the same gestational development may have very different rights regarding abortion, depending on the skill of their physician and the technology available in their community. There is no logical reason that this should be so, from either the perspective of the woman's "right" to abort or the state's right to protect the unborn child's life.[7] The worth of one unborn child does not differ from

7. In his concurring opinion in *Thornburgh*, Justice Stevens states that he believes it is "obvious that the State's interest in the protection of an embryo — even if that interest is defined as 'protecting those who will be citizens.' — increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778. Justice Stevens' proposal, that the state's interest in protecting the unborn child's life must increase as he or she develops, however, cannot be correct. If it were correct, then the state's interest in protecting the newborn as well as the mentally incompetent and disabled would be less than its interest in protecting competent adults who are arguably better capable of interacting with society, experiencing pleasure and reacting to their surroundings. Such a notion is clearly contrary to existing laws and principles of equality under the law. The development of the unborn child is not static, but the interest of the state is and should be static because the intrinsic worth of the developing individual is no less prior to birth than after birth or at any other point upon the continuum of life.

the worth of another, and there is no discernable reason for allowing one mother to obtain an abortion simply because her physician is less skilled or does not have the technology which enables him to determine that the fetus is actually of 28 weeks gestational age, and, therefore, viable; rather than 20 weeks and not viable.

D. Application of Roe *by the Supreme Court and Lower Federal Courts to Legitimate Attempts by States to Regulate Has Resulted in Abortion on Demand.*

Despite the Court's assertion in Roe that the new "right" to abortion was not absolute, that "right" has attained greater protection against state interference than virtually any other right, including those specifically set forth in the text of the Constitution. Normally, where the state asserts a recognized compelling interest in regulating speech or religion, its regulations will be upheld. See *e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985); *Tony and Susan Alamo v. Secretary of Labor*, 471 U.S. 290 (1985). In contrast, where the state attempts to further its *compelling* interest in preserving fetal life, its regulations are routinely struck down.

Although the state's interest in preserving fetal life is "compelling" at viability, the state may not prohibit *any* abortion that is deemed necessary to preserve maternal *health*. *Roe*, 410 U.S. at 165. In *Doe v. Bolton*, the Court, however, adopted an extremely open-ended definition of "health," stating:

> [T]he medical judgment [with respect to whether an abortion is necessary to preserve health] may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

Doe, 410 U.S. at 192.

This broad interpretation of the "health" exception has been followed uniformly by the lower federal courts and has been applied to statutes attempting to prohibit abortion after viability as well as to those which relate to abortions prior to viability. The Court of Appeals for the Third Circuit held that any attempt to limit the broad definition of health as applied to post-viable abortions would certainly be unconstitutional. *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 299 (3rd Cir. 1984). That court stated that legislation attempting to prohibit abortions after viability would have to be carefully scrutinized because "[i]t is noteworthy that no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus." *Id.* The Court set forth the following standard under which legislation that prohibits post-viable abortions was to be reviewed:

> It is clear from the Supreme Court cases that health is to be broadly defined. As the Court stated in *Doe v. Bolton*, the factors relating to health include those that are 'physical, emotional, psychological, familial, [as well as] the woman's age.'

Id. at 299.

Noting that the Pennsylvania General Assembly, in another subsection, had attempted to limit the broad definition of "health" by stating that "[t]he potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk," the Court added:

> Had the legislature imposed this qualification on the language 'maternal . . . health' in 3210(a) [prohibiting abortions after viability unless necessary to preserve maternal health] we would have no hesitation in declaring that provision unconstitutional. However, since it does not so state, and we are bound to construe it as constitutional, if possible, we again rely with confidence on the Supreme Court of Pennsylvania to construe 'health' as does the Supreme Court of the United States.

Id. See also, *Margaret S. v. Edwards*, 488 F.Supp. 181, 191 (D.La. 1980) (Louisiana statute prohibiting abortions *after* viability unless necessary "to prevent permanent impairment to [the woman's] health" held unconstitutional because "[p]reserving maternal health means more than preventing permanent incapacity" and "[a] rape or incest victim may not be able to prove that her mental health will be permanently impaired if she is forced to bear her attacker's child, but she might be able to show that it is necessary to preserve her immediate mental health."); *Schulte v. Douglas*, 567 F.Supp. 522 (D.Neb. 1981) (statute which prohibited abortion after viability unless "necessary to preserve the woman from imminent peril that substantially engangers her life or health" held unconstitutional).[8]

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8. The Supreme Court's decision in *Thornburgh* struck down a regulation that merely attempted to require that the method of abortion be used that was least likely to injure or kill the unborn child when that child had reached a stage in development where there was a reasonable likelihood that he or she could survive. The statute provided that other methods of abortion could be used if that

Thus, the present "balance" of the woman's liberty interest and the state's interest in protecting fetal life weighs entirely in favor of the woman's liberty interest and makes the state's "compelling" interest in preserving life meaningless. The woman's health interest (which presumably includes mental health according to the Third Circuit's decision) always outweighs the state's interest in preserving the child's life. The state may never prevent an abortion which is deemed necessary to preserve the woman's emotional well-being — even after viability.[9]

NOTES (*Continued*)

method which was best for the unborn child "would present a significantly greater medical risk to the life or health of the pregnant woman." In striking down that provision, the Court held that the statute was unconstitutional "because it required a 'trade-off' between the woman's *health* and fetal *survival*, and failed to require that maternal health be the physician's paramount consideration." 476 U.S. at 768-769 (emphasis added). According to *Thornburgh*, the state may not protect an unborn child who could survive if born prematurely, from being dismembered within the womb if other methods of abortion which could result in a live birth pose *any* increased risk to the pregnant woman's *health* — even an insignificant risk. Thus, it does not appear that the State's ability to protect its interest in preserving fetal life has fared any better with this Court.

9. As Chief Justice Burger stated in his dissent in *Thornburgh*:

> [E]very member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.
>
> We have apparently already passed the point at which abortion is available merely on demand. If the statute at at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.

476 U.S. at 782-84.

II. ROE SHOULD BE OVERRULED AND THE STATES ENABLED TO ASSUME THEIR PROPER ROLE IN PROTECTING HUMAN LIFE, BORN AND UNBORN.

As discussed above, *Roe*'s framework is, as a practical matter, unworkable. Also, because *Roe* is not grounded on sound constitutional principles, it is virtually impossible to prevent its unbridled expansion by the federal judiciary. *Roe* should be overruled and the right to protect all human life restored to the states.

A. Abortion Is Unlike the Fundamental Rights Recognized Under the Right of Privacy and Should Not Be Treated As Are Those Rights.

The *Roe* Court acknowledged that abortion is unlike all privacy rights recognized in its prior decisions:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of developing young in the human uterus. [ ] The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned.

Roe, 410 at 159 (citations omitted). Thus, it is inappropriate to treat abortion in the same manner as the privacy rights recognized in those cases.

Justice White, joined by Justice Rehnquist, argued cogently in dissent in *Thornburgh*, that the right to abortion is not fundamental:

> Given that the continued existence and development — that is to say the life — of [the fetus is] so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the

rubric of personal or family privacy and autonomy. Accordingly, the decisions cited by the Court both in *Roe* and in its opinions today as precedent for the fundamental nature of the liberty to choose abortion do not, even if all are accepted as valid, dictate the Court's classification.

. . . .

That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

. . . .

The Court's decisions in *Moore v. East Cleveland*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska* can be read for the proposition that parents have fundamental liberty to make decisions with respect to the upbringing of their children. But no one would suggest this fundamental liberty extends to assaults committed upon children by their parents. It is not the case that parents have a fundamental liberty to engage in such activities and that the state may intrude to prevent them only because it has a compelling interest in the well being of children; rather, such activities, by their very nature should be viewed as outside the scope of a fundamental liberty interest.

476 U.S. at 792-793 and n.2.

> Both the characterization of the abortion liberty as fundamental and the denigration of the state's interest in preserving the lives of nonviable fetuses are essential to the detailed constitutional rules devised by the Court to limit the states' power to regulate abortion.

Id. at 796.

Justice O'Connor has articulated a different approach. "Even assuming there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe*." *Akron*, 462 U.S. 459 (O'Connor, J., dissenting). Accordingly, under that view, the state has compelling interests in protecting maternal health and potential human life which exist throughout pregnancy; therefore, unless the regulation of abortion imposes "an undue burden" on the abortion decision, it should be subjected to a rational basis test. *Thornburgh*, 476 U.S. at 828. Only where the state imposes absolute obstacles or severe limitations on the abortion decision would its regulations be subjected to heightened scrutiny. *Id.* Given the "limited nature" of any fundamental right which might exist, (*Akron*, 462 U.S. at 465, n.10), even where heightened scrutiny is applied, "the possibility remains that the statute will withstand the stricter scrutiny." 476 U.S. at 828.[10]

Whether Justice White's approach or that of Justice O'Connor is followed, "a broad range of limitations on abortion (including outright prohibition) that are now unavailable to the states would again become constitutional possibilities." 476 U.S. at 796. As noted by Justice

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10. Presumably under this test, states would be able to prohibit abortion in furtherance of their compelling interest in protecting fetal life where the woman's interest in aborting is not of utmost urgency. At a minimum, statutes, such as that enacted by Illinois which prohibit abortions that are based solely on the sex of the fetus would be permissible. *See*, Ill. Rev. State. ch. 38 par. 81-26(8). In 1984, Judge Nordberg entered a temporary restraining order against enforcement of the Illinois provision which has been in effect since that date and remains in effect today. *Keith v. Daley*, No. 84-C-5602 (N.D. Ill 7/1/84). Such a restriction, while perhaps involving an absolute obstacle to a particular woman's desire for an abortion, and thereby triggering heightened scrutiny, would still be permissible because the state's compelling interest in protecting fetal life would override the woman's interest in obtaining an abortion based on the child's sex.

White, "such a state of affairs would be highly desirable from a standpoint of the constitution." *Id.* As duly elected members of the Pennsylvania General Assembly who take an oath to uphold the Constitution, *amici* agree.

The rights asserted by the states — protection of maternal health and the protection of unborn human life — are not exclusive of each other. Rather, they are supplemental. That states seek to prohibit abortions except in the gravest of instances in order to protect human life and also to regulate those abortions which are permitted so as to protect maternal health and fetal life are not mutually inconsistent propositions.

Amici believe that Justice White's approach would produce more stability in constitutional terms because it would return the issue of abortion to the people where it may be dealt with more effectively. However, the approach of Justice O'Connor would also go far toward remedying the present intolerable situation wherein the state's interest in protecting fetal life is totally overridden by the woman's desire, for whatever reason, or no reason at all, to terminate that life.

B. States Are Better Suited Than the Federal Judiciary to Deal With the Problem of Abortion.

This Court has "frequently recognized that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). States have retained this broad latitude both pursuant to principles of federalism and because states, through their elected representatives, are best suited to finding solutions for such problems.

As Justice O'Connor noted in *Garcia v. San Antonio Metropolitan Transit Authority*:

> The central issue of federalism, of course, is whether any realm is left open to the States by the Constitution — whether any area remains in which a State may act free of federal interference. . . . The true "essence" of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.
>
> . . . .
>
> The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States. . . . The States were to retain authority over those local concerns of greatest relevance and importance to the people.

469 U.S. 528, 581-82 (1985) (O'Connor, J., dissenting).

Abortion is primarily a public policy issue. This is evidenced by the fact that numerous factors relied upon by the *Roe* Court in support of legalizing abortion relate primarily to social reasons. *Roe*, 410 U.S. at 153. Such factors, as well as many of those set forth in *Doe v. Bolton*, regarding the definition of "health," relate to societal problems; not to *physical* health problems as commonly understood. Indeed, the vast majority of abortions — well in excess of 90% — are performed for social reasons.[11]

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11. At least one physician has suggested that he would not perform an abortion if it were requested for medical reasons rather than for emotional or social reasons. In testimony before Judge James Kelly in *Northeast Women's Center, Inc. v. Michael McMonagle, et al.*, No. 85-4845 (E.D. Pa. 4/29/87), Dr. Klebanoff, a physician who routinely performed abortions at the clinic, testified as follows:

Q. Now doctor, take us through the procedures in a routine first trimester case. What is the first thing you do?

A. The first thing I do, is introduce myself. I ask the patient if they are having their operation for emotional reasons or not.

. . . . .

Q. Now, this emotional reason or not, what is that? Would you detail that a little bit more for us?

As such, abortion falls within the traditional sphere of state regulation.

This Court has often recognized, that the states through their elected representatives are best suited to finding solutions for such social problems.

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New York Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

Given that few abortions are obtained for physical health reasons, *Roe* inaccurately characterizes abortion as a "medical" issue. Moreover, to the extent that abortion is a medical concern, it is also within the traditional realm of state regulation. "It is elemental that

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NOTES (*Continued*)

A. I ask the patient if they are having their operation due to emotional reasons.
Q. Is that the standard question that you ask?
A. I ask that in every patient, yes.
Q. What if the response is, "Yes?"
A. Then, I go ahead and proceed with the operation.
Q. That's the only question that you would ask of the patient?
A. I ask them how they are and try to put them at ease.

THE COURT: What happens if they say, "No?" What happens if they say, "No, I am not having it for emotional reasons?"

THE WITNESS: If they say, "No," which I haven't run into yet, I expect I wouldn't do the procedure.

THE COURT: You haven't run into that yet?

THE WITNESS: No.

a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954).

Whether abortion is viewed as a social problem, a medical problem, or a combination thereof, states are better equipped to deal with it than the judiciary. First, states are in a better position to be aware of abuses within their borders and the need for corrective legislation. For example, a five month undercover investigation of numerous abortion clinics conducted in 1978 by the Better Government Association and the *Chicago Sun Times* exposed widespread corrupt, unsafe and abusive abortion practices in Chicago. "The Abortion Profiteers," *Chicago Sun Times*, November 12, 1978. This investigation showed that a number of abortion providers profited greatly at the expense of Illinois women — performing abortions on women who were not pregnant, operating under unsafe conditions, and generally exploiting the women who sought their services.

Second, state legislatures have greater fact-finding capacity than the courts. This allows them to address social problems more thoroughly and effectively. For example, in direct response to the above investigative series, the Illinois General Assembly conducted extensive hearings on the regulation of abortion clinic practices and of outpatient surgical procedures generally. *See*, 80th General Assembly, *Report to the House Human Resources Committee, Subcommittee on Health*, "State regulation of abortion clinics," December 13, 1978. According to the Subcommittee report, stricter enforcement of existing regulations and additional regulations were necessary to ensure that abortions would be performed safely and ethically in the state. Physicians were simply unable or unwilling to police themselves and the penalties that were available under the Medical Practice Act at that time apparently did not deter abusive

practices. The report was the basis of amendments to the provisions of the Illinois Ambulatory Surgical Treatment and Care Act and regulations promulgated thereunder. Ill. Rev. Stat. ch 111½ par. 157-8.1. Despite the widespread abuses which these provisions were enacted to remedy, the Court of Appeals for the Seventh Circuit recently affirmed the district court's decision striking down virtually all regulations promulgated pursuant to the Ambulatory Surgical Treatment and Care Act as they apply to abortion clinics. *Ragsdale v. Turnock*, 841 F.2d. 1358 (7th Cir. 1988), *appeal docketed*, No. 88-790, 57 U.S.L.W. 3378 (November 10, 1988).

In addition to being more attuned to the need for corrective legislation within their jurisdictions, states are also better able to study changing medical technology and assess its availability. Similarly, states have a much broader range of options available with which to alleviate the problems which lead women to seek abortions than does the federal judiciary.[12]

C. *Returning the Abortion Issue to the States Will Reduce Public Tension.*

Although it has been argued, that returning this issue to the states would create an intolerable situation — one that allows different protection on a state-by-state basis, such argument is unpersuasive. Certainly, prior to *Roe*, there was great diversity among the 50 states. See this brief at 3-5. Such diversity did not present chaos.

12. Unfortunately, some of the efforts of states to provide women with viable alternatives to abortion by funding organizations which offer wide-ranging services to women with problem pregnancies have been hampered by the federal courts. See e.g., *Planned Parenthood v. Kempiners*, 568 F.Supp. 1490 (N.D. Ill. 1983) enjoining enforcement of state law that attempted to provide limited funds for problem pregnancies only to organizations which do not counsel and refer for abortion).

Rather, it allowed states to act as experimental laboratories in balancing all of the interests involved — maternal, fetal, and societal — to achieve regulations which were consistent with public sentiment.[13]

Moreover, even under the present law, there continues to be great diversity among the various states. This is due to the fact that *Roe* did not require any state to regulate abortion to the fullest extent possible. The state was severly limited in the areas where it could regulate, but even where a state was allowed to regulate on behalf of maternal health and fetal life, the Court merely stated that it could regulate "if it chooses." *Roe*, 410 U.S. at 164. As is demonstrated in the area of parental involvement in a minor's abortion decision, approximately 30 states have chosen at one point or another to require parental notice or consent.[14] Although not all states require such involvement, a number of those states that have done so have found that such laws not only reduce teenage abortion but also teenage pregnancy.[15]

13. Although it has been claimed that the existing law under *Roe* and its progeny is supported by public sentiment, such is not the case. There has been tremendous upheaval within the 50 states which has increased in recent years in response to the excessive and radical position articulated in *Roe*, *Bolton*, and subsequent cases which allow abortion on demand.

14. The following states have enacted legislation requiring parental involvement: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah and West Virginia. Although some of these statutes have been struck down and some remain in the courts, it is clear that a significant number of states felt that the need for parental involvement in the minor's abortion decision was compelling enough to cause them to pass such legislation.

15. In Minnesota, between 1980 (the last full year prior to enforcement of the parental notice law) and 1984 (a time during which the law was in effect), the number of abortions for teenagers under the age of 18 dropped from 2,327 to 1,395 a decline of 40.1%

As states have become aware of this, more and more have chosen to involve parents. Such diversity has in no way caused chaos. Nor would enactment of other restrictions which are more consistent with public sentiment cause chaos. Such restrictions would serve only to reduce public tension with respect to this issue and allow states to make their laws with respect to protection of the unborn more consistent with each other.

The present trend among the 50 states is to grant civil and criminal protection to the unborn. For example, all 50 states recognize a cause of action for prenatal injuries negligently inflicted upon the unborn child. *See generally*, W. Prosser, *Law of Torts*, 335-338 (1971). A majority of states also recognize a cause of action for wrongful death of the unborn child, and many of these apply throughout pregnancy. *Amadio v. Levin*, 509 Pa. 199, 203 n.3 (1985); Ill. Rev. Stat. ch. 70, sec. 2.2 (1983). Indeed, a number of state legislatures have proscribed the killing of a fetus as homicide or otherwise criminalized such conduct. *See e.g.*, Ill. Rev. Stat. ch. 38, par. 9-1.2, 9-2.1, 9-3.2, 12-3.1, 12-4.4 (West Supp. 1986); Cal. Penal Code sec. 187 (West Supp. 1983); N.Y. Penal Law sec. 125.00 (McKinney 1975); Utah Code Ann. sec. 76-5-201 (Supp. 1983); Iowa Code Ann. sec. 707.8(1) (West 1979); Ga. Code Ann. sec. 16-5-80 (1983).

The Pennsylvania Supreme Court recently stated in *Amadio*:

NOTES (*Continued*)

and the decline in the abortion rate for this age group was 32.2%. Figures based on data contained in *Reported Induced Abortions*, published yearly by Minnesota Department of Health. For the same time period and age group, the number of births dropped from 2,083 to 1,654 — a decline of 18.6%, and the birthrate dropped 7.9%. Figures obtained from Minnesota Department of Health computer printouts regarding births and female population size. Also during this time period, the number of pregnancies (abortions plus births) for Minnesota teens under age 18 dropped from 4,360 to 3,049 — a decline of 30.1%; and the pregnancy rate decreased 20.9%. *Id.*

> We have, since our decision in *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960), recognized that a child en ventre sa mere is a separate individual from the moment of conception, and have permitted that child to sue for injuries received during gestation when the child is born alive. Implicit in our holding in *Sinkler* is the acknowledgement that a child en ventre sa mere is an individual with the right to be free of prenatal injury. If a child en ventre sa mere is an individual at the time of its injury, then, *a fortiori*, the child is also an individual when those injuries cause its death, and it makes no difference in liability under the wrongful death and survival statutes whether the child dies of the injuries just prior to or just after birth.

509 Pa. at 204. It is clear that Missouri (that the statued here under review) also recognizes that human life begins at conception. However, under *Roe*, these and other states are forced to ignore scientific facts and to maintain flatly inconsistent laws on their books—protecting unborn human life from destruction or injury by others on the one hand and, on the other, permitting the unborn child to be destroyed or injured[16] through abortion whenever his or her mother so chooses. Such a glaring anomily encourages disrespect for the law.

---

16. Some children upon whom an abortion has been attempted or performed do survive the abortion procedure. *See, e.g.*, Stroh & Hinman, *Reported Live Births Following Induced Abortion: Two and One-half Years' Experience in Upstate New York*, 126 Am. J. Obstet. Gynecol. 83, 88 (1976). Those who do survive, however, may be severely damaged by the abortion procedure. *Id.* These children will eventually become aware of the cause of their imparament.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court reverse *Roe v. Wade* and return to the states the right to protect unborn human life.

Respectfully submitted,

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APPENDIX A

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The *amici curiae* consist of members of the General Assembly of the Commonwealth of Pennsylvania, including the following:

Senators: Anthony B. Andrezeski (D) Erie; Gibson E. Armstong (R) Lancaster; Edward W. Helfrick (R) Northumberland; J. William Lincoln (D) Fayette; Roger A. Madigan (R) Bradford; Raphael J. Musto (D) Luzerne; Michael A. O'Pake (D) Berks; Frank A. Pecora (R) Allegheny; John W. Regoli (D) Westmoreland; M. Joseph Rocks (R) Philadelphia; John J. Shumaker (R) Dauphin; William J. Stewart (D) Johnstown; J. Barry Stout (D) Washington; Noah W. Wenger (R) Lancaster.

House Members: John E. Barley (R) Lancaster; Joseph W. Battisto (D) Monroe; Fred Belardi (D) Lackawanna; Jerry Birmelin (R) Wayne; Kevin Blaum (D) Luzerne; Alvin C. Bush (R) Lycoming; Italo S. Cappabianca (D) Erie; Edgar A. Carlson (R) Tioga; Gaynor Cawley (D) Lackawanna; Richard J. Cessar (R) Allegheny; Paul I. Clymer (R) Bucks; Nicholas A. Colafella (D) Beaver; Anthony L. Colaizzo (D) Washington; Tony DeLuca (D) Allegheny; Thomas W. Dempsey (R) Lycoming; Scott Dietrich (R) Luzerne; Jim Distler (R) Elk; Howard L. Fargo (R) Mercer; Thomas J. Fee (D) Lawrence; Patrick E. Fleagle (R) Franklin; A. Carville Foster, Jr. (R) York; Stephen F. Freind (R) Delaware; James J. Gallen (R) Berks; Thomas P. Gannon (R) Delaware; Richard A. Geist (R) Blair; Leonard Q. Gruppo (R) Northampton; George C. Hasay (R) Luzerne; Samuel E. Hayes, Jr. (R) Blair; Dick L. Hess (R) Bedford; Edwin G. Johnson (R) Blair; Ralph Kaiser (D) Allegheny; Ted V. Kondrich (R) Allegheny; Gerard A. Kosinski (D) Philadelphia;

Frank LaGrotta (D) Lawrence; Dennis E. Leh (R) Berks; William R. Lloyd, Jr. (D) Somerset; Keith R. McCall (D) Carbon; Christopher K. McNally (D) Allegheny; Emil Mrkonic (D) Allegheny; Dennis M. O'Brien (R) Philadelphia; Richard D. Olasz (D) Allegheny; Joseph A. Petrarca (D) Westmoreland; Merle H. Phillips (R) Northumberland; Joseph R. Pitts (R) Chester; Eugene G. Saloom (D) Westmoreland; Jere W. Schuler (R) Lancaster; Edward G. Staback (D) Lackawanna; Ted Stuban (D) Columbia; Elinor Z. Taylor (R) Chester; Leona G. Telek (R) Cambria; Thomas M. Tigue (D) Luzerne; Peter R. Vroon (R) Chester; Frances Weston (R) Philadelphia; Chris R. Wogan (R) Philadelphia; John N. Wozniak (D) Cambria; Frank W. Yandrisevits (D) Northampton.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

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BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS

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Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED HEREIN

1. WHETHER ESTABLISHING THE APPROPRIATE STANDARD OF REVIEW IS NECESSARY TO DETERMINING THE CONSTITUTIONALITY OF THE MISSOURI STATUTES.
2. WHETHER THE ABORTION PRIVACY ANALYSIS SET FORTH IN *ROE V. WADE* SHOULD BE APPLIED IN THE PRESENT CASE.

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United States Supreme Court Cases: **Page(s)**

Akron v. Akron Center for Reproductive Health, 426 U.S. 416 (1983) 4, 5, 13, 14, 15, 23, 24

Ashwander v. TVA, 297 U.S. 288 (1936) 7, 8, 9

Bellotti v. Baird (I), 428 U.S. 132 (1976) 13

Bellotti v. Baird (II), 443 U.S.622 (1979) 4, 13

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Colautti v. Franklin, 439 U.S. 379 (1979) 4, 9

Doe v. Bolton, 410 U.S. 179 (1973) 2, 4, 15

Gary-Northwest Ind. Women's Services v. Orr, 451 U.S. 934 (1982) 11, 23

H.L. v. Matheson, 450 U.S. 398 (1981) 4, 13

Harris v. McRae, 448 U.S. 297 (1980) 4, 5, 6

Hartigan v. Zbaraz, 108 S.Ct. 479 (1987) 11, 13

Maher v. Roe, 432 U.S. 464 (1977) 4, 5

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 6, 18

Mattiello v. Connecticut, 4 Conn. Cir. Ct. 55, 225 A.2d 507, *appeal dismissed*, 395 U.S. 209 (1969)..... 9

Naim v Naim, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955) (per curiam) 9

Palko v. Connecticut, 302 U.S. 319 (1937) 6, 18

Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 9, 13, 23

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 4, 13

Poe v. Ullman, 367 U.S. 497 (1961) 8

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 8

Roe v. Wade, 410 U.S. 113 (1973) ..... passim

Singleton v. Wulff, 428 U.S. 106 (1976) 9

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986) 3, 5, 8, 9, 10, 11, 12, 13, 24, 25

Other Cases:

Akron Center for Reproductive Health v. Akron, 479 F.Supp. 1172 (N.D. Ohio 1979)..... 23

Akron Center for Reproductive Health v. Akron, 651 F.2d 1198 (6th Cir. 1981) 23

Akron Center for Reproductive Health v. Slaby, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988) *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 10, 1988) (No. 88-805) 14

American College of Obstetricians and Gynecologists v. Thornburgh, 737 F. 2d 283 (3d Cir. 1984) 8

Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347) 11

Gary-Northwest Indiana Women's Services v. Bowen, 96 F. Supp. 894 (N.D. Ind. 1980) 12, 22, 23

Hodgson v. Minnesota, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988) (en banc) 13

Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981). 23

Simopolous v. Commonwealth, 221 Va. 1059, 277 S.E.2d 194 (1981) 23

Other Authorities:

Abortion and the Constitution (D. Horan, E. Grant & P. Cunningham eds. 1987) 11

Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987) 18

A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)..... 9

Bopp & Coleson, *The Right To Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989)..... 9, 12, 16, 17, 19, 21, 24, 25

Brief Amicus Curiae for Americans United for Life as Amicus Curiae at 4 n.l, *Simopolos v. Virginia*, 462 U.S. 506 1983 23

Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987). 18

A. Cox, *The Role of the Supreme Court in America* (1976) 16

Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987) 18

Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 18

Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250 (1975) 18

Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973) 15

F. Frankfurter, *The Public and Its Government* 49-51 (1930) 16

Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) 9

Horan & Balch, "*Roe v. Wade*: No Justification in History, Law or Logic," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987) . 18

Means, *The Phoenix of Abortion Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Abuse of Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) 18

Pfeifer, "Abandoning Error: Self-Correction by the Supreme Court," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987) . 25

Plato, *Phaedrus* 18

Plato, *Republic* 18

L. Wardle, *The Abortion Privacy Doctrine* (1980) 11

Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231 25

Woodward, *The Abortion Papers*, The Washington Post, Jan. 22, 1989, at D1, col.1 15

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INTEREST OF AMICUS[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than

[1]This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The Missouri legislation at issue herein is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its affiliate, Missouri Citizens for Life. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Missouri regulations at issue herein.

SUMMARY OF ARGUMENT

The necessary first step in the judicial review of the Missouri statutes at issue herein is to determine the appropriate standard of review. Without resolution of this threshold issue, the Court will be uncertain what constitutional analysis to employ, whether a low level of scrutiny, strict scrutiny, or some intermediate standard.

This Court should not merely assume, without confronting, the continued viability of *Roe v. Wade*. To so consider the statutes, while avoiding the underlying issue of the correctness of *Roe's* right to choose abortion and its trimester framework, would be to depart from the precedents of this Court. Such avoidance would also lead to untoward results.

The Court should confront directly the necessary threshold issue of the standard of review. In doing so, the Court should be guided by the analysis of *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), and find that there is no constitutional right to abortion. Thus, the standard of review to be employed herein should be

the rational basis test. An attempt to establish an intermediate standard of review would also result in undesirable results. The only lasting resolution of the matter is to overrule *Roe* completely and allow the states to resolve the matter through the mechanisms of the democratic process.

ARGUMENT

I. ESTABLISHING THE APPLICABLE CONSTITUTIONAL ANALYSIS IS THE NECESSARY THRESHOLD ISSUE IN THE REVIEW OF THIS CASE.

The first step in any judicial review of state statutes is to determine the standard of review. Until a system of measurement is established, be it cubits, yards, or meters, declaring the measure of an object is meaningless. Likewise, an evaluation of the constitutional dimensions of Missouri's legislative handiwork is meaningless unless the Court reveals the character of its measuring rod. Therefore, the Court should begin its analysis in this case by reappraising *Roe's* abortion right and trimester scheme.

A. THIS COURT HAS CONSISTENTLY BEGUN CONSTITUTIONAL REVIEW WITH THE THRESHOLD ISSUE OF DETERMINING THE APPROPRIATE STANDARD OF REVIEW.

It is the consistent practice of this Court to begin its constitutional review of a case by setting forth the standard of review to be applied and the elements of the applicable analysis. This consistent pattern may be seen in the following examples.

1. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE CASES REGARDING THE REGULATION OF ABORTION.

In cases involving state regulation of abortion, this Court has consistently set forth the standard of review before considering the particular statutes at issue. This may be seen from the seminal case of *Roe* through the most recent case decided with analysis, *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986).

In *Roe v. Wade*, 410 U.S. 113, the *Roe* majority labored over the appropriate constitutional analysis, for more than thirty pages of the official reporter, before striking down the Texas abortion statute in a brief paragraph. The result was a trimester scheme built upon a claimed fundamental right — with stages of compelling interests adhered to movable points of medical technology — all perched upon a substantive due process analysis. As unlikely as the resulting analysis may be, the *Roe* majority did not ignore the threshold step of establishing the standard by which the statute would be reviewed.

In subsequent abortion cases of this Court, this pattern (of establishing the standard of review as a threshold matter) is clearly evidenced, in cases such as the following:

1. *Doe v. Bolton*, 410 U.S. at 189, 195 (cross- references to *Roe* regarding the appropriate analysis).
2. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976) (set out *Roe* analysis in detail).
3. *Maher v. Roe*, 432 U.S. 464, 470 (1977) (began by setting forth equal protection analysis).
4. *Colautti v. Franklin*, 439 U.S. 379, 386-87 (1979) (reviewed the *Roe* standard of review before considering the statutes).
5. *Bellotti v. Baird (II)*, 443 U.S.622, 633-42 (1979) (extensive discussion of *Roe*, *Danforth*, and other precedent setting forth the proper analysis).
6. *Harris v. McRae*, 448 U.S. 297, 311-18 (carefully reviewing the abortion privacy right analysis), 319-20 (setting forth the establishment clause tests), 322-23 (establishing the equal protection analysis), 324 (settling on the rational basis test as the applicable standard of review)(1980).
7. *H.L. v. Matheson*, 450 U.S. 398, 408-10 (1981) (review of controlling precedent and standards).
8. *Akron v. Akron Center for Reproductive Health*, 426 U.S. 416, 419-20 (reaffirming *Roe* as setting forth the controlling analysis), 426-31 (extensive restatement of the trimester scheme prior to consideration of the Ohio statutes) (1983).

9. *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. at 2178, 2184 (preliminary and concluding reaffirmation of *Roe* as containing the appropriate analysis).

Particularly crucial to the present discussion are the cases of *Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*. In *Akron v. Akron Center for Reproductive Health*, 426 U.S. 416, with *Roe* under attack — by a growing Court dissent, in the state legislatures, and in the academic world — the *Akron* majority considered the continued viability of *Roe* as the threshold issue of its analysis. *Id.* at 419-20.

Likewise, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, with *Roe* still under attack by a larger Court dissent, with states still struggling to constitutionally assert their supposedly compelling interests, and with an undiminished assault by legal academics, a narrow majority of this Court again stopped at the threshold to establish the standard of review before applying the analysis to the latest set of statutes. *Id.* at 2178. Once again, the viability of *Roe* was considered as the necessary preliminary consideration.

2. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE CASES REGARDING THE PUBLIC FUNDING OF ABORTION.

In both *Maher v. Roe*, 448 U.S. 297, and *Harris v. McRae*, 448 U.S. 297, abortion funding cases, this Court considered the necessary first step of the standard of review before dealing with the constitutionality of the legislation before it. Especially noteworthy in this respect is *Harris v. McRae*, where this Court considered carefully whether the abortion privacy right, or any other constitutional protection, entitled indigent women to public funding of abortion. After carefully reviewing the constitutional protections and analyses, this Court concluded that the rational basis test was the controlling standard of

review. *Id.* at 324. Under this standard, the Court then determined that the Hyde Amendment, limiting funding for abortions under federally financed programs to situations where the life of the mother was at risk, had a rational basis.

3. THIS THRESHOLD DETERMINATION IS EVIDENT IN THE PRIVACY ANALYSIS IN *BOWERS v. HARDWICK*.

In privacy cases outside the abortion realm, this Court has also found it essential to pause at the threshold to determine the standard of review. The recent case of *Bowers v. Hardwick*, 106 S.Ct. 2841, stands as a perfect example. In *Bowers*, as in the abortion cases, it was asserted that a substantive-due-process privacy right encompassed the activity at issue. This Court first considered the appropriate analysis, as described more fully below, *see infra* at III (A), and determined that there was no constitutional right to homosexual sodomy. For present purposes, the key element is the threshold consideration of the proper constitutional analysis. The *Bowers* majority noted that, before a right could be declared fundamental under a substantive due process analysis, as urged by the respondent, a certain standard must be met.

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'

Id. at 2844 (citations omitted).

Thus, this Court first set forth the standard of review, then applied the appropriate standard to the issues at hand.

B. THERE IS NO PRINCIPLED WAY TO AVOID THE ISSUE OF THE APPLICABILITY OF *ROE v. WADE* TO THIS CASE.

It will be argued by some that the judicial review of this case need not include a consideration of the continued viability of *Roe v. Wade* — that this Court may simply assume, without considering, the standards set forth by *Roe*, and uphold the Missouri statutes as within the scope of permissible abortion regulation under *Roe* and its progeny. While this might have a perceived advantage, i.e., postponing the inevitable confrontation with *Roe's* faulty analysis, any perceived advantage is illusory. This is evident for several reasons.

First among the reasons for confronting the issue now is the lack of any truly principled way to avoid the issue. As noted above, this Court has consistently established the standard of review as the necessary first step in its analysis. To do otherwise now would be to abandon this Court's usual method of review. The question would certainly be raised as to why, in this case and by this Court, the usual analysis was abandoned.

Of course, this Court has a long-standing principle of avoiding constitutional issues where a case may be decided on some other ground. Justice Brandeis, in his famous concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (joined by Stone, Roberts, and Cardozo, JJ.), summed up the seven rules comprising the avoidance principle:

> First, "[t]he Court will not pass upon the constitutionality of legislation in a friendly non-adversary proceeding. . . ." *Id.* at 346.
>
> Second, "[t]he Court will not 'anticipate a question of law in advance of the necessity of deciding it.'" *Id.* (citations omitted).
>
> Third, "[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Id.* at 347.

Fourth, "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Id.* at 348.

Fifth, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Id.* (citations omitted).

Sixth, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 347.

Seventh, "'[w]hen the validity of an act of the Congress[2] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* (citation omitted).

These rules, based on considerations of policy, developed by this Court, and on Article III of the United States Constitution, were quoted in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947), where this Court stated that the rules were employed to "avoid[] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until necessity compel[led] it in the performance of constitutional duty." *Id.* at 569. "Like the case and controversy limitation itself and the policy against entertaining political questions," the Court declared, the avoidance principle "is one of the rules basic to the federal system and this Court's appropriate place within that structure." *Id.* at 570.

This avoidance principle has been reflected in "numerous cases and over a long period." *Poe v. Ullman*, 367 U.S. 497, 503

[2]This principle applies to acts of state legislatures as well. *See, e.g., Thornburgh*, 737 F.2d 283, 294 (3d Cir. 1984).

(1961)(Frankfurter, J., plurality opinion).[3] It has been repeated by this Court in relation to review of state abortion laws. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). However, in keeping with the usual abortion distortion factor (apparent where any area of the law touches on abortion)[4] the principle has not been scrupulously followed in abortion cases.[5]

In *Thornburgh*, 106 S.Ct. 2169, Justice White observed the majority's eagerness to strike down abortion legislation at the expense of the *Ashwander* avoidance principle and summarized the matter well in response to the majority's refusal to find an emergency exception in the two-physician requirement for postviability abortions:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' [citation omitted] The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

[3]There has been controversy over particular applications of the principle, but not the principle itself. *See, e.g., Mattiello v. Connecticut*, 4 Conn. Cir. Ct. 55, 225 A.2d 507, *appeal dismissed*, 395 U.S. 209 (1969); *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955) (per curiam); A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

[4]*See infra* II (B). For a fuller discussion of the abortion distortion factor in general and the failure of this Court to follow the *Ashwander* avoidance principle in particular, in cases such as, *inter alia*, *Roe v. Wade*, 410 U.S. 113, *Colautti v. Franklin*, 439 U.S. 379 (1979), *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, see Bopp & Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989) (The anticipated publication date is April, 1989. Page references — other than the initial page number — employed herein are to the unpublished manuscript, which has been provided to the Clerk of this Court.).

[5]*Id.*

cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Thornburgh, 106 S.Ct. at 2205.

It is not surprising to find the avoidance principle itself avoided, as was done in *Thornburgh* and other abortion cases, because the precedent for failure to follow the usual rules in abortion cases was set in *Roe* itself. *Roe v. Wade* was widely criticized for violation of this avoidance principle. For example, now Chief Justice Rehnquist, in his dissent to *Roe*, declared, "[T]he Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Roe*, 410 U.S. at 171-72 (Rehnquist, J., dissenting) (citation omitted).

The distortion worked on the law where it touches on abortion should not be continued in the present case by failure to reach the threshold issue of the standard of review. While it is appropriate and laudable for courts to avoid reaching issues not essential to the determination of the case before them, the standard of review is not one of the issues which may be avoided, provided that the constitutional issues are reached. It is a necessary threshold determination.

Nowhere in the list of avoidance rules of this Court is there one which says that, when the constitutionality of a state statute is at issue, this Court will bypass the determination of the appropriate standard of review. Indeed the precedents require otherwise. Therefore, sound adjudication requires that adjudicatory principles be followed consistently, whether or not a case touches on abortion. In this case, that requires this Court to determine the viability of *Roe* — to state the standard by which it will review abortion statutes — as the necessary threshold issue in the review of the Missouri statutes for constitutionality.

II. FAILURE TO DETERMINE THE APPLICABLE STANDARD OF REVIEW WHILE UPHOLDING THE MISSOURI STATUTE WOULD LEAD TO UNTOWARD RESULTS.

Failure to confront the issue of *Roe's* viability would lead to untoward results, including continued, interminable litigation of the subject of abortion in this and lower courts. This ongoing litigation would cause the lower courts to continue making legislative policy choices, leading to further distortion of abortion jurisprudence. The courts would be forced to fashion social policy with even less guidance than before. Likewise, this Court would be faced with the need to draw ever-finer legislative policy lines.

A. LITIGATION WOULD CONTINUE CONCERNING THE CONSTITUTIONALITY OF STATE STATUTES UNDER THE STANDARD OF REVIEW ESTABLISHED IN *ROE*.

In the sixteen years since *Roe* was decided, there have been numerous cases concerning abortion brought in state and federal courts and taken on appeal. As of 1980, just seven years after *Roe*, there were one hundred thirteen federal district court opinions, forty-five federal appellate court decisions, and fourteen cases in this Court relating to abortion. L. Wardle, *The Abortion Privacy Doctrine* Tables A-C (1980). In the subsequent nine years, the flow has not abated. Including the present case, twenty-two abortion cases have been reviewed by this Court, and many more have been brought but not granted review or have been dealt with summarily. *Abortion and the Constitution*, Appendix One (D. Horan, E. Grant & P. Cunningham eds. 1987)(listing twenty cases up to and including *Thornburgh*); *Hartigan v. Zbaraz*, 108 S.Ct. 479 (1987). *See, e.g., Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347); *Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982), *summarily aff'g*

Gary-Northwest Indiana Women's Services v. Bowen, 96 F. Supp. 894 (N.D. Ind. 1980).

As observed by Justice White in *Thornburgh*, such a flood of litigation is in no way evidence of any evil intent by the states; rather, it is inherent in the nature of the right and analysis declared in *Roe* and in this Court's subsequent changing of the rules[6] set up in *Roe:*

> The majority's opinion evinces no deference toward the state's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy. . . . In fact, of course, the legislature's past failure to predict the evolution of the right first recognized in *Roe v. Wade* is understandable and is in itself no ground for condemnation. Moreover, the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of *mens rea*. The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have seemed permissible.

Thornburgh, 106 S.Ct. at 2198 (White, J., dissenting).

The flood of litigation shows no signs of abating. Failure to consider the continued viability of *Roe* would do nothing to abate the flood. Rather, the uncertainty created by such a decision would cause the flood to swell, further inundating the courts.

[6]For an analysis of how this Court has failed to follow the principle of stare decisis, by gutting *Roe* of virtually all content except the bare right to choose abortion, see Bopp & Coleson, *supra* note 4, at 12-42.

B. FURTHER LITIGATION WOULD FORCE THE COURTS TO CONTINUE MAKING LEGISLATIVE POLICY CHOICES AND DRAWING EVER-FINER LINES, LEADING TO FURTHER CONFUSION IN ABORTION JURISPRUDENCE.

To avoid the issue of *Roe's* viability would leave the lower courts as well as state and federal legislators in disarray, uncertain as to the status of abortion jurisprudence — especially given the shifting balance of this Court on abortion matters, which is evident in the progression from *Roe*, 410 U.S. 113 (seven to two majority), to *Akron*, 426 U.S. 416 (six to three majority), to *Thornburgh*, 106 S.Ct. 2169 (five to four majority), to *Hartigan v. Zbaraz*, 108 S.Ct. 479 (1987) (evenly divided court).

Moreover, the courts would need to draw ever-finer lines, in matters more properly considered legislative policy choices, with increasingly blurred guidelines. As noted below, *see infra* II(C), this Court has been unable to give the lower courts clear guidelines for analyzing abortion statutes.

The need to draw finer and finer lines without clear guidelines is well illustrated by the situation in the lower federal courts with regard to waiting periods for minors. Seven cases to date have engaged this Court in attempting to fine-tune the permissible regulation of minors seeking to abort. *Danforth*, 428 U.S. 52; *Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622; *H.L. v. Matheson*, 450 U.S. 398; *Akron*, 462 U.S. 416; *Ashcroft*, 462 U.S. 476; and *Thornburgh*, 106 S.Ct.2169.

Despite this series of cases, the lower courts are currently wrestling with the regulation of abortion for minors, including the constitutionality of a mandatory waiting period. The circuits have split. In *Hodgson v. Minnesota*, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988)(en banc), the Eighth Circuit upheld a forty-eight hour waiting period. However, the Sixth Circuit struck down a twenty-four hour waiting period for minors in

Akron Center for Reproductive Health v. Slaby, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988), *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 10, 1988)(No. 88-805).

No change in the need for continued judicial hair-splitting appears imminent. As noted in the following subsection, this is a job traditionally entrusted to legislatures and to which they are more adequately suited than courts.

C. THIS COURT WOULD CONTINUE TO BE FACED WITH LEGISLATIVE POLICY CHOICES ON ABORTION, LEADING TO FURTHER DISTORTION OF THE LAW WHERE IT TOUCHES ON ABORTION, AND THE NECESSITY OF RESOLVING ISSUES DECIDED DIFFERENTLY IN THE LOWER COURTS.

Rather than making the rules of abortion jurisprudence clearer, the decisions of this Court have made the "bright lines" of *Roe* "blurred." *Akron*, 462 U.S. at 455 (O'Connor, J., dissenting). The result is that, with the continued flood of abortion cases, abortion jurisprudence is becoming more obscure, unpredictable, and difficult for the legislatures and lower courts to follow. Justice O'Connor, in *Akron*, noted the failure of this Court to apply "neutral principles" and its reliance on an analytical framework that "varies according to the 'stages' of pregnancy" and "the level of medical technology available when a particular challenge to state regulation occurs." *Id.* at 452 (O'Connor, J., dissenting). She observed that "[t]he *Roe* framework . . . was clearly on a collision course with itself." *Id.* at 458. The result of such blurring of the guidelines would be more hair-splitting cases for this Court to resolve, taking it ever deeper into the morass of minutiae, and ever further from the grand sweep of timeless, neutral principles of the Constitution to the consideration of which it is best suited by its granted powers and august position.

The sort of nit-picking detail required of this Court by present abortion jurisprudence is better suited to legislatures.

Justice O'Connor commented on the basically legislative[7] work of the Court in its review of the legislation at issue in *Akron:*

> It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.

Id. at 456.

Legislatures have historically been entrusted with making the sort of social policy decisions performed by this Court in its abortion decisions. They are not bound by "case or controversy" requirements or rules of evidence and procedure. They may hold hearings, appoint advisory panels, employ researchers, experiment, and revise their views without concerns of stare decisis.

John Hart Ely wrote shortly after *Roe* was decided: "[P]recisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly not under the guise of enforcing the Constitution." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 n.89 (1973). Similarly, Justice Frankfurter, some four decades before *Roe*, criticized

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[7]Memoranda by members of the *Roe* majority, found in papers of Justice Douglas and recently released by the Library of Congress, reveal an acknowledgment of the legislative nature of the *Roe* majority's handiwork in *Roe*. There is discussion of concern that much of the decision constituted "dicta" and "about the desirability of the dicta being quite so inflexibly 'legislative.'" The memoranda reveal the author of *Roe* acknowledging that the opinion contained dictum and that the lines drawn were "arbitrary." Noticeably absent is discussion of the requirements of the Constitution; rather, the exchanges read like negotiations among members of a legislative conference committee seeking to hammer out compromise legislation. Woodward, *The Abortion Papers*, The Washington Post, Jan. 22, 1989, at D1, col. 1. The memoranda help put in context Justice White's charge that the *Roe* and *Bolton* majority was engaged in an exercise of "raw" judicial power." *Bolton*, 410 U.S. at 222 (White, J., dissenting).

> the imposition by judges of their private notions of social policy [on the states] because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matter of fact and opinion not particularly within the special competence of judges, behind the impersonal dooms of the Constitution.

F. Frankfurter, *The Public and Its Government* 49-51 (1930).

Roe v. Wade has been criticized by Archibald Cox as "read[ing] like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics." A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). This has proven to be the case. His oracle has proved sound, and the lower courts are left in disarray by changes in medical technology, even where this Court has seemingly set down a bright line. *See* Bopp & Coleson, *supra* note 4, at 25-42. It would be left to this Court to seek to extricate the lower courts from the morass of confusion, to resolve their disagreements, and to attempt to give guidance for the future, knowing that, under the current scheme, the guidelines would become worthless with the next pronouncement of ACOG.

Finally, the inherent flaws in *Roe*, coupled with the efforts of the Court majority seeking to preserve it, have wrought a profound distortion in the law where it touches on the subject of abortion. As a result, while the pro-*Roe* majority in previous cases cried "stare decisis," it ignored the doctrine in subsequent cases, gutting *Roe* of all content but the bare right to have an abortion — virtually on demand. Bopp & Coleson, *supra* note 4, at 5-42. While the prochoice majority declared the right to abortion to be based on the right to privacy, it treated the abortion privacy right differently from any other privacy right and failed to provide the nexus between the declared fundamental right and American history and tradition. *Id.* at 43-76. While the defenders of *Roe* stripped the unborn of rights, classifying them as less than persons, examination of the rest of the law reveals a quantum leap in fetal

rights with the recognition of the separateness of the unborn from their mothers and their personhood for a host of other purposes. *Id.* at 77-118. While the authors of *Roe's* progeny discussed the abortion right as a medical procedure, they treated it differently than any other medical procedure, restricting the traditional role of the states in regulating medical matters, even to the point of striking down reasonable informed consent statutes — thereby reversing the whole modern trend of informed consent law. *Id.* at 119-138. And, when the champions of *Roe* dealt with procedural and adjudicatory matters, it became evident that there were two sets of rules: general rules and special, abortion rules. *Id.* at 139-196. As elsewhere, the abortion distortion effect is evident in this area, making the right to abortion more anomalous and absolute.

Failure of this Court to confront the necessary threshold issue of the viability of *Roe* would leave this massive flaw in the law intact, forcing this Court to employ ever-finer distinctions and increasingly arbitrary divisions upon an interminable series of cases in an attempt to repair the irreparable.

III. THE ABORTION PRIVACY ANALYSIS OF *ROE* SHOULD BE ABANDONED IN FAVOR OF A RATIONAL BASIS TEST FOR ABORTION LEGISLATION.

The only cure for such a tangent from the norm of constitutional law is a correction, namely, the reversal of *Roe*. Only such a correction can repair the profound distortion worked by (and required by) abortion jurisprudence. This Court should reverse *Roe* and abandon any notion of a fundamental constitutional right to abortion and, with it, any requirement of compelling state interests. The only appropriate standard for reviewing abortion legislation is the rational basis test.

A. UNDER THE PRIVACY ANALYSIS OF *BOWERS*, THE RIGHT OF PRIVACY DOES NOT EXTEND TO ABORTION.

In *Bowers v. Hardwick*, 106 S.Ct. 2841, this Court, employing an evaluation of the history of Western attitudes toward homosexual sodomy, concluded that there was no fundamental privacy right to engage in such activity under either the test of *Palko v. Connecticut*, 302 U.S. 319 (1937), or *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977). Yet, the historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy.[8] Some comparisons of the two analyses indicates the discrepancies between the usual privacy analysis and the relaxed form applied to abortion by the *Roe* majority.

The *Roe* majority cited Plato's *Republic* as evidence of abortion's deep roots in our cultural traditions. 410 U.S. at 131. By contrast, the *Bowers* majority did not apparently see such evidence as worthwhile, for no mention is made to the numerous allusions in Plato's writings to the practice of homosexual sodomy among the ancients. *See*, Plato, *Phaedrus*.

The *Roe* approach suggested that a shift of opinion, in favor of abortion, among selected elites and in a few states, was

[8]Justice Blackmun, in *Roe*, relied primarily on an article by Cyril Means for his history of abortion. *See, e.g.*, 410 U.S. at 135; Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971). Although the article's scholarship was questionable at the time, for the non-sequiter conclusions it drew, it has since been effectively refuted with respect to the validity of its history and analysis. *See, e.g.*, Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-92 (1975); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 379-89 (1979); Horan & Balch, "*Roe v. Wade:* No Justification in History, Law or Logic," Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," and Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution* (D. Horan, E. Grant & P. Cunningham eds. 1987).

constitutionally significant. By contrast, the *Bowers* opinion saw little constitutional significance in the lack of enforcement of sodomy laws in general and the repeal of such laws in many states. 106 S.Ct. at 2845. These trends did not make a constitutional right.

The *Bowers* analysis was more rigorous than that of *Roe*. There was no grasping at historical straws in *Bowers*, such as occurred in *Roe*. While the *Bowers* historical sketch was not exhaustive, it was, unlike *Roe's*, not glaringly inaccurate. Nor did it have to be complete, for it needed only to show that the practice of homosexual sodomy was not rooted in the traditions of this nation nor essential to a scheme or ordered liberty — a task it did in a simple, straightforward manner. The comparison of the historical analysis employed in *Roe* with that used in *Bowers* indicates that, if the Texas abortion law challenged in *Roe* were subjected to the same analysis as the Georgia sodomy statute in *Bowers*, the abortion law would have been upheld. *See* Bopp & Coleson, *supra* note 4, at 45-76 (a detailed evaluation of *Roe* as a privacy right, in comparison to other privacy rights, and further analysis of the *Roe/Bowers* analytical dichotomy).

Application of the analysis employed in *Bowers* to the issues of *Roe* reveals that, under a proper constitutional analysis, there is no fundamental right to abortion. Therefore, the strict standard of scrutiny employed for fundamental rights should be abandoned and the abortion legislation of the states, including the Missouri statutes at issue herein, should be evaluated by the rational basis standard of review.

B. PRESERVING AN ABORTION PRIVACY RIGHT WHILE RECOGNIZING A COMPELLING STATE INTEREST IN UNBORN HUMAN LIFE THROUGHOUT PREGNANCY WOULD LEAD TO SUBSTANTIAL DIFFICULTIES.

It may be argues by some that the issue of whether there is a fundamental right to abortion need not be reached, for this Court may simply declare that there is a compelling interest in

unborn human life throughout all stages of pregnancy. Under such a holding, the state, in asserting and protecting that compelling interest, could then limit abortion practice. However, such an approach would lead to substantial difficulties.

1. LITIGATION WOULD CONTINUE CONCERNING THE PROPER ADVANCEMENT OF STATE INTERESTS AND WHETHER LEGISLATION IS NARROWLY TAILORED TO MEET THOSE INTERESTS.

Maintaining a fundamental right to abortion while finding the states' interest in unborn human life to be compelling would do nothing to stanch the flow of abortion litigation — only the emphasis would be shifted. Questions would be raised in case after case concerning whether the state interests were advanced properly by certain legislation and whether the legislation was narrowly tailored to meet those interests. The fundamental rights analysis itself generates litigation in the field of abortion jurisprudence. By maintaining that analysis and finding a compelling interest in unborn human life, this Court would contribute little to ending the interminable litigation of this matter in the courts.

2. THE CONTINUING LITIGATION WOULD FORCE UPON THE COURTS THE NEED TO CONTINUE MAKING POLICY CHOICES, MORE PROPERLY SUITED TO LEGISLATIVE BODIES, WHICH HAS LEAD TO A SUBSTANTIAL DISTORTION IN THE LAW WHERE IT TOUCHES ABORTION.

If the fundamental rights analysis is maintained, the need for the courts to make policy choices, as discussed supra, would continue unabated. These policy choices are more properly and effectively made by legislatures. Maintaining the fundamental rights analysis would do little to repair the distortion wrought by courts bending over backward to protect the abortion liberty at all costs. The predictable result would be even greater distortion if the abortion liberty continues to enjoy the imprimatur of this Court.

3. THIS COURT WOULD BE FORCED TO CONTINUE MAKING EVER-EXPANDING POLICY CHOICES.

Likewise, by maintaining a fundamental rights analysis, this Court would be required to continue acting as the nation's medical review board, making ever-expanding policy choices on ever-finer points of social policy. Only a return of the matter to the political arena and the democratic process, designed to resolve such difficult matters of social policy, will put an end to the interminable imploring of this Court to play a role for which it was not created and is ill-suited.

4. THIS COURT'S OWN EXPERIENCE WITH THE DECLARED COMPELLING INTERESTS IN MATERNAL HEALTH AND "POTENTIAL LIFE" AFTER VIABILITY SHOWS THE INHERENT PROBLEMS WITH DECLARING A COMPELLING INTEREST IN UNBORN LIFE WHILE MAINTAINING THE ABORTION PRIVACY RIGHT.

Declaring a compelling interest in human life throughout pregnancy would only cause further complications for this Court, as evidenced by its experience with prior interests declared compelling in the abortion context. In *Roe*, this Court declared that the state had a compelling interest in maternal health, from the end of the first trimester on, and in "potential" unborn life from viability to term. 410 U.S. at 163.

In practice, the fundamental liberty right of the mother has consumed the supposedly compelling interests of the state. *See* Bopp & Coleson, *supra* note 4, at 12-42. Some examples will illustrate the voracious appetite of the abortion right, under the control of justices unwilling to abide by stare decisis.

The doctrine of stare decisis was developed as an essential corollary to the rule of law, a corner stone of our system of constitutional government. This rule-of-law doctrine allows obedience to and stability in the law. The observance of stare

decisis normally yields a degree of predictability in the law. Despite invocation of *Roe* as a polestar for creating and reviewing abortion regulation, abortion law has been marked by instability and uncertainty. This Court's pronouncements have been far from clear, and there have been changes of the rules in the middle of the game.

It is ironic that, while claiming to follow *Roe*, this Court has systematically gutted *Roe* to allow the current desired result. The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, the Court's appeal to stare decisis is to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

This Court has indicated this to be the core and substance of the precedent it follows by striking down any meaningful attempt to assert the interests it has declared as "compelling" in *Roe* and by abandoning key elements of the *Roe* formula when convenient. It is clear, then, that while the pro-*Roe* majority has raised the cry of stare decisis, it has not in fact followed its own precedent, except in the most skeletal fashion.

For example, *Roe* said that a state had a compelling interest in maternal health, beginning at the end of the first trimester, which would allow it to, *inter alia*, regulate "as to the facility in which the procedure is to be performed, that is, *whether it must be a hospital* . . ." 410 U.S. at 163-64 (emphasis added). An Indiana district court in *Gary-Northwest Indiana Women's Services v. Bowen*, adhered to this precedent and upheld a statute requiring hospitalization for post-first-trimester abortions. 496 F. Supp. 894 (N.D. Ind. 1980). The plaintiffs had argued that dilation and evacuation abortions had become so safe that hospitalization should not be required, at least during the first half of the second trimester (to eighteen weeks). *Id.* at 896-97. The district court, adhering to precedent, quoted the passage from *Roe* allowing the state to require hospitalization after the first trimester and declared, "The express language of *Roe* mandates that Indiana's hospitalization requirement be found by this Court to be constitutional." 496 F. Supp. at 899.

The district court also rejected the attempt to subdivide the trimesters, by allowing state regulation of "abortions more dangerous than childbirth," rather than treating "second trimester" abortions as a unit, holding that "[t]his Court must respect *Roe's* specific ultimate rulings. If this Court does not respect the specific ultimate rulings in *Roe*, those rulings will lose their usefulness . . . [and s]tates will be hard pressed to pursue their legitimate, compelling interests in protecting maternal health." *Id.* at 900. The district court further noted the impracticability of abandoning the trimester framework in favor of a case-by-case determination, and the fact that it was "the policy of the United States Supreme Court to avoid, if possible, the creation of rules of law which increase litigation." *Id.* at 900-01.

This Court summarily affirmed this case on appeal, leading to the widespread perception that this Court had adopted a bright-line approach and meant what it said about state interests being compelling. *Sub nom. Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982).[9]

However, when faced with a similar hospitalization provision, enacted by the city of Akron, the pro-*Roe* majority abandoned stare decisis in reviewing the ordinance. The district and circuit courts had considered the hospitalization requirement as constitutional and firmly controlled by this Court's precedents. *Akron Center for Reproductive Health v. Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979); 651 F.2d 1198 (6th Cir. 1981).

The *Akron* majority, on this Court, chose to follow medical precedent rather than its own. The American College of Obstetricians and Gynecologists had decided that clinic abortions were safe into the second trimester, and this Court

[9]Twenty-three states enacted hospitalization requirements for abortions after the first trimester. *Akron*, 462 U.S. at 426 n.9 (citing Brief for Americans United for Life as Amicus Curiae at 4 n.1, *Simopoulos v. Virginia*, 462 U.S. 506 (1983)). *Cf. Planned Parenthood Association of Kansas City v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981) (invalidating hospital requirement) *with Simopolous v. Commonwealth*, 221 Va. 1059, 277 S.E.2d 194 (1981) (upholding hospital requirement).

struck down the hospitalization requirement, holding that abortion regulations may not "depart from accepted medical practice." *Id.* at 434.

In the words of Justice O'Connor, the Court had abandoned its "bright-line" approach. Henceforth, legislators would be required to track the changing trends of medical technology, rather than follow the precedents of this Court. *See* Bopp & Coleson, *supra* note 4, at 25-30 (a fuller analysis of this failure of stare decisis).

A second key concept of *Roe* was the woman's right to make the abortion decision "in consultation" with her physician. 410 U.S. at 163. However, in *Akron*, 462 U.S. at 449, the pro-*Roe* majority again abandoned stare decisis, holding that a woman need not even speak with her physician about her abortion. *See* Bopp & Coleson, *supra* note 4, at 30-34 (a fuller discussion of this point).

Former Chief Justice Burger, in *Thornburgh*, observed how the state interests, declared in *Roe*, had been ignored. Despite the declared "compelling" interest in maternal health, "the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure . . . " 106 S.Ct. at 2190 (Burger, C.J., dissenting). He further noted that the *Thornburgh* majority's willingness to strike down a second physician requirement (to care for viable, aborted children) made of *Roe*'s declared "compelling" interest in unborn life "mere shallow rhetoric." *Id.* at 2191. He added, "Undoubtedly the Pennsylvania Legislature added the . . . requirement on the mistaken assumption that this Court meant what it said in *Roe* concerning the 'compelling interest' of the states . . ." *Id.*

Chief Justice Burger concluded that the Court had left its original consensus against abortion on demand — perhaps the greatest example of the abandonment of stare decisis in abortion law — and, thereby, had left him behind. *Id.* at 2190-91. He declared that "[t]he soundness of our holdings must

be tested by the decisions that purport to follow them," and, finding that *Roe* had failed such a test, called for the reexamination of *Roe*. *Id.* at 2190, 2192.

The result of the continued neglect of the "compelling" interests, declared in *Roe*, by the *Thornburgh* majority was to create a climate of instability, unpredictability, inconsistency, unworkability, and unfairness — the antithesis of the values sought to be promoted by stare decisis and the rule of law. *See* Bopp & Coleson, *supra* note 4, at 12-23, 34-42 (a more detailed analysis of the shortcomings of *Thornburgh* in light of the principles underlying stare decisis and the rule of law). In view of the failure of the pro-*Roe* majority to follow stare decisis in abortion jurisprudence, it is ironic that in *Akron*, faced with calls for the reversal of *Roe*, the majority trumpeted stare decisis and claimed to be following *Roe*. 462 U.S. at 420 n.1.[10]

Thus, to declare a compelling interest in unborn human life throughout pregnancy may not yield the result intended. As seen in the record of past cases, compelling interests have suffered catastrophic erosion when subject to an abortion right. It is likely that a new declaration of a compelling state interest in unborn life from the time of conception would suffer a similar fate.

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[10]While it is beyond the scope of this brief to discuss the doctrine of stare decisis at length, the amicus curiae notes briefly that there is a difference between giving lip-service to the doctrine with alleged adherence to *Roe*, while ignoring inconvenient aspects of it at will, and honestly confronting a past mistake of this Court. The former is to be condemned; precedent not overruled ought to be followed. The latter is an essential aspect of constitutional adjudicaton and, where necessarily done, should be applauded; precedent seen to be erroneous from the perspective of time, experience, and expanded scholarship must be corrected. *Roe v. Wade* is a precedent that requires reversal and stare decisis demands, rather than forbids such reversal. *See* Bopp & Coleson, *supra* note 4, generally and at 197-04; Pfeifer, "Abandoning Eror: Self-Correction by the Supreme Court," in *Abortion and the Constitution* 3-22; Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 251-57.

CONCLUSION

Abortion jurisprudence needs resolution after sixteen year of turmoil. This Court attempted to resolve the matter in 1973. Time has proven the effort a failure. This Court is now confronted with the opportunity to restore a proper interpretation to the Constitution, returning this volatile matter of social policy to the proper fora — the state legislatures.

Objective application of the tests of fundamentality established by this Court reveals that there is no fundamental right to abortion apart from judicial fiat. By confronting this fact, as the threshold issue in this case, this Court can fulfill its duty to adjudicate consistent with its precedents and, most importantly, in faithfulness to the Constitution. Because the abortion liberty fails to rise to the level of a fundamental right, the rational basis test should be employed. Given the states' historic interest in preserving life from the time of conception (an interest firmly rooted in the history and conscience of our nation), there is clearly a rational basis to uphold the Missouri statutes at issue herein.

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AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the United States Supreme Court

October Term, 1988

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v.

REPRODUCTIVE HEALTH SERVICES, ET AL.

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BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

By WILLIAM J. GUSTE, JR.,
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QUESTION PRESENTED

Appellants have presented seven Questions for review. *Amicus*, State of Louisiana, wishes to address those questions as follows:

Whether the Police Power reserved to the States and the people by the Tenth Amendment to the Constitution allows the States the exercise of power to balance the competing interests of the mother's right to abortion and the unborn child's right to life?

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OTHER AUTHORITIES

Cox, A., *The Role of the Supreme Court in American Government*, (1976) 15
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Lenow, J. L., *The Fetus as a Patient: Emerging Rights as a Person*, A. J. Law and Med. 9 Vol. 1 (1983) 18

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By WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana

With Attorneys General Joining for the States of
Arizona, Idaho, Pennsylvania, and Wisconsin

STATEMENT OF THE CASE

Attorneys General in several states come together to present their interest in the Court's decision in this case which may affect many state laws regulating abortion.[1]

[1] The opinion below is reported at 851 F.2d 1071 (8th Cir. 1988).

The states of Arizona, Idaho, Pennsylvania and Wisconsin have joined with Louisiana in support of the Appellants to demonstrate the public interest in limiting and regulating the right to abortion and to allow the individual state legislatures to define when human life begins. Other states have aligned with Massachusetts in support of Appellees to encourage expanding the right to abortion. This decision will determine the power states may lawfully exercise in regulating abortion and in protecting the rights of unborn children.

INTEREST OF THE AMICUS CURIAE

This brief is filed, *amicus curiae*, by William J. Guste, Jr., Attorney General of Louisiana, pursuant to his official duty to defend the constitutionality of State statutes. Robert K. Corbin, Attorney General of Arizona, Jim Jones, Attorney General of Idaho, Ernest D. Preate, Attorney General of Pennsylvania, and Donald J. Hanaway, Attorney General of Wisconsin, have joined this brief with Louisiana to restore to the States their right to legislate in matters related to abortion. The interests of Louisiana in this case are significantly similar to those of Missouri in that Louisiana has statutes which, for example, define that human life begins at the moment of conception; which make the unborn child a legal person for purposes of the unborn child's right to life as protected by State laws; which forbid the use of public funds, institutions and/or public employees from participating in abortions except to prevent the death of the mother; and which regulate abortion to the extent permitted by the decisions of the United States Supreme Court.[2] The interests

[2] The Missouri and Louisiana Statutes are reproduced in Appendices A and B respectively, at App. 1 and 5.

of other states are likewise similar; therefore, these several states have a direct and substantial interest in the disposition of this case. The position of *amicus* is solely to uphold the right of the States to determine the power states may lawfully exercise in regulating abortion and in protecting the rights of unborn childre...

SUMMARY OF ARGUMENT

I. THE RIGHT OF THE SEVERAL STATES TO LEGISLATE IN MATTERS OF PUBLIC POLICY RELATED TO ABORTION IS A PROPER EXERCISE OF THE POLICE POWER RESERVED TO THE STATES AND THE PEOPLE BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Louisiana laws are significantly similar to those of Missouri and may be at risk in these proceedings. Louisiana urges the Court to reject further attempts to balance the interests of the unborn child against those of the mother and to allow *Amicus* to resolve this issue through the democratic process at the state level. *Amicus* further urges that the court allow the states to exercise their general police powers to legislate in abortion-related matters because of this Court's precedents and because

of the Framers' concept of the constitutional division of power between the federal and state goverments.

The Court has long recognized the wisdom of abstention from involvement in matters distinctively political in nature. The nature of the opposing forces in abortion issues is essentially political and therefore not amenable to judicial resolution. *Amicus* suggests that the instant case, as well as *Roe v. Wade*[3] and its progeny, are inappropriate for judicial resolution. To achieve federal-state harmony on this issue, *Amicus* urges this court to reverse or to modify *Roe*.

II. THERE ARE SIGNIFICANT SIMILARITIES BETWEEN THE LAWS AND PUBLIC POLICIES OF MISSOURI AND LOUISIANA BALANCING THE COMPETING RIGHT TO ABORTION AND RIGHT TO LIFE OF THE UNBORN CHILD

Under both Missouri and Louisiana laws, it has been a longstanding policy that an unborn child is a human being from the time of conception. Both states have a compelling interest in protecting an unborn child's right to life and in regulating and limiting abortion to the extent permitted by the Constitution.

The substantive laws of both states grant certain rights to the unborn child. In particular, both states prohibit public employees, facilities or funds from involvement in abortions except when medically necessary to prevent the mother's death. In the area of inheritance law, the unborn child has inheritance rights particularly well-

[3] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).

grounded in Louisiana, which has adopted much of the Roman Civil Law on this subject. In the area of tort law, Louisiana was the first state to allow recovery for injuries to an unborn child, rejecting the traditional common-law rule on this issue. *Amicus* submits that it is blatantly inconsistent to grant a legal remedy to an unborn child injured during pregnancy, as Louisiana does, and to deny that same unborn child the right to life, as *Roe* does.

Amicus likewise contends that the question of when human life begins is crucial to any discussion of abortion and that this question ought to be resolved through the political process at the state ievel.

Roe and its progeny have established the competing rights of the mother and the unborn child, both of which are linked to the states' compelling interests. *Amicus* argues that the point at which these compelling interests intervene is inherently unstable because the competing interests are on a collision course with each other. The Constitution does not provide for a "trimester" and "viability" approach. The Constitution reserves to the states and the people through the Tenth Amendment the exercise of power to legislate in matters of public policy related to the right to abortion and the right to life of the unborn child.

ARGUMENT

I. THE RIGHT OF THE SEVERAL STATES TO LEGISLATE IN MATTERS OF PUBLIC POLICY RELATED TO ABORTION IS A PROPER EXERCISE OF THE POLICE POWER RESERVED TO THE STATES AND THE PEOPLE BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The State of Louisiana has a long and unbroken legislative history in the area of abortion related legislation. Like the appellant, State of Missouri, *Amicus* has at risk in these proceedings the viability of numerous laws affecting the health, peace and tranquility of its citizens.

Seeking to restore order from conflict, Louisiana urges this court not to become once more entangled in the thicket of the medical, ethical, moral and social controversy from which *Roe v. Wade*[1] and its progeny emanate. Rather, *Amicus* urges the Court to forsake further attempts to balance the interests of the unborn child against those of the mother, and recognize that a definitive and workable resolution of that issue is and ought to be accomplished appropriately through the political process, and adjudged beyond the capacity of this Court to resolve through constitutional principles.

Chief Justice Taney, in the beginnings of the Court's work, cautioned that, "It is the province of a court to expound the law, not to make it." Further, " . . . it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." *Luther v. Bor-*

[1] *Supra* 3.

den, 48 U.S. 1 at 40, 46 (1849). This cardinal precept of judicial restraint was again affirmed in *Mobile v. Bolden*, 446 U.S. 55, 100 S Ct. 1490, 64 L Ed 2d 47 (1980) wherein this Court noted that:

> It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro v. Thompson*, 394 U.S. 618, 634, 638, 22 L Ed 2d 600, 89 S Ct 1322 *id.*, at 642-644, 22 L Ed 2d 600, 89 S Ct 1322 (concurring opinion). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 30-32, 36 L Ed 2d 16, 93 S Ct 1278. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.*, at 33, L Ed 16, 93 S Ct 1278. See *Lindsey v. Normet*, 405 U.S. 56, 74, 31 L Ed 2d 36, 92 S Ct 862; *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L Ed 2d 491, 90 S Ct 1153. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . ., involving questions of economic and social policy,' *San Antonio Independent School District v. Rodriguez, supra*, at 33, 36 L Ed 2d 16, 93 S Ct 1278. Mr. Justice Marshall's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'superlegislature.' *Shapiro v. Thompson, supra*, at 655, 661, 22 L Ed 2d 600, 89 S Ct 1322 (Harlan, J., dissenting). We are not free to do so." *id.* at 76.

Amicus suggests that, absent a finding of an issue involving fundamental personal rights which are uniquely secured by the Constitution, further inquiry into whether the Missouri statutes in question are beneficial, wise, or

in the best interest of those thereby affected, are, in the words of Justice Sutherland, "wholly irrelevant to the inquiry of constitutionality." *Carter v. Carter Coal Co.*, 298 U.S. 238, 295, 56 S Ct 855, 80 L Ed 1160 (1936).

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S Ct 1278 at 40, 36 L Ed 2d 16 (1973) the Court held that "strict judicial scrutiny" should be applied only when legislation may be said to have deprived or interfered with the exercise of some fundamental personal right or liberty. See: also, *Akron v. Akron Center For Reproductive Health*, 462 U.S. 416, 462, 103 S Ct 2481, 76 L Ed 2d 687 (1983), (O'Connor, dissenting.)

Amicus agrees with and adopts the arguments and reasoning of Justice White in *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 790, 791, 106 S Ct 2169, 90 L Ed 2d 779 (1986), (White, J., dissenting, joined by Rehnquist, J.) to the effect that the woman's ability to choose an abortion is not so fundamental as to "call into play anything more than the most minimal judicial scrutiny." *Id.* at 790. As then Justice Rehnquist noted in his dissent in *Roe*, ". . . the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 410 U.S. at 174.

Justice White, speaking for the Court in *Bowers v. Hardwick*, 478 U.S. 186, 106 S Ct 2841, 92 L Ed 2d 140, (1986) found no fundamental right to privacy allowing homosexual sodomy, and characterized such rights as being those "liberties that are 'deeply rooted in this Nation's history and tradition.'" 478 U.S. at 192.

Amicus suggests that the woman's election to abort an unborn child is, for certain, not rooted in either the history or tradition of this Nation, nor so fundamental that legislation placing limitations thereon should receive anything more than the minimal scrutiny of this Court in terms of the rational relationship thereof to legitimate government objectives. To the extent that the language of *Roe* suggests otherwise, that decision should therefore be overruled. ". . . [W]hen it has become apparent that a prior decision has departed from a proper understanding of the Constitution, that decision must be overruled." *Thornburgh, supra*, 476 U.S. at 788 (White dissenting).[5]

In the context of judicial review of abortion legislation, the Court has already given partial recognition to

[5] Supreme Court reversing error: *e.g. Hudson and Smith v. Guestier*, 6 Cranch 281, 285 (1810) overruling *Rose v. Himely*, 4 Cranch 241 (1808); *Edwards v. California*, 314 U.S. 160, 176-77 (1941) overruling *City of New York v. Miln*, 36 U.S. (11 Pet) 102 (1837); *Jones v. Opelika*, 319 U.S. 103 (1943) overruling *Jones v. Opelika*, 316 U.S. 584 (1942); *Legal Tender Cases*, 12 Wall 457, 603 (1870) overruling *Griswold v. Hepburn*, 2 Duvall 20 (1869); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) overruling *Ex parte Bakelite* 279 U.S. 438 (1929); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) overruling *Swift v. Tyson*, 16 Pet 1 (1842); *Williams v. North Carolina*, 317 U.S. 287 (1942) overruling *Haddock v. Haddock* 201 U.S. 562 (1906); *Benton v. Maryland*, 395 U.S. 784, 794 (1968) overruling *Palko v. Connecticut*, 308 U.S. 319 (1937); *West Virginia State Board of Education v. Barnette*, 319 U.S. 64, 642 (1943) overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) overruling explicitly *Adkins v. Children's Hospital* 261 U.S. 525 (1922) and abandoning error in *Lochner v. New York*, 198 U.S. 45 (1905); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) overruling *Plessy v. Ferguson*, 163 U.S. 537 (1895).

this limitation in, *Maher v. Roe*, 432 U.S. 464, 97 S Ct 2376, 53 L Ed 2d 484 (1977) to the extent that it therein declined to substitute its judgment for that of the legislature relative to abortion funding. The Court concluded that:

> 'The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and values over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on weighing of its wisdom or social desirability, for this Court does not strike down state laws because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, 99 L Ed 563, 75 S Ct 461 (1955), quoted in *Dandridge v. Williams*, *supra*, at 484, 25 L Ed 491, 90 S Ct 1153. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) *id.* at 479, 480.

It is the position of *Amicus* that the Court should extend its application of the logic of *Maher*, *supra.*, to the case, *sub judice*. The Court can reach this result by a finding that, within those powers expressly reserved to the several States by the Tenth Amendment[6] is the

[6] U.S. Constitution, Amend. X: "The Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

general police power to legislate in those matters related to abortion which affect the health, peace, welfare and moral fiber of its people, and to proscribe conduct adverse thereto. *United States v. Darby*, 31 U.S. 100, 124, 61 S Ct 451, 462, 85 L Ed 609 (1941); *National League of Cities v. Usrey*, 426 U.S. 833, 96 S Ct 2465, 49 L Ed 2d 245 (1976).

Judicial deference to the political process at the State level is not only consonant with this Court's prior expressions, but is also in conformity with the Framer's concept of the constitutional division of power between the federal and state governments.

Madison, in *Federalist* 45, argued that the creation of a strong union would not, "derogate from the importance of the governments of the individual States." He further opined that, "The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."[7]

For virtually as long as this Court has sat in judgment it has given recognition to the wisdom of abstention from involvement in matters distinctively political in nature. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court tersely noted that, "Questions in their nature political." . . . "can never be made to this court." *id.* at 168. Justice Story later judiciously forecast the pitfalls of the Court's intrusion into matters best left to the will of the people when he observed that, "The predicament in which this court stands in relation to the nation

[7] *Federalist*, 45 (Madison) pp. 289, 293.

at large is full of perplexities and embarrassments. . . . It stands therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more that its duty; and I trust, it will always be found to possess firmness enough to do that." *Trustees of Dartmouth College v. Woodward*, 7 U.S. (4 Wheat.) 518, 712, 4 L Ed 629 (1819).

History reveals that in those vexing cases to which Justice Story alluded, where sharply and deeply divided lines have been drawn based on moral, cultural or religious convictions, this Court has most ably fulfilled its constitutional role when, in recognition of the political nature of the issue before it, it has relegated such matters for resolution to the legislative forum.

Even in those instances where the Congress and the people have legislated in such matters, the Court has expressed a willingness to defer to the States wherever possible. The sovereignty of the States was thusly recognized to permit them to enact prohibition laws within their territorial limits, notwithstanding the adoption of the ill-fated 18th Amendment. *McCormick & Company v. Brown*, 286 U.S. 131, 52 S.Ct. 522, 76 L Ed S Ct 1017 (1931). Following the repeal of that Amendment, the courts have generally upheld the power of the States to regulate the sale or consumption of alcohol. *U.S. v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L Ed 2d 233 (1935); *Hughes v. United States*, 112 F 2d 417 (1940); *Crews v. Undercofler*, 249 F.Supp. 13 (1966), affirmed 371 F. 2d 534; *Commonwealth v. Stofcheck*, 185 Atl. 840, 322 Pa. 513 (1936).

Similarly, this Court has declined to elevate the constantly contested social, moral and political issues surrounding the legalization of gambling to the level of constitutional scrutiny. *State v. Rozenthal*, 559 P 2d 830, 93 Nev. 36, appeal dismissed, 434 U.S. 803, 98 S Ct 32, 54 L Ed 2d 61 (1977). The Court has likewise refrained from finding 14th Amendment privacy rights to bar the States from enacting penal statutes against homosexual conduct.[8]

Amicus readily acknowledges that the issues at stake herein are of uniquely greater moment than alcohol abuse, gambling, or homosexuality. However, the nature of the abortion issue differs therefrom only in degree, not in kind. The nature of the national unending struggle of opposing forces, in each instance, is, in essence, political, value laden, and not therefore amenable to judicial resolution.

This Court has not otherwise been loath to categorize questions presented for determination as being essentially political in nature, and therefore non-justiciable. Foremost in any such determination is the lack of adequate criteria for the making of a decision, or the impossibility of the Court's rendering a decision without an initial policy determination of a kind clearly non-judicial in nature.[9]

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[8] *Bowers v. Hardwick*, *supra.*, 478 U.S. 186.

[9] *Coleman v. Miller*, 307 U.S. 433, 454, 455, 59 S Ct 972, 88 L Ed 1385; *Baker v. Carr*, 369 U.S. 186, 82 S Ct 691, 7 L Ed 2d 663 (1962); *Colegrove v. Green*, 328 U.S. 549, 66 S Ct 1198, 90 L Ed 1432 (1945), reh. den. 329 U.S. 825, 67 S Ct 118, 91 L Ed 701, motion for reargument den. 329 U.S. 828, 67 S Ct. 199, 91 L Ed 703.

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court carefully delineated circumstances which require a finding that the nature of the matter before the Court is essentially unsuitable for judicial determination:

> A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. *id.* 369 U.S. at 82.

Amicus suggests that the Court now has before it precisely the sort of question described in *Baker* which renders this case, and all prior decisions emanating from *Roe v. Wade*,[10] *supra.*, and, for that matter even *Roe* itself, inappropriate for judicial resolution. The question relates not to 14th Amendment privacy rights; rather, it requires a declaration of the ever shifting status of the unborn child, measured on the sliding scale of pre-natal "meaningful life and his resulting rights balanced against those of his mother," *cf. Roe v. Wade.*

The dissenting opinion in, *Akron v. Akron Center for Reproductive Services*, 462 U.S. 416, 1035 S Ct 2481, 76 L Ed 2d 687 (1983) most aptly states the argument of *Amicus* on this point. Justice O'Connor therein cautions that:

> 'We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K.*

[10] *Supra* 3.

& T. R. Co. v. May, 194 U.S. 267, 270, 48 L Ed 971, 24 S Ct 638 (1904) (Holmes, J.) *Maher*, 432 U.S. at 479-480, 53 L Ed 2d 484, 97 S Ct 2376 (footnote omitted). This does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right we defer to the judgments made by state legislatures. The point is, rather, that 'when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103, 36 L Ed 2d 772, 93 S Ct 2080 (1973). *id.* at 465 (O'Connor, J., dissenting, joined by White, J., and Rehnquist, J.).

Justice O'Connor then proceeds to articulate the dissent's perception of the "many hard questions" with "few easy answers" in the following terms:

> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . . A. Cox, *The Role of the Supreme Court in American Government* 114 (1976). The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation en-

> sues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes 'accepted medical practice' at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments. *id.* at p. 458.

For this Court to either affirm or reverse the decision below in this appeal on the merits will ultimately involve a reconsideration of the ever shifting knowledge and values to which the dissent in *Akron* alludes. *Amicus* urges the Court to decline this invitation, and rather to defer to the several States for a resolution of these issues in the appropriate political forum.

II. THERE ARE SIGNIFICANT SIMILARITIES BETWEEN THE LAWS AND PUBLIC POLICIES OF MISSOURI AND LOUISIANA BALANCING THE COMPETING RIGHT TO ABORTION AND RIGHT TO LIFE OF THE UNBORN CHILD

A. The Nature of the Laws

The Louisiana Legislature reaffirmed the longstanding policy of Louisiana that the unborn child is a human being from the time of conception and is a legal person for the purpose of the unborn child's right to life as follows:

> 1299.35.0 Legislative intent
>
> It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and

> find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.[11]

In the definitions enacted, "'Unborn child' means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy."[12]

The Louisiana state interest in protecting the unborn child's right to life is clear and compelling and forms the basis for regulating and limiting abortion to the extent permitted by the United States Supreme Court. The Missouri Act defining human life as beginning at conception also forms a statutory basis to establish inheritance rights inuring to the unborn child's heirs. These statutes do not constitute state action impinging on any privacy right to abortion. These statutes demonstrate public

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[11] La. R.S. 40:1299.35.0. (See App. 6)
[12] La. R.S. 40:1299.35.1. (See App. 6)

interest in recognizing the competing right to life of the unborn child from the moment of conception.

By the democratic process, the Louisiana Legislature further expresses the strong interest of the state to prohibit public funds, facilities or employees from participating in abortions except when medically necessary to prevent the death of the mother.[13]

B. Treatment of the Fetus in Property Law

(1) The Fetus in Property Law

At common law, fetal rights were recognized in property law from the time of conception.[14] For instance, the states have established mechanisms for protecting the unborn child's right to inherit property upon its birth.[15] In Louisiana, a Civil Law Jurisdiction, former Civil Code Article 29, found in Book 1 "Of Persons," recognizes the unborn child's property rights and rights of forced heirship as rights preserved for its own sake as a person:

> Article 29. Children in mother's womb
>
> Children in the mother's womb are considered, in

[13] La. R.S. 40:1299.34. Employees of state and political subdivisions; counseling abortion prohibited. (See Append. B).

[14] Lenow, J.L., *The Fetus as a Patient: Emerging Rights as a Person*, A.J. Law and Med. 9 Vol. 1, 3 (1983) citing C.J.S. *Wills* sec 655 (1976). "The word 'children' includes those *en ventre sa mere* at the time of the testator's death, especially where such intention is clear by reason of express provision in the will."

[15] *Id.* Michigan, for example, provides for the appointment of a guardian ad litem to protect an unborn child's property, etc.: "The guardian ad litem is authorized to engage counsel and do whatever is necessary to defend and protect the interest of the unborn person."

> whatever relates to themselves, as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit.[16]

This principle stems directly from the classical period of Roman law[17] which is again ingrained in the Louisiana Civil Code in Book III, "Of the Different Modes of Acquiring the Ownership of Things," and stipulates that the capacity or ability to own rights is the core of one's legal personality.[18] The redactors of the Louisiana Civil Code clearly treated the fetus as a person directly traced to antiquity.

2. The Fetus in Tort Law

The traditional rule of tort law was to deny recovery for prenatal injuries even if the child were born alive.[19] However, the live birth requirement for a wrongful death remedy was logically indefensible on the following grounds:

> To deny a right of action to a stillborn child produces the incongruous result that a tortfeasor would be liable for injuries to an unborn child who is later still-

[16] The original version of Civil Code Article 29 as it appeared in the Digest of 1808 included the passage "yet the hope that such children may be born alive, causes them to be considered" in the law. Effective January 1, 1988, La. C.C. art. 26 became Article 29 without changing the law.

[17] *Weeks v. Garrison*, civil action No. 73-469, La. Eastern District (1973) at 12; Brief cites Pugh, Nina, "Nasiturum, the Roman Law on the Inception of Human Personality," Master's thesis, L.S.U. (1963) at 25-28.

[18] *e.g.*, La. C.C. arts 953-957, 963.

[19] 410 U.S. at 162.

> born. This rewards tortfeasors for killing rather than maiming a fetus and also creates an incentive for tortfeasors to withhold efforts to save their victim's lives.[20]

In *Cooper v. Blanck*, 39 So.2d 352 (La. App. Orl. 1923), Louisiana became the first state in the union to allow recovery for pre-natal injuries to a child. The Louisiana Court rejected the common law precedent in *Allaire v. St. Luke's Hospital*, 56 N.E. 638 (Ill. 1900), which found that the child before birth is a part of the mother and is only severed from her at birth. The lack of a separate legal personality was first expressed by Justice Holmes in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), where the court of Massachusetts denied recovery for pre-natal injuries because the unborn child had no separate existence. Rejecting *Dietrich*, Louisiana set a precedent for the nation by finding a remedy for wrongful death, holding that the civil law stipulated that the unborn child is separate from its mother and has a right of recovery for its own injuries. Louisiana further found that the pecuniary damages for the lost benefit of an unborn child were not too speculative on the following grounds:

> "Life," said Blackstone, "begins, in contemplation of the law, as soon as the infant is able to stir in its mother's womb." If the Common Law decisions are uniformly opposed to this view, or if, as was said in the majority opinion in *Allaire v. St. Luke's Hospital*, the doctrine of the Civil Law and Ecclesiastical law has not been indulged in the courts of the Common Law, we cannot follow them in the application

[20] Lenow, 14 *supra* at 7.

> of principles of our law, which while it presents many analogies, is yet a distinct system. *Cooper*, *supra*, 39 So.2d at 358.

In *Roe*, the majority opined that the right to an abortion is not inconsistent with the parents' rights for a wrongful death remedy for a stillborn child due to pre-natal injuries.[21] Although there are commentators who agree that *Roe* is not inconsistent with wrongful death actions, an examination of the origin of the action reveals blatant inconsistencies that grant a legal remedy for the unborn child who is injured during pregnancy yet deny that same unborn child the basic right to life.

C. State's Interest in Protecting Fetal Life

The question of when human life begins is fundamental to the discussion on abortion. In *Roe*, the court decided that it need not resolve the difficult question of when human life begins because even scholars disagree.[22] This Court declared in *Roe*[23] and reaffirmed in *Planned Parenthood of Central Missouri v. Danforth*,[24] that the right to abortion is not absolute. The right is "inherently different" from other aspects of the constitutional right to privacy.[25] The right is qualified by "compelling state interests."[26]

It is evident from *Roe*, *Planned Parenthood* and *Akron*[27] that the points at which these "compelling interests" intervene are inherently unstable.

[21] 410 U.S. at 162.
[22] 410 U.S. at 159.
[23] 410 U.S. at 153.
[24] 428 U.S. 52 (1976).
[25] 410 U.S. at 159.
[26] 410 U.S. at 154.
[27] 462 U.S. 416.

This Court originally set the intervention of the State interest in the health of the mother at the end of the first trimester "*in light of present medical knowledge.*"[28] This Court likewise held that a state's interest in "potential" life begins at "viability," by which is meant "potentially able to live outside the mother's womb, albeit with artificial aid."[29]

In *Akron v. Akron Center for Reproductive Health*,[30] this Court expands the *Roe* framework of dividing the pregnancy into stages and sets the intervention of the State's interest in the health of the mother at the end of the second trimester.[31] In the case presently before the court, the Missouri statutes recognize that the present state of medical knowledge has advanced the stage at which the unborn child becomes viable to a point in time before the end of the second trimester. The Missouri statutes seek to protect the interest of the unborn child at this stage of development which the Appellees will argue is in direct conflict with the rights of the mother as the court has found them to exist in *Akron*. Anticipating this problem, Justice O'Connor criticized the *Roe* trimester framework and the role of viability. She suggests that the point at which the state may intervene is on a "collision course with itself."[32]

Obviously, the settings for these two compelling in-

[28] 410 U.S. at 163 (emphasis added).

[29] 410 U.S. at 160.

[30] *Supra* 462 U.S. 416, 103 S.Ct 2481, 76 L.Ed. 687 (1983).

[31] *Id.*, *Akron* overruled state actions regulating abortions in the second trimester unless medically necessary because the abortion procedure is hailed as less dangerous than the delivery.

[32] 462 U.S. 416, 103 S.Ct. 2481 at 458.

terests are not sacrosanct. First of all, the point of "viability" was "purposefully left flexible for professional determination and dependent upon developing medical skill and technical ability."[33] As to the interest in maternal health, that interest must be balanced with the State's interest competing to protect the life of the unborn child. Present science makes it possible for the unborn, fertilized *in vitro*, to survive outside the womb immediately after conception "albeit with artificial aid," for purposes of successful transplantation. Faced with such advancements in medicine, by implication from the reasoning in *Roe*, it is urged by *Amicus* that this Court should recognize that the State's interests in protecting the life of the unborn child is compelling from conception.

The competing interests of the mother and the unborn child, under the theory of *Roe*, are in irreconcilable conflict with each other. Therefore, since the Constitution does not provide for a "trimester" and "viability" approach, and the Constitution reserves to the States through the Tenth Amendment the exercise of power to legislate in matters of public policy, *Amicus* urges this Court to overturn *Roe* and to uphold the constitutionality of the Missouri statutes.

[33] *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

CONCLUSION

Amicus respectfully urges this Court to rule in favor of Appellants, and to uphold the constitutionality of the Missouri statutes based on compelling state interests in balancing the right to abortion and the right to life of the unborn child through the legitimate exercise of police power reserved to the states and the people by the Tenth Amendment of the United States Constitution.

February 23, 1989

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APPENDIX A: MISSOURI STATUTES

RS MO §1.205.1 The general assembly of this state finds that:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being;

(3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

2. Effective January 1, 1988 the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

RS MO §188.010. It is the intention of the general

assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

RS MO §188.025. Every abortion performed at sixteen weeks gestational age or later shall be performed in a hospital.

RS MO §188.029. Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

RS MO §188.205. Use of public funds prohibited,

It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

(L.1986, H.B. 1596, § A (§2).)

RS MO §188.210. Public employees, activities prohibited,

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

(L.1986, H.B. No. 1596, § A (§ 3).)

RS MO §188.215. Use of public facilities prohibited,

It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

(L.1986, H.B. No. 1596, § A (§ 4).)

Definitional language is set forth in Mo.Rev.Stat. § 188.200 (previously Section 1 of "the Act"), which provides:

RS MO §188.200. Definitions

As used in sections 188.200 to 188.220, the following terms mean:

(1) "Public employee," any person employed by this state or any agency or political subdivision thereof;

(2) "Public facility," any public institution, public fa-

cility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof;

(3) "Public funds," any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

APPENDIX B: LOUISIANA STATUTES

La. R.S. 40:1299.34. Employees of state and political subdivisions; counseling abortion prohibited

No person employed by the state of Louisiana, by contract or otherwise, or any subdivision or agency thereof, and no person employed in any public or private social service agency, by contract or otherwise, shall require or recommend that any woman have an abortion. Notwithstanding anything contained herein to the contrary, this Section shall not apply to a doctor of medicine, currently licensed by the Louisiana State Board of Medical Examiners pursuant to R.S. 37:1261 et seq., who is acting to save or preserve the life of the pregnant woman.

La. R.S. 40:1299.34.5 Use of public funds

Notwithstanding any other provision of law to the contrary, no public funds, made available to any institution, board, commission, department, agency, official, or employee of the state of Louisiana, or of any local political subdivision thereof, whether such funds are made available by the government of the United States, the state of Louisiana, or of a local governmental subdivision, or from any other public source shall be used in any way for, to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother.

La. R.S. 40:1299.35.0. Legislative intent

It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The

Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.

La. R.S. 40:1299.35.1. Definitions

As used in R.S. 40:1299.35.0 through 40:1299.35.18, the following words have the following meanings:

(1) "Abortion" means the deliberate termination of a human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child caused by a spontaneous abortion.

(2) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.

(3) "Viable" means potentially able to live outside of

the womb of the mother upon premature birth whether resulting from natural causes or an abortion, or otherwise, and whether that potentiality exists in part due to the provision or availability of natural or artificial life-support systems.

(4) "Conception" means the fertilization of a human female ovum by the sperm of a human male.

(5) "Physician" means a person licensed to practice medicine in the state of Louisiana.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM L. WEBSTER, et al., *Appellants*,

v.

REPRODUCTIVE HEALTH SERVICES, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES
CIRCUIT COURT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT COURT

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF MEDICAL ETHICS IN SUPPORT OF APPELLANTS

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February 23, 1989

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QUESTIONS PRESENTED HEREIN

1. WHETHER MO. REV. STAT. § 188.205, WHICH MAKES IT UNLAWFUL FOR PUBLIC FUNDS TO BE USED FOR THE PURPOSE OF ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE, IS UNCONSTITUTIONAL FOR REASONS OF VAGUENESS AND VIEWPOINT DISCRIMINATION.

2. WHETHER MO. REV. STAT. § 188.205, WHICH MAKES IT UNLAWFUL FOR PUBLIC FUNDS TO BE USED FOR THE PURPOSE OF ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE, IS UNCONSTITUTIONAL AS A VIOLATION OF A WOMAN'S FOURTEENTH AMENDMENT RIGHT TO CHOOSE ABORTION IN CONSULTATION WITH HER PHYSICIAN.

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Harris v. McRae, 448 U.S. 297 (1980)	16, 20-22
Kolender v. Lawson, 461 U.S. 352 (1983)	6
Maher v. Roe, 432 U.S. 464 (1977)	16, 20-21
Meyer v. Nebraska, 262 U.S. 390 (1923)	20
Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37 (1983)	19-20
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	10
Regan v. Taxation Without Representation (TWR), 461 U.S. 540 (1983)	17
Roe v. Wade, 410 U.S. 113 (1973)	3
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Virginia v. American Booksellers Association, 108 S.Ct. 636 (1988)..... 6-7

OTHER CASES:

Planned Parenthood Association of Chicago Area v. Kempiners, 700 F. 2d 1115 (7th Cir. 1983)..... 21

Planned Parenthood of Central and Northern Missouri v. State of Arizona, 718 F. 2d 938 (9th Cir. 1983), 1983), appealed after remand, 789 F. 2d 1348 (9th Cir.)..... 15

United States v. Maude, 481 F.2d 1062 (D.C. Cir. 1973). 7

STATUTES:

Mo. Rev. Stat. § 188.205 ..... *passim*

OTHER AUTHORITIES:

Bopp & Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989)..... 3, 7-10, 16

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BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF MEDICAL ETHICS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE[1]

The American Academy of Medical Ethics (AAME) is an educational and legislative lobbying organization with approximately 20,000 physician members. The AAME was incorporated in 1986 in response to an adversely changing medical and ethical climate in the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists

[1] This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

(ACOG). In accordance with the Hippocratic Oath, the AAME is ethically opposed to the practice of abortion (except to save the life of the mother) and the involvement of physicians in referring for the procedure. The AAME contends that the unborn child is a patient that deserves protection and the full advocacy of the physician and that abortion referral is against the best interests of the unborn. The AAME seeks to further its interests by this brief amicus curiae in support of appellants.

SUMMARY OF ARGUMENT

There is more to a proper void for vagueness analysis than a single step from an initial impression that a term or phrase might be vague to a judicial finding of unconstitutional vagueness. Because in most cases the determination of vagueness is more a subjective than an objective evaluation, it may be said that generally vagueness — like beauty — is in the eye of the beholder. To limit the subjective nature of vagueness evaluations, this Court has developed several counterbalancing elements which must be considered in determining whether legislation is impermissibly vague. A failure to employ the full analysis has been a distorting characteristic of abortion jurisprudence, giving the impression that courts are more eager to strike down abortion legislation than to follow the usual principles of adjudication.

By applying a complete void for vagueness analysis, including a comparison of prior examples found not overly vague by this Court, it will be demonstrated that the expression "encouraging or counseling a woman to have an abortion not necessary to save her life" is not unconstitutionally vague.

Nor does the Missouri prohibition on expending public funds for encouraging or counseling for abortion constitute impermissible viewpoint discrimination in violation of the first amendment. Rather, such limitation is a legitimate exercise of the state's power to determine where to spend its funds and a permissible assertion of an interest in promoting childbirth found legitimate in prior decisions of this Court.

Finally, as the Missouri statute creates no barrier to a woman's access to abortion information which is not already present, but merely declines to fund encouraging or counseling for abortion with public funds, there is no violation of a woman's fourteenth amendment right to choose abortion in consultation with her physician.

ARGUMENT

I. THE MISSOURI PROHIBITION ON THE EXPENDITURE OF PUBLIC FUNDS FOR ENCOURAGING OR COUNSELING WOMEN TO HAVE ABORTIONS IS NOT UNCONSTITUTIONAL FOR REASONS OF VAGUENESS OR VIEWPOINT DISCRIMINATION.

A. The Prohibition on Expending Public Funds for Encouraging or Counseling for Abortion Is Not Unconstitutionally Vague.

Vagueness, like beauty, is often in the eye of the beholder. While the vagueness or clarity of some legislation is so plain as to be capable of nearly objective determination, the determination as to other legislation is more subjective. In these latter situations, the old adage about beauty becomes apropos to determinations of vagueness.

Absolute clarity is not required by the precedents of this Court. Nonetheless, courts hostile to any state assertion of the interests declared compelling in *Roe v. Wade*, 410 U.S. 113 (1973), have found the vagueness doctrine a convenient instrument of destruction in the field of abortion jurisprudence.[2] In the process, these courts have worked a distortion in this doctrine of the law where it touches abortion, just as they have wrought such a distortion (from the usual principles of jurisprudence) in other areas of the law touching on abortion. *See generally* Bopp & Coleson, supra note 2.

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[2] *See* Bopp & Coleson, *The Right to Abortion: Absolute, Anomalous, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 191 (1989)(Citations to specific page numbers hereinafter — other than the initial page number (191) — are to the unpublished manuscript, a copy of which has been filed with the Clerk of this Court. The anticipated publication date is April, 1989.).

As may be seen from the application of the full vagueness analysis established by this Court, the Missouri statute at issue herein is not unconstitutionally vague. Rather, the finding of vagueness by the lower courts is yet another example of the abortion distortion factor at work, making the right to abortion yet more absolute and anomalous.

1. The Full Vagueness Analysis

The principle underlying the vagueness doctrine is the notion of due process, as was explained by this Court in *Grayned v. City of Rockford*:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

408 U.S. 104, 108 (1972).

This Court set forth the vagueness test with relation to abortion legislation in the case of *Colautti v. Franklin*:

> It is settled that, as a matter of due process, a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,' or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' is void for vagueness. This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.

439 U.S. 379, 390-91 (1979) (citation omitted).

This Court has also noted that the level of vagueness tolerated varies with the nature of the statute at issue. *Village of*

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). First, economic regulations receive less scrutiny due to their narrow subject matter, the economic motivation for businesses to consult legislation before acting, and the availability of clarification by personal inquiry or administrative ruling. *Id.* Second, where criminal penalties are imposed, the scrutiny is stricter, although a scienter requirement may mitigate a certain amount of vagueness — especially where the principle of adequate notice regarding proscribed conduct is adequately met. *Id.* at 498-99. Third, where a law "threatens to inhibit the exercise of constitutionally protected rights," more clarity is also required. *Id.*[3]

There are limits to the vagueness doctrine, however. It is not enough for a court to decide that a term seems vague and to then declare a statute void, based upon that mere perception. A full analysis includes consideration of several counterbalances to perceived vagueness which are often neglected.

(1) The test for vagueness itself contains the first consideration beyond the initial impression of vagueness concerning a word or phrase. The court must ask whether "a person of ordinary intelligence" will be given "fair notice that his contemplated conduct is forbidden by statute." *Colautti*, 439 U.S. at 390-91. Will the average person be able to figure out what the state had in mind? If so, despite some facial vagueness of a term, the statute containing it may not properly be determined void for vagueness. Moreover, this hypothetical person of ordinary intelligence will not be asked to examine the word or

[3] Prior to the abortion cases, the stricter scrutiny mentioned with regard to fundamental rights had only been applied to inhibitions of free speech or association, as evidenced by the examples given in *Hoffman Estates*, 455 U.S. at 499, and in *Colautti*, 439 U.S. at 391. It is evidence of the "super-protected" nature of the abortion right, noted early by John Hart Ely, that this right has been exalted to a place beside the traditionally lofty right of free expression. As Ely expressed it, the protection afforded the abortion right is "far more stringent" than that accorded any other right, "so stringent that a desire to preserve the fetus's existence is unable to overcome it — a protection more stringent . . . than the present Court affords the freedom of the press explicitly guaranteed by the First Amendment." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 (1973).

phrase in isolation, but, rather, he or she will be required to consider the matter in the context of the whole piece of legislation under scrutiny. Facial vagueness of an isolated word or phrase is insufficient. There must also be contextual vagueness — such that the average person cannot figure out what the state is proscribing. Closely related is the concept of whether there will be erratic arrests, i.e., can the police figure out what the legislature is saying? Of course, in a facial challenge, as is being brought in the case at bar, the matter of erratic arrests is pure speculation in all but the most objectively vague cases.

(2) A second counterbalance to the perceived vagueness of certain legislative language is the duty which courts have to give a statute a construction which favors its constitutionality, where fairly possible. Such construction, of course, must be reasonable and readily apparent from the language itself. *See, e.g., Grayned v. City of Rockford*, 408 U.S. at 410; Brief for Amicus Curiae National Right to Life Committee, Inc. herein (setting forth the full set of avoidance rules, including the duty to apply constructions favoring constitutionality, whereby this Court avoids the vast majority of constitutional issues pressed upon it for decision).

(3) A third limitation on the vagueness doctrine is the duty of courts to consider any limiting construction by a state entity, such as a state court or enforcement agency, especially those whose interpretations may be considered "authoritative." *Virginia v. American Booksellers Association*, 108 S.Ct. 636, 644 (1988)(giving consideration to a state attorney general's construction, but not giving it the weight of an "authoritative" construction, and certifying certain questions of construction to the state supreme court); *Frisby v. Schultz*, 108 S.Ct. 2495 (1988)(adopting the construction urged by a city's attorney at oral argument before this Court); *Kolender v. Lawson*, 461 U.S. 352, 355 (1983). The lack of an "authoritative" construction in no way limits the duty of a reviewing court to apply a narrowing construction in a facial challenge where the statute is "readily susceptible" of such a construction upholding its constitutionality. *American Booksellers Association*, 108

S.Ct. at 644-45 (*citing Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). *See also* Bopp & Coleson, *supra* note 2, at 160 n.175 (explaining the sometimes employed distinction between "extrapolation" of a statute and "construction" of a statute in regard to the problem of "authoritative" constructions).

(4) A fourth counterbalance to the vagueness doctrine, which a court must consider, is the principle that a perceived difficulty with marginal cases does not cause unconstitutional vagueness. *United States v. Harriss*, 347 U.S. 612, 618 (1954).[1] It is not a sufficient analysis for a court to imagine obscure cases in which a piece of legislation might not provide as much guidance as desired and, on that basis, declare a legislative enactment void for vagueness.

(5) A fifth principle in a full vagueness analysis is that where one's "conduct falls squarely within the 'hard core' of the statute's proscription," a facial vagueness challenge will not be allowed. *Broadrick v. Oklahoma*, 413 U.S. at 608.

(6) A sixth counterbalance to initial perceived vagueness is the doctrine that where technical terms or terms of special meaning are employed (e.g., common law terms), or where the terminology is commonly grasped in the context, a fatal ambiguity will not be found. *United States v. Maude*, 481 F.2d 1062, 1068 (D.C. Cir. 1973).

(7) Finally, the vagueness doctrine does not require "unattainable feats of statutory clarity." *Id.* This Court, in *Broadrick*, noted:

> Words inevitably contain germs of uncertainty. . . . 'There are limitations in the English language with respect to being both specific and manageably brief, and it

[1] While many of the discussions of the vagueness rule, such as that in *Harriss*, are decided under the due process clause of the fifth amendment, this Court has applied the principles equally to the fourteenth amendment. This may be seen in the common citation of vagueness analysis precedents dealing with federal statutes in cases involving state laws. *See, e.g., Grayned*, 408 U.S. at 108 n. 3.

> seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'

413 U.S. at 608 (*quoting CSC v. Letter Carriers*, 413 U.S. 548, 578-79 (1973)). Thus, absolute precision in legislative drafting is not required. It is enough if "citizens who desire to obey the statute will have no difficulty in understanding it." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)(citation omitted).

A full vagueness analysis, then, is a two-stage process. This may be clearly seen in *United States v. Harriss*, 347 U.S. 612, which was cited as authority for the vagueness doctrine in *Colautti*, 439 U.S. at 390. First, the reviewing court must evaluate the statute in light of common understanding, technical use of terms, scienter requirements, applicability of its "hard core" to the plaintiff, and so on, to see if, indeed, vagueness exists. Second, the court must then determine whether a construction is fairly possible which favors constitutionality and, if one exists, employ it. Although *Harriss* included both stages in its statement of the rule, 347 U.S. at 617-18, it is notable that *Colautti*, an abortion case, did not, 439 U.S. at 390, foreshadowing the problem found in the general application of the vagueness analysis in abortion jurisprudence, which is discussed in the following portion as a preliminary to specific application to the statute at issue herein.

2. The Full Vagueness Analysis Applied.

In general, the application of the vagueness doctrine by this Court and other courts to abortion jurisprudence has resulted in a considerable distortion of the law. Indeed, whether a court sets forth the vagueness analysis as a full two-stage process, or merely mentions the first part, as done by *Colautti* (i.e., that vague criminal statutes violate constitutional principles) has proven a reliable signal of the outcome of vagueness evaluations in abortion cases. *See* Bopp & Coleson, *supra* note 2, at 166-80 (a fuller discussion of the void for vagueness doctrine and its misapplication to abortion legislation). While a principled vagueness analysis requires consideration of all the counterbalances to any initial impression of vagueness, these considerations are often neglected by courts eager to strike down abortion legislation. *Id.*

Two examples from this Court's opinions illustrate the abortion distortion factor well. In *United States v. Vuitch*, 402 U.S. 62 (1971), this Court dealt with a vagueness challenge in an abortion context. *Vuitch* was noteworthy for a clear explication of the constitutional construction principle: "statutes should be construed whenever possible so as to uphold their constitutionality." *Id.* at 70. Applying this principle, the majority construed a "health" exception to a general abortion prohibition broadly to include mental health, and, thus, eliminated the ambiguity. *Id.* at 71. This recognition of the full vagueness analysis and its appropriate application was followed in *Doe v. Bolton*, 113 U.S. 179 (1973), where this Court construed the term "necessary," in a Georgia statute, to uphold its constitutionality. 113 U.S. at 191-92 ("based upon his best clinical judgment that an abortion is necessary."). It is noteworthy that these proper uses of the full vagueness analysis resulted in the expansion of abortion rights. *See Bolton*, 113 U.S. at 192 (The Court noted that this "room" for a physician to make his "best medical judgment" operated to the benefit of the pregnant woman.").

By contrast, in *Colautti* the pro-*Roe* majority sustained vagueness challenges to two restrictive statutes. The Court cited the first part of the *Harriss* vagueness analysis for the rule against overly vague criminal statutes. 439 U.S. at 390. The second step was to determine whether a construction could fairly be found to resolve the ambiguity. The majority did not quote the *Harriss* construction rule, although *Harriss* was obviously close at hand (having just been cited). Nor did the Court make much effort to find a saving construction, although such constructions were readily available. *See* Bopp & Coleson, *supra* note 2, at 173. The *Colautti* majority virtually conceded that a different construction rule existed where abortion rights

were being expanded than where they were being restricted. The Court noted the *Vuitch* and *Bolton* constructions favoring constitutionality and declared them distinguishable, because they "afford[ed] broad discretion to the physician," unlike the statute at issue in *Colautti*, 439 U.S. at 394.[5]

Justice O'Connor, dissenting in *Akron*, likewise noted the pro-*Roe* majority's propensity for finding vagueness where none was readily perceptible. 462 U.S. at 475 (O'Connor, J., dissenting).

The impression left of the general application of the vagueness principle to abortion jurisprudence is that it has been found a convenient tool for striking down attempted assertions of "compelling" state interests by the states. See Bopp & Coleson, supra note 2, at 166-80 (noting the influence this Court's lowered standards for abortion jurisprudence has had on the lower courts).

It is incumbent upon this Court, in applying the vagueness rules to the statute at bar, to apply the rules applicable to all statutes, correcting the erroneous impression left by this Court in *Colautti* and *Thornburgh* that special — and more stringent — rules exist for abortion statutes, but not for all

[5] In *Thornburgh*, the pro-*Roe* majority likewise refused to apply the avoidance rule that one should apply sympathetic constructions to state statutes in order to uphold their constitutionality — although not in the context of a vagueness challenge. Justice White in dissent summed up the departure from the normal rules in abortion cases as follows:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Thornburgh, 106 S.Ct. at 2005. *Cf. Danforth*, 428 U.S. 52, 100 (1976) (White, J., dissenting) ("Incredibly the Court reads the statute to require 'the physician to preserve the life and health of the fetus, whatever the stage of the pregnancy,' . . . thereby attributing to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge under *Roe*. . . .").

others. In the case at bar, the plaintiffs/appellees have challenged the phrase "encouraging or counseling a woman to have an abortion not necessary to save her life" as unconstitutionally vague and the Court of Appeals has so held. J.S. at A68-69. However, applying the full vagueness analysis reveals this holding to be erroneous.

Initially, the standard of requisite clarity must be established. As no criminal penalties are involved, heightened clarity is not required for that reason. Appellees, however, urge that the right of free expression is implicated, thus raising the standard of clarity required. However, as the State notes, J.S. at 24-25, the language of Mo. Rev. Stat. § 188.205 merely instructs officials in control of the public fisc not to expend State monies on programs that involve encouraging or counseling a woman to have an abortion (except where her life is at risk). This particular part of the state legislation forbids no one to discuss the subject of abortion. J.S. at 25.[6] Thus, the level of clarity required of the piece of legislation at issue herein is that lower level required of economic regulations. However, even under the stricter clarity requirement for matters impinging on first amendment rights, the statute is not unconstitutionally vague under the full vagueness analysis.

In applying the preceding enumerated counterbalances to any perceived vagueness, the first question is to ask whether "a person of ordinary intelligence" will be "given fair notice that his contemplated conduct is forbidden by statute." *Colautti*, 439 U.S. at 390-91. This "average" person must consider the statute as a whole and the common usage of terms in determining whether any particular terms are beyond his comprehension. Because of the preamble to the statute, declaring that life begins at conception and that unborn human life should be protected to the full extent possible in the law, and because of the efforts made by the statute to protect unborn life to the maximum extent possible by requiring, *inter alia*, appropriate viability tests, and because of the long history of the State's

[6] The interpretation of the state statute given it by the State attorney general is entitled to careful consideration, as discussed more fully *infra*.

efforts to assert its "compelling" interests through legislation, this average person would have to conclude that the State of Missouri is opposed to abortion except to preserve the life of the mother. The plain language of § 188.205 would also make this clear: "It shall be unlawful for any public funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life."

This person of average intelligence would also examine the context of the term "counsel" which the lower court and the Appellees find so problematic. He or she would note that the word does not stand alone but is modified by the prepositional clause "to have an abortion not necessary to save her life." This "average" person would then rather easily conclude, from the words "to *have*," that affirmative advocacy of abortions not necessary to save the lives of mothers was proscribed. After all, the clause does not proscribe counseling a woman *not* to have such an abortion.

This average person would be familiar with the term "counsel" from the common use of the term to mean "to advise," which he could find in any dictionary which an "average" person would use. *See, e.g., Webster's Seventh New Collegiate Dictionary (1967).*

In sum, a person of average intelligence could easily conclude that the statute prohibited state officials from funding any activity whereby a woman was encouraged or advised to have an abortion which was not medically indicated to save her life.

Just as plainly, this "average" person would see that the statute did not forbid neutral advice or "encouraging or counseling" *not to have* an abortion not necessary to save a mother's life.

Also, this average person would know that, as the statute applied only to the funding of programs by the state, any mistake in his or her interpretation would carry no criminal penalties. While the reasonably intelligent person would know that English terms are capable of various meanings, he or she would, as one must do every day, assign the meaning to the

terms contextually, not in isolation, narrowing the range of meanings easily by the use of reason.

Finally, as this person of average intelligence would be chargeable with knowledge of the law (and persons in medical practice relating to abortion would doubtless have actual knowledge) he or she will know that this Court has upheld the statutory language at issue on just such an interpretation, resulting in certainty of constitutionality in such interpretation and removing any likelihood that one would be found in violation by appropriating funds for any programs that did not encourage or counsel women to have abortions not necessary to save their lives. The requirements of fair notice would be easily satisfied.

Second, as this Court has declared its duty to give a construction favoring constitutionality where fairly possible, it should adopt an interpretation of "encouraging and counseling to have an abortion" to mean positive advocacy of abortion. Such an interpretation is reasonable and readily apparent from the language of the statute itself. No unseemly stretching of the normal usage of the English language would be required. It should be noted that, while a state construction of a statute might seem preferable, most abortion cases will be brought in federal district courts, precluding state courts from making constructions. Thus, for federal courts to refuse to construe abortion statutes, where fairly possible, to uphold their constitutionality is to subject abortion jurisprudence to a more difficult standard of clarity than general legislation by depriving it of the usual benefit of a sympathetic construction at bar. In short, legislators dealing with abortion are faced with the daunting task of obtaining linguistic perfection, an unfair burden not placed on other legislation.

Third, while the interpretation of this phrase by the Missouri Attorney General may not be authoritative, in the sense of being binding (as a judicial construction would be), this Court commonly considers the statutory interpretations of state attorneys general and counsel at oral argument before the bench. The interpretation of such a person in a position of

representation of the state makes such an interpretation worthy of consideration and respect. Moreover, where the reading given is readily apparent and reasonable from the text and context, there is little reason to reject such a reading. Should a state court later choose to interpret the matter differently but "authoritatively," it would do so knowing that such an interpretation had not received the approval of this Court and might be subject to an as applied challenge. The more likely scenario would be for the legislature to reword the language of the statute to prohibit funding of all programs which involved "encouraging or counseling *about* abortion" — if that were, in fact, its intent. The result of such new wording would be fair warning that the State would not fund even a discussion of the practice of abortion. As the language now stands, there is no good reason to strike this statute for vagueness when the State's official representative offers a perfectly plausible construction of it.

Fourth, while marginal cases might be imagined where this statute, as would be the case with most statutes, might be misinterpreted, such marginal cases would not make the legislation unconstitutionally vague. The legislation as a whole is clearly aimed at limiting state support for abortion and the specific wording at issue is clearly aimed at affirmative advocacy of abortion in state funded counseling situations. While it might be remotely imaginable that a person expending state funds to a program not counseling in favor of abortion, or merely mentioning abortion as an option without promoting the practice in any way, might be found to have violated the law, such possibilities — especially in light of the Attorney General's interpretation and the proposed construction adopted by this Court — is at best of marginal probability.

Fifth, some of the plaintiffs/appellees in this cause, as stated by the Court of Appeals, "have occasion to encourage or counsel such women to terminate their pregnancies" or "occasionally encourage or counsel certain patients to have abortion, even though the pregnancy is not life-threatening." J.S. at A10. Such affirmative advocacy of abortion "falls squarely within the

'hard core' of the statute's proscription." *Broadrick*, 413 U.S. at 608. Because they do not do this in every case, but only "have occasion" to do so, these plaintiffs are not totally precluded from making a facial challenge. *Id.* However, it should be noted that their allegation that they wish to encourage and counsel women to have abortions, which allegation is what gives them standing to challenge this portion of the statute, is an adoption of the interpretation given by the Missouri Attorney General (affirmative advocacy) and was easily understood by the plaintiffs theselves in asserting their standing and by the lower courts in recognizing the standing of these plaintiffs. J.S. at A10.

Sixth, the phrase, "encouraging and counseling to have an abortion," is easily understood, as previously noted, from its contextual use. To "counsel" is also a technical term, due to its use in other abortion legislation prohibiting "counseling for abortion," where it has been upheld against a vagueness challenge in a similar state funding context. *Planned Parenthood of Central and Northern Missouri v. State of Arizona*, 718 F.2d 938, 948-49 (9th Cir. 1983), *appealed after remand*, 789 F.2d 1348 (9th Cir.), *aff'd sub nom. Babbitt v. Planned Parenthood*, 107 S.Ct. 391 (1986). The *Babbitt* case indicates that the language used by Missouri is not of the nearly objectively vague variety, but is, at least, of the sort where vagueness is in the eye of the beholder. More likely still, it is of the nearly objectively clear variety. Moreover, the common knowledge of psychological, legal, pastoral, financial, and other counselors, lends credibility to the argument that counsel is a commonly understood technical term, meaning "to advise."

Seventh, while the Missouri legislature might have used more precise terms, or defined them more fully, that does not make what it has enacted unconstitutionally vague. Nor does a certain amount of initial perceived vagueness mandate a finding of unconstitutionality. Absolute precision in legislative drafting is not required. Moreover, while the lower courts and appellees have difficulty with the term "counsel," one must ask what alternative the State should employ — advise, discuss,

give opinions? Clearly, the term "counsel" is a common term for the sort of discussions between a doctor or other medical practitioner and a patient. To counsel "to have" easily may be interpreted as entailing affirmative advocacy. To ask for more than such simple, straightforward English, which best portrays with brevity the intention of the legislators, is to ask too much.

Finally, some terms which this Court has upheld against vagueness attacks are worth noting. This Court has upheld, in criminal or quasi-criminal settings, such terms as "crime involving moral turpitude," "restraint of trade," "any offensive, derisive or annoying word," "connected with or related to the national defense," "fair and open competition," and other, similar phrases. *See* Bopp & Coleson, *supra* note 2, at 174-75.

In sum, it may be said of the legislation at bar that "citizens *who desire to obey* the statute will have no difficulty in understanding it." *Colten*, 407 U.S. at 110 (emphasis added).

B. The Prohibition on Expending Public Funds for Encouraging or Counseling for Abortion Does Not Constitute Impermissible Viewpoint Discrimination for Purposes of the First Amendment.

Appellees' charge of viewpoint discrimination, in violation of the first amendment, is based on the premise that someone's free expression would be inhibited by this legislation. This is untrue. The only "encouraging and counseling to have an abortion" provision before this Court is one which gives instructions to those controlling expenditures of State funds as to what sort of programs the State wishes to fund.

There is no question of the propriety of the State of Missouri choosing to favor childbirth over abortion in its funding decisions. It has been clearly established by this Court that a state may do so. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Under these cases, if a state chose to do so, it could erect billboards, distribute leaflets, or run advertisements in print and broadcast media expressing its preference

for childbirth and opposition to abortion — all matters with first amendment implications. There is nothing constitutionally infirm with Missouri's decision to express its preference for childbirth over abortion by choosing to publicly fund one viewpoint over the other. Nor is the state requiring any physician to express a viewpoint with which he disagrees, which this Court has found objectionable. *See, e.g., Akron*, 462 U.S. 416. The state is merely limiting the kind of services that are provided by its expenditures of public funds.

Appellees attempt to analogize this case to *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and declare that by refusing to fund advocacy of abortion, while funding opposition to abortion, the state has committed viewpoint discrimination. Motion to Affirm at 15. However, *FCC* by its own admission "rests on a very narrow proposition," namely, that

> the specific interests sought to be advanced by . . . [the] ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects.

FCC, 468 U.S. at 402. Of course, in the case at bar, no journalistic freedoms are at issue. Nor has the state government created a broadcasting public forum, as it did in *FCC*, and then limited speech by means not justified by the ends they were supposed to achieve. The *FCC* majority noted that if, as in *Regan v. Taxation Without Representation (TWR)*, 461 U.S. 540 (1983), the public radio stations could "segregate [their] activities according to the source of [their] funding," there would be no problem with a ban on editorializing, just as there was no problem with the statutory refusal to fund the first amendment (political lobbying) activity of the plaintiffs in *TWR*. The *FCC* majority found the key fault with the FCC's bar on editorializing by partially publicly funded broadcast stations to lie in the fact that "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and more importantly, it is barred from using even wholly private funds to finance its editorial activity." *FCC*, 468 U.S. at 400.

However, the effect of Missouri's decision not to fund affirmative encouraging or counseling for abortion is to leave medical practitioners with the full range of free expression intact in any area of their practice not funded by the state. Moreover, they are entirely free to determine whether or not they choose to participate in state funded programs, which according to this statute will only be programs that do not include encouraging or counseling women to have an abortion not intended to save the mother's life. Physicians choosing to express other opinions on the subject of abortion, on state-funded time, would simply not be funded with state funds unless they chose to segregate their activities and express their contrary opinions on non-state-funded time. No attempt is made to regulate what physicians or other medical personnel say on their own time, nor is there any penalty of loss of funding if they express contrary views on their own time, with their own resources.

However, the statute is not even directed at physicians. The thrust of the statute is to instruct those controlling these funds as to what programs and activities they may fund. No penalties are prescribed for physicians who affirmatively encourage or counsel women to have non-lifesaving abortions. Those refusing to abide by the guidelines would merely no longer be funded, provided that the controllers of the state funds were allocating those funds properly, in accord with this restriction.

The notion of applying content-based discrimination principles in the context of state funding schemes would lead to absurd results. This is so because government funding programs, by their very nature, generally choose one viewpoint from a variety of possible viewpoints. For example, the field of family planning is replete with alternative viewpoints. Some favor no family planning whatsoever and are, therefore, opposed to any type of family planning. Others favor only natural family planning methods, denouncing artificial means. Yet others see no problem with any preventive family planning, provided that life is protected from the moment of conception, and are stongly opposed to abortion. Some advocate family planning that would extend to abortion. A few writers have

even advocated legal infanticide in the early days of a child's life to care for those children determined by their parents to be unwanted after birth.

In choosing to fund one of these activities over another, a government entity could be accused of engaging in viewpoint discrimination. For example, those advocating only natural family planning — and strongly opposed to artificial means — could as logically object (on content-based discrimination grounds) to exclusion of their viewpoint as those advocating abortion liberty object to exclusion of their viewpoint. Were such an analysis allowed to prevail, there could be no government funding of preventive family planning, for those opposed to the use of condoms and birth control pills would be able to assert that their viewpoint was being discriminated against by non-funding. To be "fair" under such a scheme, the government would have to fund all views on family planning equally. There would be funding for rhythm instuctors and instructors who teach how to "do nothing" to prevent conception during intercourse. Likewise, there could be no governmental AIDS prevention programs, teaching "safe sex" and distributing or prescribing condoms, for those opposed to such activities would claim viewpoint discrimination for failure of their viewpoint to be similarly funded. The logical extension of Appellees' theory demonstrates its inherent flaw.

However, as determined by the prior decisions of this Court — specifically in the area of preferring childbirth over abortion — a state may make such a value judgment and fund what it chooses. In choosing to fund only certain types of counseling, it is essential that other types not be funded or the program is amorphous. Any legislative spending program must have restrictions to limit the expenditures authorized to those purposes authorized.

The fact that the type of activity chosen to be funded includes verbal communication does not thereby implicate the first amendment. This is not a case where the government "has opened [a forum] for use by the public as a place for *expressive activity.*" *Perry Education Association v. Perry Local Edu-*

cator's Association, 460 U.S. 37, 45 (1983)(emphasis added). First amendment analysis is appropriate in such cases, where there is affirmative government restriction on expressive speech. However, first amendment analysis is not appropriate where the issue is whether a state may choose to subsidize one medical service out of a variety of other possible medical services.

The fact that verbal communication is involved in the medical service does not change the analysis from that employed in *Maher and Harris*. *Maher*, in fact, when explaining why the government may make a value judgment preferring childbirth over abortion (and implement it with public funds), analogized this choice to the governmental freedom to encourage one first amendment activity over another. The *Maher* Court discussed *Meyer v. Nebraska*, 262 U.S. 390 (1923), which held that a state need not fund, but may not criminalize, the teaching of German in its schools. Then, the *Maher* Court stated:

> [*Meyer* does not deny] to a state the policy choice of encouraging the preferred course of action. Indeed, in *Meyer*, the Court was careful to state that the power of the State to 'prescribe a curriculum' that included English and excluded German in its free public school 'is not questioned. . . .' Yet were we to accept appellees' argument [that the state's decision to fund other medical procedures created an obligation to fund abortions], an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German on grounds identical in principle to those advanced here.

In the same way that choosing English over German is not viewpoint discrimination in a first amendment sense, state funding choices that fund one medical counseling practice over another do not constitute viewpoint discrimination in the first amendment sense. To hold otherwise would be to require the government to be completely neutral in all its funding programs, subsidizing all speech related to its viewpoint on a subject. This would "engraft an 'equal time' requirement onto

the dispensation of state funds for the encouragement of matters reflecting legitimate state interests." *Planned Parenthood Association of Chicago Area v. Kempiners*, 700 F.2d 1115, 1128 (7th Cir. 1983)(Cudahy, J., concurring). Such an approach is impossible to reconcile with the holdings of this Court in *Maher* and *Harris*.

II. THE MISSOURI PROHIBITION ON THE EXPENDITURE OF PUBLIC FUNDS FOR ENCOURAGING OR COUNSELING WOMEN TO HAVE ABORTIONS IS NOT AN UNCONSTITUTIONAL VIOLATION OF A WOMAN'S RIGHT TO CHOOSE ABORTION IN CONSULTATION WITH HER PHYSICIAN.

Appellees also claim that refusal of the State to fund encouraging or counseling women to have abortions is a violation of the fourteenth amendment right of these women to choose an abortion in consultation with their physician. Motion to Affirm at 15. The Court of Appeals erroneously agreed that this refusal to fund advocacy of abortion was "an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth." J.S. at A72.

The obstacle and path language comes from the holdings of this Court in *Maher v. Roe*, 432 U.S. 464, and *Harris v. McRae*, 448 U.S. 297. In *Harris*, this Court reaffirmed what it had said in *Maher* that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 448 U.S. at 316.

Just as in *Harris*, however, there is the initial question of whether the "freedom of choice," allowing a woman to choose abortion, is equivalent to "full and uncensored medical advice about alternatives to childbirth." In *Harris*, a similar equation was attempted, with plaintiffs arguing that, because the "freedom of a woman to decide whether to terminate her pregnancy for health reasons . . . l[ay] at the core of the constitutional liberty identified in *Wade*," the failure of the federal govern-

ment to fund abortions intended to protect the health of indigent women violated the abortion liberty of *Roe*. This Court noted that the equation was arguable, but did not determine whether the right to abortion entitled one to funding for abortions intended to promote the health interests of the mother.

This Court did not reach the issue of whether the abortion right encompassed a right to abortions for health reasons, because it said that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* For the same reason, this Court need not consider whether an abortion right carries with it the right to publicly financed information on the whole range of alternatives to childbirth. The same analysis employed in *Harris* is appropriate here.

The key element of the *Harris* analysis which is applicable here is whether the State has placed an obstacle in a woman's path by failing to fund advocacy of abortion by medical personnel. This Court declared in *Harris* that, while a state may not erect obstacles in the path of a woman seeking abortion, it need not remove those not of its own making. *Id.* The *Harris* Court then held that indigency was one of the obstacles not of state making which a state need not remove. *Id.*

Thus, refusal of Missouri to fund advocacy of abortion by medical personnel for women who cannot afford to hear such advocacy elsewhere is not an obstacle placed in the path of abortion by the state. If a woman cannot afford to seek out medical personnel who will encourage and counsel her to have an abortion, it is the fault of her indigency, not that of the State.

The only conceivable ways it could be argued that the State has placed an obstacle in a woman's path to abortion (or pro-abortion information) is to say that, having funded medical personnel who can speak, one must fund all their selected speech, or that, if the state has once allowed such pro-abortion speech, removing it is the creation of an obstacle. The free speech argument has already been dealt with elsewhere, so

will not be repeated. The latter argument, carried to its logical conclusion, would mean that any government funding once provided could never be removed without creating obstacles to the exercise of any fundamental right so subsidized. The result would be a ludicrous paralysis of government, with legislators never able to change their minds about funding and hesitant to ever launch a funding program for fear of locking themselves into it eternally.

Of course, the power to appropriate funds, as done by the State of Missouri herein, carries with it the power to limit what will be funded. That is all that Missouri has done here. It has not erected any obstacles to the choice of abortion not already in existence. For this reason, there is no fourteenth amendment violation to be found in the action of the State in refusing to fund encouraging or counseling women to have abortions.

CONCLUSION

For the reasons set forth herein, this Court should find constitutional the provisions of Mo. Rev. Stat. § 188.205 which forbids the expenditure of public funds for the purpose of "encouraging or counseling a woman to have an abortion not necessary to save her life."

Respectfully submitted,

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BRIEF

(45)

88-605

No. .

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

WEBSTER, ATTORNEY GENERAL OF MISSOURI,
PETITIONER,

v.

REPRODUCTIVE HEALTH SERVICES, INC.,
RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief for Amicus Curiae, The New England Christian Action Council, Inc., Submitted in Support of the Petitioner.

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22 pp

Questions Presented for Review.

I. Whether *Roe* v. *Wade*, 410 U.S. 113 (1973) should be reconsidered and reversed. As the only known example in U.S. Law based on an alleged "non-consensus" relative to a central question of fact, did *Roe* violate several accepted maxims of law, and thus preclude democratically informed choice in this matter?

II. A case study from Massachusetts showing one approach to resolving the consensus question of whether "conception" is the beginning of each human life, in a democratically sound manner, and how the *Roe* logic was employed to oppose it. If *Roe* is reversed, the abortion legislation returned to the States, is such an approach suitable for the further redress of this question?

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Interest of the Amicus Curiae.

The New England Christian Action Council, Inc. ("NECAC") is a non-profit organization pursuant to M.G.L. c. 180, tax-exempt under IRS code 501(c) 4. Its purpose is to

educate the public on matters of the sanctity of all human life, and to work for the legal protection of the unborn. Its offices are in Gloucester, Massachusetts.

The NECAC is affiliated with the Christian Action Council, Inc. ("CAC"), a non-profit organization pursuant to the laws of Washington, D.C. The CAC has two sub-divisions. The first is IRS code 501(c) 3, and sponsors 400 Crisis Pregnancy Centers nationwide. The second is IRS code 501(c) 4, and sponsors 120 chapters nationwide, of which the NECAC is one. The CAC national offices are in Falls Church, Virginia.

The NECAC has been involved in a unique effort to redress the question of public consensus in regard to the biological origins of individual human life. This is the central unanswered question in *Roe*, and a central question raised in *Webster's* appeal to reconsider *Roe*. This brief is being filed in order to bring what the amicus believes is a distinct and simple contribution to this case.

Argument.

I. *Roe* v. *Wade* Should Be Recognized and Reversed.

In the Missouri statute at issue in *Webster*, the legislative concern was with the public funding of abortion in its direct and indirect aspects. The concern of the amicus is at the most fundamental level, namely the right of the Missouri Legislature's statutory preamble to address the status and nature of unborn human life. In relevant part, it states that "the life of each human begins at conception," and that "unborn children have protectable interests in life, health and well being." This statement of fact represents the due process of political consensus, and should accordingly stand.

It is interesting to note that this preamble only assumed that such a statement of fact would be instructive *prima facie*. It had no specific intent to breach the parameters of *Roe*. Now, however, in appealing the July 1988 decision of the Eighth Circuit Court of Appeals, *Webster* has questioned whether *Roe* should be reconsidered, given that it has proven unable to deal with such a properly phrased statement of fact. The U.S. Justice Department concurs with *Webster*, and so does the amicus.

The "Non-Consensus" Question.

We know of no example in U.S. Law, apart from *Roe*, where a non-consensus as to a central question of fact was then translated into a verdict. Such anomaly should be considered a legal pariah, and on this ground alone, *Roe* should be overturned. When a jury listens to a case, it is charged by the judge to ascertain the fact or facts relevant to judicial action. If a jury cannot fully agree on such fact[s], it is a "hung jury," and the case is dismissed. We maintain that *Roe* gave a verdict against unborn human life on the alleged basis of a "hung jury."

The relevant portion of *Roe* states:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer [410 U.S. 180-181; cf. p. 192].

To say that this question "need not" be resolved flies in the face of several important accepted maxims of law.

If such an allegation of "non-consensus" had merit, it nonetheless violates a previously unsullied maxim which requires consensus as to the fact[s], apart from which no judiciary can rule. This truth is so universal in our country's legal history, that it is remarkable that *Roe* could assert such an exception.

Roe did not even entertain the idea that the absence of life in utero could be evidenced. Had it been able to positively argue a consensus against life beginning at "conception," *Roe* would have done so. But since the consensus on "conception" is overwhelming (as we shall see, *infra*), the only way *Roe* could advance the case for abortion, was to ignore the need for positive consensus on the facts of biological human life. It thus reduced itself to alleging this heretofore unknown "non-consensus" criterion. Otherwise, we do not believe the Court would embrace such a dangerous and undemocratic logic. Where else has it appeared in U.S. legal history?

Roe also provided no positive evidence that this alleged "non-consensus" was actually true. It dealt with only a certain educational/professional elite, whose views are certainly well regarded in daily political and social life, but even among whom this alleged "non-consensus" was in no fashion evidenced. Besides which, it is not consensus or lack thereof among such an elite which ultimately informs public policy, but is the positive consensus among the people as expressed through the ballot box and legislative process that determines such. Those who may be among such an elite do educate and influence this process, but they do not decide it among themselves. And the judiciary is constituted to interpret legislation so as to enforce constitutional consistency — it is not in the business to legislate *de novo*, and especially in the void of an alleged "non-consensus."

Roe, in fact, ignored an established consensus on the humanity of the unborn child which existed at the time of the Fourteenth Amendment's ratification. In his dissent in *Roe*, Mr. Justice Rehnquist states:

> To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat. Tit. 20, §§ 14, 16 (1821). By the time of the Fourteenth [401 U.S. 175] Amendment in 1868, there were at least 36 laws enacting by state or territorial legislatures limiting abortion. While many States have amended or updated [410 U.S. 176] their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 [410 U.S. 177] and "has remained substantially unchanged to the present time." *Ante* at 119, 35 L.Ed.2d at 158.
>
> There apparently was no question concerning the validity of this provision or of any of the other statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter [410 U.S. 198-200].

This history covered a time period when the American Medical Association ("AMA") took a strong stand against human abortion. Dr. Horatio R. Storer of Boston was appointed head

of the AMA's Committee on Criminal Abortion in 1857. Two years later, in 1859, the Committee made the following recommendations:

> *Resolved,* That while physicians have long been united in condemning the act of producing abortion, at every period of gestation, except as necessary for preserving the life of either mother or child, it has become the duty of this Association, in view of the prevalence and increasing frequency of this crime, publicly to enter an earnest and solemn protest against such warrantable destruction of human life.
>
> . . .
>
> *Resolved,* That the Association request the zealous co-operation of the various State Medical Societies in pressing this subject upon the legislatures of their respective States . . . [*The Human Life Review,* Vol. XIII, No. 1, Winter 1982, Appendix D, pp. 95-96].

The passage of tougher anti-abortion laws in several key states during this era has been attributed to physicians like Dr. Storer and the 1859 AMA report. Professor Joseph B. Witherspoon of the University of Texas Law School, states that:

> The conjunction of state ratification of these amendments (the Thirteenth, Fourteenth, and Fifteenth) with state adoption or modification (i.e., to make them more restrictive) of anti-abortion statutes designed to protect unborn children constitutes a contemporaneous legislative construction by states of the meaning of the Amendments they ratified. That construction can only be that unborn children are human beings and person under the Constitution.

> Any other view of their action would be out of line with the history of this period [footnote: Witherspoon, Joseph P., Testimony Before the House Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Ninety-Fourth Congress, Second Session, 1976, cited in Congressional Record, March 3, 1976, p. 5108].

In other words, there was an unchallenged positive "consensus," that human life is fully and legally present "at every period of gestation." Gestation begins exactly at the moment of "conception" (as defined when the haploid sperm fertilizes the haploid egg and results in a one-celled zygote of unique genetic human identity), and this biological fact has never been scientifically challenged since the 1859 AMA report. This consensus on the humanity of the unborn and his or her need for equal protection under the law framed the "personhood" language of the Fourteenth Amendment.

Also in *Roe's* language, the door has been left open for establishment of consensus, and in so doing, has implicitly and powerfully stated that a proven consensus can redress its conclusion. The phrase, "at this point in the development of man's knowledge," invites redress, and the amicus takes that invitation and seeks to employ it in means that serve democratically informed choice for the electorate. Indeed, the U.S. Senate Subcommittee on the Judiciary, meeting in April 23-24, 1981, cited this clause as its charter for assembly[], as it considered the question of when human life begins. The testimony was overwhelming, in positive and factual evidences, along with no biological data presented to disprove conception as such a beginning point. And yet, such consensus results have never been able, in the politics of this controversy, to gain their due stature in directly disproving *Roe's* alleged "nonconsensus." The *Webster* case now affords such redress.

Thus, not only is the alleged "non-consensus of *Roe* without evidence, but the existing consensus was ignored." *Roe* has reversed the facts arbitrarily, and thus *Roe* should be itself reversed.

In the election of representatives, whether local, state or federal, the ballot only provides for positive choices. There may be one or several candidates, and always the option for write-in alternatives. But one can never vote, "I don't know." And in the context of referenda questions, we also know of no precedence for an "I don't know" answer. But *Roe* has also violated this maxim by enshrining the "I don't know" posture in its ruling. And if the dusty minutiae of political archives such an "I don't know" mechanism were ever to be discovered, its unprecedented nature would be quickly adduced. An "I don't know" entity can never be elected to public office, and its pure negativity has never been otherwise applied to the decision making process that produce laws and verdicts. Why so in *Roe*? Where else is alleged "ignorance" employed as a judicial, legislative electoral means to determine law?

Roe overstepped it interpretive role, and usurped legislative powers. We agree with Mr. Justice White, who dissented from Mr. Justice Blackmun's *Roe* language. Specifically, he said that *Roe* was an act of "raw judicial power" [p. 196], which we see as an effective fiat against the requisites necessary for consensus on questions of fact. If truly there were no consensus, then just as in all other law, no decision should have been rendered — and the States should have continued to have full legislative prerogative in this matter. This should have been a minimum threshold. Moreover, with no evidence to contradict the positive data for conception, *Roe* has exacerbated its error, thus revealing a tendentious judicial activism, wholly incongruent with the above maxims.

Such "raw judicial power" has effectively precluded democratically informed choice. It has removed the question of con-

sensus from the domain of state legislative process, and thus vitiated an accountability to the electorate. Mr. Justice Douglas, in concurrence with *Roe*, stated the need for:

> freedom of choice in the basic decisions of one's life respecting . . . procreation . . . [410 U.S. 187].

Here, the language of "freedom of choice" has been employed, a goal cherished in all human nature. But since unborn human life was dismissed arbitrarily in *Roe*, the language of true and democratic choice has been violated. All choices have boundaries, and in legal terms, one's exercise of choice cannot extend to the violation of another's very life and/or constitutional choices. Since *Roe* dismissed the life of unborn humans, not be positive evidence, but by unsubstantiated "non-consensus", it has done a disservice to the very language of choice it claims as a concern. The tacit non-admission of positive vis-á-vis conception in favor of the alleged "non-consensus," and the removal of this subject from the States has put *Roe* squarely in opposition to democractically informed choice, and its ruling is thus unconstitutional and undemocratic.

In the *Webster* appeal, these concerns are paramount. The Missouri Legislature's prerogative to agree that conception marks the beginning of an individual human life, and to pass legislation consistent with that, was blocked. Since the *Roe* ruling and logic was the means employed to block such due process, it should be overturned. Again, the amicus agrees with Mr. Justice White:

> This issue, for the most part, should be left with the people and to the political processes that people have devised to govern their affairs [410 U.S. 196].

If, in such democractically informed choice, human abortion were to be ratified in any fashion, then at least the people would have willed it without obscuring its definition under the rubric of "non-consensus". Or if, in such democratic process, abortion is outlawed or curtailed, the same holds true. In this latter possibility, true choice in matters of procreation have been defined as appropriate in preventing conception; but not defined in abortion, which destroys existing, nascent, biologically unique human life.

In either scenario, partisans of the minority position always have redress to seek and win consensus of the people if they can politically mount the argument and gain support. But if the injunction against the Missouri statute holds, then those partisans who argue for the humanity of the unborn are not even permitted to discuss the question in the public arena. Not even in a non-binding statutory preamble. This constitutes an unprecedented threat to democratic process and access. Our contention that *Roe* should be reversed is based on the need for Constitutional democracy to be pre-eminent (and thus returned to the access of partisans for the unborn), as opposed to judicial fiat. The real priority is for the people to govern themselves, as possessors of "original power" [cf. Massachusetts Constitution, Part 1, Article 5; and as telescoped through the U.S. Constitution's Ninth and Tenth Amendments].

Roe v. *Wade* has violated various judicial maxims in six assertions. 1) In postulating a mythical "non-consensus" criterion relative to judicial questions of fact; 2) in giving no positive evidence contrary to "conception" to support the assumed absence of life; 3) in giving no positive evidence that the alleged "non-consensus" was actually true; 4) in ignoring the consensus that existed at the time of the Fourteenth Amendment; 5) in enshrining a mythical "I don't know" criterion relative/applicable to the elective processes (and as we shall evidence, *infra*, in a Massachusetts case study where the *Roe* logic was accordingly applied); 6) in unwarranted judicial legislation; and 7) in violating the language of choice and democratic process by restricting its application by means of "non-consensus". In sum of these, *Roe* is unprecedented in its creation of the "non-consensus" mechanism, and accordingly has vitiated democratically informed choice. For these aforesaid reasons, we ask the Court to overturn *Roe* and return the matter of abortion legislation to the States.

II. A Case Study of How Roe's Logic Blocked Democratically Informed Choice in Massachusetts.

In brief synopsis, we finally wish to bring to the Court's attention a case study of how the NECAC sought to redress the consensus issue through a legally non-binding referendum in Massachusetts. It was kept off the 1988 ballot by a logic consistent with *Roe*. Just as *Roe* was employed to strike down the Missouri statute at issue here, and thus interfered with due legislative process, its precedent setting negativity paved the way for democratically informed choice to be vitiated in Massachusetts. *Roe* should be overturned.

In fulfillment of all appropriate statutory guidelines in the Commonwealth of Massachusetts, the NECAC organized a petition drive that collected 25,835 validated signatures in 105 of the Commonwealth's 160 State Representative districts to place a non-binding public policy question on the 1988 ballot. In research conducted relative to this process, no other example was found where more than ten such districts had ever been so successfully petitioned. It may be that there are exceptions to be found. Clearly, this petition drive represented a unique effort in Massachusetts history, and reflected the will of the people in a signal way. Of registered voters asked randomly by the NECAC volunteers to sign the petition, nearly 75 percent did so.

The question was simple and multiple-choice:

> IN <u>BIOLOGICAL TERMS</u>, WHEN DOES AN INDIVIDUAL HUMAN LIFE BEGIN?
>
> To vote on this question, mark a cross X in the square at the right of the answer you prefer. Only vote for one.
>
> A. CONCEPTION [ ]
> B. VIABILITY [ ]
> C. BIRTH [ ]
> D. WRITE IN [ ] » SPECIFY A DIFFERENT TERM_____

The purpose was straightforward: to determine what consensus does or does not exist on this question, in a legally non-binding manner of apprising the State Legislators of public sentiment. Just as the 1981 U.S. Senate Subcommittee on the Judiciary redressed the consensus question by referring to *Roe*'s contingency clause, "at this point in the development of man's knowledge," so too did the NECAC exercise the same democratic prerogative in its ballot question initiative.

The fundamental conviction here was that no positive democratic vote has ever been taken on this question, and that if "conception" were to be evidenced as the consensus, then *Roe* could be redressed through an eventual attempt at a Human Life Amendment to the U.S. Constitution. In research conducted by the NECAC ion the spring of 1987, 1,012 random people were asked this question. Of the 902 willing to give a positive answer; 637 said conception (70.6%); 124 said viability (13.7%); 120 said birth (13.3%); and 21 specified other (2.3%). None were able to cite any date contrary to "conception" as such a beginning point.[1] Though this was not a "scientific" survey, it was conducted in such a way to give the NECAC a sober expectation of reality. Almost no education was given prior to the question being asked, and nearly 45% of the surveys were taken in university settings where the "pro-choice" sentiments run their strongest.[2]

However, the Massachusetts Attorney General, James M. Shannon, struck down the question as "inappropriate" for the ballot.[3] In Mr. Shannon's public life as a former U.S. Congressman, and former director with Planned Parenthood League of Massachusetts, Inc. ("PPLM"), he has been an outspoken supporter of *Roe*. The NECAC appealed to the Massachusetts Supreme Judicial Court ("SJC"), the first time in the history of the Commonwealth that a blocked public policy question has been so appealed.[4] They are rarely blocked, and only when they involve matters clearly not of public policy. The SJC ruled that it has no jurisdictional power to review the Attorney General's decision on this matter.[5] And though the Attorney General did not address the NECAC's Constitutional arguments in his brief for the SJC,[6] and the SJC likewise did not, the question was kept off the ballot. We argue that the office of the Attorney General was employed to oppose democratically informed choice, and out of a commitment to the *Roe* logic. Our concern is not with the specific persons — involved others could have acted likewise. Rather it is with

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[1] The 110 respondents not choosing a positive answer correspond to those who would not vote on such a ballot question. Percentages are rounded off. Of the 21 who specified other, some answers were non-biological term. Survey results on file at the offices of the NECAC; *cf.* note 2.

[2] Harvard, Brown, Univ. of Massachusetts, and Salem State.

[3] Mass. Op. Atty. Gen., Sept. 2, 1988

[4] SJC Case No. 4898.

[5] *New England Christian Action Council, Inc.* v. *Secretary of the Commonwealth and the Attorney General of the Commonwealth*, [ ], October 3, 1988—January 4, 1989.

[6] SJC case No. 4898, *Brief for the Defendants*.

the *Roe* logic and how it empowered such an undemocratic reality. The NECAC will lobby the State Legislature to place the question on the 1990 ballot by virtue of its own authority.

This *Roe* logic was evidenced on August 17, 1988, when NECAC executive director, John C. Rankin, received a phone call from an Assistant Attorney General, speaking on behalf of the Attorney General, offering to negotiate a change in the language of the question.[7] Specifically, the Attorney General's office asked if the NECAC were willing to allow one or both of two other options on the multiple-choice question; 1) "I don't know," and 2) "No, I do not want to instruct my legislator." Mr. Rankin answered that first, he likely had not such authority to change the wishes of the 25,835 petitioners *post de facto*, and secondly, if he did, he would not. In a letter to the Attorney General one month prior, Mr. Rankin outlined the question's purpose as seeking to redress the "non-consensus" argument of *Roe*.[8] Thus, to allow an "I don't know" option would vitiate the question's purpose and enshrine *Roe*'s unconstitutional logic, as would the second "negative opt out" offer by the Attorney General's office.[9] The positive multiple-choice phrasing was purposely selected to represent the full range of possibilities, covering the language of *Roe* and which nobody ever suggested as tendentious, unfair or undemocratic. By excluding any purely negative option, the question was acting on the Constitutional unanimity for positive consensus on fact, apart from which the judiciary cannot rule. It is clear to the *amicus*, that since *Roe* is undemocratic in its nature of alleged "non-consensus" and judicial fiat, that its logic pro-

[7] Evidenced in NECAC's SJC Case No. 4898 Brief and Appendix for the Plaintiff-Appellant.

[8] This August 4, 1988 letter is copied in *Addendum Two* for PPLM's SJC Case No. 4898 [88-363] *Brief for Amicus Curiae submitted in Support of the Defendants*.

[9] Both options were without constitutional precedence at the state or federal levels.

vided one of its partisans with the rationale to block the will of nearly 26,000 citizens.

In the Attorney General's September 2, 1988 opinion, he said: 1) it was not a valid public policy question; 2) it was not a proper form of instruction; 3) multiple-choice is not permissible; and 4) the Attorney General's office has no authority to change the question's substantive phrasing after the fact.

If so, how does one explain the August 17 phone call from the Assistant Attorney General? Why would he suggest two other options if multiple-choice is invalid?[10] And why would he include the word "instruct" in his second option if the question were not a proper form of "instruction?"[11] Why would he make any offer at all if it were truly not a question of public policy?[12] And why would he ask the NECAC to consider making such a substantive change, when the Attorney General's opinion explicitly said that the law forbade such?[13]

The *amicus* believes that since advocates of *Roe* and legalized abortion know that there is no evidence against conception as the origin of an individual biological human life, theyh do their best to prevent such public acknowledgement. But in so doing, they have opposed democratically informed choice. We believe that the Attorney General's office wanted to force a "negativity" on to the question behind which pro-abortioon partisans could unite—consistent with the "I don't know" evasionary criterion of *Roe*.

In *Roe*, it stated that:

> A state, by adopting one particular theory of life, may not override the rights of pregnant women to terminate their pregnancies [410 U.S. 154].

[10] NECAC's *Brief, op cit.*, p. 27ff. The 1970 Massachusetts Legislature placed a multiple-choice question on the ballot relative to Vietnam policy. It derives authority to do so from the people; Massachusetts Constitution, Part 1, Article 5.

[11] *Ibid.*, p. 23*ff*.

[12] *Ibid.*, p. 4*ff*.

[13] Mass. Op. Atty. Gen., Sept. 2, 1988, p. 9, note 7.

The Eighth Circuit Court of Appeals ratified *Roe* in this regard as it struck down the Missouri statute. Yet, *Roe* erred, for definitions of life are necessary for law, and Missouri was doing exactly that in stating the humanity of unborn children. It is not a "theory" of life (*i.e.* speculative or imposed) which we argue for, but consensus on the "facts" of life. The NECAC's referendum work redresses *Roe*, so that democratic process may be employed to agree on the facts, if attainable, and if so, to write laws accordingly.

In one final concern of interest to the Court as to *Roe*'s affect, the NECAC was opposed improperly on "religious" grounds, and in a manner that is also reflected in *Roe*. First, on August 12, 1988, the Civil Liberties Union of Massachusetts ("CLUM"), wrote the Attorney General, asking that the NECAC question not be approved. The relevant portion states:

> First, the ballot question, as worded, does not pose a question of public policy but instead a question which implicates, for many individuals, religious views concerning the point at which human life "begins." In our view the government has no proper role making such inquiries into its citizens' views on religious matters, even if those views are expressed in the form on an anonymous ballot. Although the proposed ballot question is couched as a question of "biological" fact, casting the question in those terms cannot conceal the reality that it constitutes, in effect, a poll of the voters' beliefs on a religious matter.[14]

And second, PPLM, in its brief, also made the same argument:

> There is yet another problem with the proposed question. To many people, the question will necessarily

[14] Letter on file at the offices of the NECAC; *cf.* note 2.

> be read to ask "in [religious] terms, when does an individual life begin." [*sic*]. But if the question is viewed as an inquiry into the voters' religious beliefs, it is equally improper as a ballot question. The separation of church and state mandated by the federal and state constitutions requires that voters not be polled as to their religious beliefs, and that their representatives not be instructed to vote to adopt one religious belief or doctrine over another.[15]

This argument is highly disingenuous *prima facie*. Without needing to get into questions of the First Amendment's interpretation, we see that there is nothing religious in the question. It specifically underscored *biological fact*. Whereas the CLUM or PPLM may argue that religious questions may not be asked, it has here defined biology as religious. In other words, they are saying that religious people or groups (the CAC has a Protestant statement of faith) are not allowed to ask public policy questions relative to scientific knowledge. How amazing! They are essentially saying that religious citizens, if such logic is consistently applied, are precluded from participation in the "public square" except on the terms of "secular" citizens. In other words, this logic says that "biology" is not "secular" in matters of human abortion. And this is an extraordinary affront against the First Amendment's "free exercise" clause. It is the CLUM and PPLM who have imagined the alleged "religious ulterior motives" behind the question, in order to avoid democratic accountability to the facts of the issue.

And *Roe*, in this specific context, has provided the rationale. In its use of "personhood" to evade "individual biological humanlife" and to underscore a "non-consensus" criterion, it has arbitrarily defined concern for "conception" as somehow

[15] PPLM *Brief*, op. cit., pp. 9-10.

theoretical or religious, and thus beyond the purview of law. It has reversed reality. For example, we note the 1973 Court's treatment of medical ethics:

> The emerging teachings of Christianity were in agreement with the Pythagorean etic. . . . Thus, suggests Dr. Edelstein, it is a "Pythagorean manifesto and not the expression of an absolute standard of medical conduct."
>
> This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics [410 U.S. 165].

In other words, *Roe* is dismissing 2,000 years of medical ethics by aligning it with the alleged "rigidity" of Christianity, and with Pythagorean sectarianism. It seems that such alignment is a convenient way to remove preconceptually undesired facts from debate. *Roe's* language also spoke of "conception" as "the official belief of the Catholic Church" [p. 181]. Thus it conveniently transferred questions of fact into religious dogmas of "belief." The CLUM and PPLM have all the rationale they need here for their opposition to the First Amendment's "free exercise" clause in denying religious citizens the right to seek consensus of scientific questions of fact. This logic is a grave threat to democratically informed choice, and constitutional law.

Therefore, the NECAC's experience in seeking to democratically discuss the consensus question which *Roe* evaded but left open for future redress, has clearly evidenced how *Roe's* logic has blocked democratically informed choice. This gives further reason, experientially, for the Court to conclude that

Roe should be reversed and the matter of abortion legislation returned to the States. In asking the Court to reverse *Roe* on this additional ground, we are asking for a parallel conclusion that the NECAC's ballot initiative is a suitable means by which the question may be redressed at the State level.

Conclusion.

In accordance with the argument we presented, *supra*, in support of the appellant *Webster*, the amicus asks the Court to overturn its 1973 *Roe* v. *Wade* decision and return the matter of abortion legislation to the States.

Roe is the only known example in U.S. Law based on an alleged "non-consensus" relative to a central question of fact, and as such it violated several judicial maxims and thus precluded democratically informed choice as applicable in this issue. And *Roe* has been employed by its partisans to block democratically informed choice in Massachusetts. It is bad law and should be overturned.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET A.L., APPELLANTS

v.

Reproductive Health Services, ET A.L.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

THE RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA, INC., a California 501c(3) educational and charitable corporation hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of respondent has not been obtained.

INTEREST OF AMICUS

It is believed the material herein is material, relevant and unique. The brief shows primarilarily via US Law and dictionary definitions that the term "person" in turn includes the term "individual". The term "Right to Privacy" as recently used by this Court is shown to be one specifically and explicitly rejected by this Court before 1965 and criticized.

Amicus is possibly the oldest right

to life organization. It may have the largest network of help groups helping women with problem pregnancies.

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SUMMARY OF ARGUMENT

The present brief is limited to one topic, the fact that "individual" in Title 1 USC Section 1 includes preborn humans who thus are legally "persons.

Usage in the English language in America as reflected in dictionaries is a first reason why preborn humans are individuals.

"Individual" is not a particular term of medical art and is not found in Medical Dictionaries such as Stedman's or Dorland's.

"Individual" is defined in ordinary or unspecialized dictionaries. The Library of Congress contains dozens of such ordinary dictionaries, many of which are updated and republished annually. Each of said ordinary dictionaries contains at least one definition of "individual" which defines a class which includes each preborn

human. None supports the opposite contention that pre born humans are not individuals. While said dictionaries include other definitions which include classes of entities which are not preborn humans, none of said dictionaries define "individual" in such a manner as to indicate that the term "individual" as used in Title 1 USC Section 1 excludes preborn humans.

Medical dictionaries define a newly fertilized human ovum as a "zygote" which in turn is defined an individual.

Many dozens, probably hundreds of medical texts found in medical school libraries state that the new individual begins at the time of fertilization of the human ovum by the human sperm.

Every preborn human has the two necessary characteristics to be an individual, internal unity and being different from the rest of the universe.

MEANING OF "INDIVIDUAL"

Title 1 USC Section 1 states in applicable part:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise-

the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;"

Obviously "individual" adds something to the definition of "person" and does not merely restate the term "person" or there would have been no reason for the same Congress that passed Title 1 USC Section 1 in 1947 to amend it in 1948 to add "individual" which would be redundant.

Amicus knows of no case interpreting "individual" in Title 1 USC Section 1 or any other place which might be helpful

to this Court.

"Person" in the 14th and other Amendments is defined, since the Amendments were initially "Acts" of Congress before being sent to the states for ratification. "Acts" is a broader term than "laws". It follows that for purposes of the 14th Amendment, all "individuals" in the sense intended by Congress are "persons". The opposite is not true in that certain "persons" such as corporations are not individuals. "individual" is both a noun and an adjective, but is obviously used only as a noun in Title 1 USC Section 1.

What are "individuals"? Is it a medical term? Is there any definition of individual which includes born humans and excludes preborn humans?

One begins with dictionaries. A search of dozens of non medical dictionaries indicates that each

contains definitions of "individual" which include the preborn from the time of fertilization in a class with the born, and none includes the born in a class which excludes the preborn. The staff of the Library of Congress is continuing this search until every dictionary has been searched, and if any difference is discovered in dictionaries searched in the future, the Court will be notified. "Individuals" has a broad definition which would include many non human entities. Few would argue this was Congressional intent. The most reasonable intent is humans born and preborn in part because all the other entities defined as "persons" in Title 1 USC Section 1 are non humans.

Medical dictionaries like "Dorland's and "Stedman's" do not define "individual", so although it is used in medicine, it is apparently not a word

having a unique different medical definition.

The necessary characteristics of an individual are two, uniqueness and unity. Each preborn has them, with the possible exception of identical twins who lack uniqueness for only a very short time after twinning, which time expires before the time of abortion.

A few dictionary definitions of "individual" omitting definitions which could not apply to humans, and the definition of "individual" as "person", found in many dictionaries, include:

A. Webster's Twentieth-Century Dictionary (1938):

"n. 1. a single person, being, or thing; a single entity; one of a class.

2. In biology, a single organism in existence separate from the parent; one of a kind, whether partially or fully developed, as the entire product of a

fertilized egg or ovula, or the bud of a plant."

Comment: non humans can be individuals if they have unity and uniqueness. While the first phrase of definition 2 has two possible meanings, one of which excludes the preborn, that sense is incorrect because the definition goes on to include the entire product of a fertilized egg.

B. "The American Heritage Dictionary", American Heritage Publishing Co and Houghton Mifflin Co, states:

"n. 1. a. A single human being considered separately from his group or from society.

Usage: in the sense of a person, is most fitting in examples in which a single human being is distinguished from a group or mass.

C. "Second College Edition, the

American Heritage Dictionary": same as B, supra.

D. "Funk and Wagnall's Standard Dictionary, New York:"

"n. 1 A single person, animal or thing; especially a human being;

2 Anything that cannot be divided or separated into parts without losing its identity."

E. "Macmillan Dictionary for Students" Macmillan Publishing Co, NY, Collier Macmillan Publishers, London":

"n. 1. single person, esp. as distinct from a group.

2. single living thing."

F. "The Merriam-Webster Dictionary for LARGE PRINT Users" G K Hall, Boston:

"n 1 : a single member of a category: a single person, animal, or thing"

G. "Webster's Third New International Dictionary" G & C Merriam

Co, Springfield, Mass (1971), (1967) and also (1961) without any change:

"n-s 1: a single or particular being or thing or group of beings or things: as a: a particular being or thing as distinguished from a class, species, or collection (1): a single human being as contrasted with a social group or institution (2): a single organism as distinguished from a group, b: a particular person, c: the product of a single fertilization- called also genetic individual,

2: an indivisible entity or a totality which cannot be separated into parts without altering the character or significance of these parts"

The preceding are a fair representation of the definition of "individual which appears in many other dictionaries, none of which dictionaries appear to contradict the preceding

definitions.

Medical dictionaries such as "Dorland's" or "Stedmans" do not define "individual" directly, so presumably it is not a term that medicine uses in a specialized manner. What they do do, however, is to define the fertilized human ovum to be a Zygote, and then define the zygote to be an individual. Accordingly, by a two step process which appears to be sufficiently reliable, it is possible to claim and amicus does claim that the fertilized ovum, in ordinary typical medical language is an individual.

Do medical books say anything about the individualness of the fertilized ovum? Most do not. After all most medical books are for very advanced students. The fact that the fertilized ovum is an individual, although not profound, is not a complicated fact. One

does not teach simple counting in and advanced calculus course or elementary bonding in an advanced organic chemistry course because one does not belabor the obvious. But many books found in medical libraries, probably hundreds do make statements such as the following, each of which was found in a different book on just one shelf, found by using the word "fertilization" in the subject index in the University of California Irvine Medical Library:

A. "the beginning of an individual life is coincident with the fusion of the male and female pronuclei shortly after fertilization."

B. "Development of a new individual begins when a spermatazoon fertilizes an egg."

C. "Only one of the resulting meiotic nuclei is retained in the egg cell, and this nucleus fuses with the

nucleus of the entering sperm to produce the first of the nuclei of the new-generation individual."

D. "Medawar (1953) stated that...'fertilization and pregnancy are almost the only natural occasions on which the antigenic diversity of the individuals of a species has any opportunity to reveal its consequences."

E. Edwards, the doctor who first succeeded in in vitro fertilization in humans, of course had no doubt that the fertilized ovum of Louise Brown was not a part of the body of the solution. He stated: "Fertilization involves the fusion of the gametes and activation of the oocyte, and establishes the genotype of a new individual."

F. "When the two pronuclei fuse, the biologic qualities of an individual human life come into existence."

G. "Of all the approximately 160

different types of cells that compose the human body, the egg cell is the only one that has the capacity to form a new individual. Although the egg needs that critical meeting with a sperm in order to do so, the egg cell is the primary intermediary between two generations of adults."

In recent years, medical advances have made even more obvious the universally medically known fact that fertilization always means a new individual. In the case of in vitro fertilization, the fertilized ovum can be deposited in the womb of a mother not the donor of the ovum. This makes very obvious the fact that the host mother and the fertilized ovum were separate individuals having absolutely no past contacts when the ovum was in the solution. The coupling of the ovum to the womb does not change the preexisting

individuality of each during the pregnancy. In fact a third woman may then adopt and raise the child who would then have three mothers, genetic, nurturing and raising.

This has been carried very far in mice. An embryo can be frozen and defrosted and it will grow again. Is the embryo part of the freezer´s body? Are they the same individual? Mice embryos have been cut into little parts and put back together into a conglomerate, and if done early enough, they continue to grow. What happens if you join parts of two or more mice embryos into a conglomerate? They grow. There are mice with four genetic fathers and four genetic mothers. This is certain because the experimenters took mice from white, grey, yellow and dark fur, and the conglomerate mouse had checkerboard fur, and was obviously a new individual.

Similar conglomerates like goat/sheep are possible. The preborn mule is obviously a different individual from its non mule mother. A preborn cow flown over the ocean in the uterus of a rabbit, there only for temporary storage, is obviously an individual.

The new individual,like a young person of any age, needs only a suitable hospitable environment and the absence of disabling or deadly factors to develop into a more mature individual.

One would hope that the Court would consider a new born to be an individual. What is the difference between the preborn one day and the new born the next?

The preborn can be more mature and better adapted to survive and thrive than many newborns. The preborn is fed, inhales, exhales, and removes wastes via tube, means, but so do some adults we

consider persons. No matter what criteria one attempts to fix on to differentiate the individuality of the preborn from that of the new born, the same logic if applied as a general rule leads to absurdities and horrors.

"Individual", like most words has different meanings and different shadings of meanings, depending on the context and other factors. However, like most other words, a person fluent in the English language can usually easily determine substantially the exact meaning intended and receive the thought desired to be transmitted. Amicus can see no reasonable meaning for individual which includes the born and excludes the unborn. This does not mean that someone who is skilled and motivated cannot struggle and finally think of some meaning less good than the normal meaning of individual which would

include the preborn.

Certain results logically follow from certain causes. What logically follows if the Court accepts the responsibility of deciding which human beings can be treated like trash, a responsibility the Court has been discharging with much difficulty and much criticism since 1973.

One can foresee a continuing of the combination of humility and anti scientific attitude where the Court (unfairly some say) puts the burden of proof on those favoring life, then as in the present case refuses to permit any proof on the beginning of life or the individuality of the preborn or any relevant evidence of any kind.

The technique the Court has used in the abortion cases has made it impossible for the truth to out. The question has never been when human life

begins, but rather what value do we put on new life. The Court has written hundreds of pages on abortion without ever looking at the first section of the US law to see what Congress said about "person". No skilled attorney has cross examined the witnesses for abortion to expose the fallacies behind the glib slogans.

Many are frustrated. They grew up believing and being proud that we were a nation of laws, not men. This Court's handling of abortion, and particularly internal notes recently made public have made it obvious how this Court thinks and works to effect its will. Many are outraged, so they are engaged in what is already by far the most widespread civil disobediance in US history. They believe that killing a preborn child who needs your love is the ultimate act of cruelty.

It must have been the dream of certain Justices in 1973 to do much good for women by allowing only a little killing. It is easy to construct hypothetical situations where much good can be done by permitting only a little bit of killing. That is what this Court thought it was doing in 1973. In practice, however, life is far more complex than hypothetical situations. There are frequently approaching unforeseen from the future adverse results so that the possibility of doing much good by a little killing is illusory and the evil done by the killing sometimes far exceeds the worst fears of those who authorized the killing.

THE RIGHT TO PRIVACY

The "fundamental" Right to Privacy which this Court found in 1965 is surely one of the more curious Constitutional Rights. The Justices have thus far declined to point to any Congressional debates or notes from Delegates to the Constitutional Convention supporting the Right.

The Right to Privacy is so subtle that for nearly two hundred years nearly two hundred Justices lived, served their nation on this Court, studied the law, heard arguments, and died without suspecting it existed. For nearly two hundred years, in practical fact, it did not exist. The law during those years was clearly stated by this Court in Prudential Ins Co v Cheek 259 U S 530 at 542, 543, 66 LE 1044 at 1053, 1054 (1921) as follows:

"The cases cited from Georgia, from

Kansas, and from Texas, place material dependence upon provisions of the several state constitutions guaranteeing freedom of speech, from which is deduced as by contrast a right of privacy called the 'liberty of silence;' and it seems to be thought that the relations between a corporation and its employees and former employees are a matter of wholly private concern. [543] But, as we have stated, neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' or the 'liberty of silence;' nor we may add, [1054] does it confer any right of privacy upon either persons or corporations."

How do dictionaries define "privacy"? The older dictionaries such as "Webster's Twentieth-Century Dictionary, NY, NY 1938, define

"privacy" as follows:

"n. 1. A state of being in retirement from the company or observation of others; secrecy.

2. A place of seclusion from company or observation; retreat; solitude; retirement.

3. Joint knowledge; privity. [obs]

4. Taciturnity. [obs]

5. Secrecy; concealment of what is said or done.

Syn. Retirement, seclusion, secrecy, solitude, concealment, retreat."

Other dictionaries are much the same.

This Court has adopted a new definition for this new Right. The Court probably did not find its definition in any dictionary because a fairly diligent search of dictionaries has failed to turn up any definition from which this Court could have chosen its definition

of "privacy".

The Court definition does not include a number of activities which would seem to beg including. Why can one not do what one wants in the solitude of one's home, if done without hurting others? If the "Right to Privacy" means anything, it would seem to mean that. Yet one cannot shoot, snort, smoke, swallow, or suck certain scrumptious sinful substances, because if found in your blood later, you could be subject to criminal penalties. Is there a right to suicide without hurting others?

What makes the right to abortion so fundamental?

This course of judicial activism has not been without its critics. For example, Corwin and Peltason write that: "The justices have not been too clear on what makes a right fundamental, but they have explained that it is not whether it

is considered important. The rights to education, to shelter, and to food are basic, but in a constitutional sense they are not fundamental rights because they are not rights that the Constitution 'explicitly or implicitly' guarantees .... Apparently, for example, the right to an abortion is fundamental because it is part of the right of privacy protected by the Constitution; however, the right to education is not fundamental, a distinction that some find difficult to draw." [pp 200-210]

And, while the Supreme Court has recognized that the Ninth Amendment "protects the right to engage in political activity against unreasonable national regulation, until 1965 no law had been declared unconstitutional because of disparagement of any of these unenumerated rights, nor had there been a suggestion that this amendment limited

the powers of the states. Then, the Court ruled that a Connecticut law forbidding the use of contraceptives violated the right of marital privacy and stated that this right is 'within the penumbra of specific guarantees of the Bill of Rights' and is one of the fundamental rights reserved by the Ninth Amendment to the people against disparagement by a state or national government. More recent decisions tend to peg the right of privacy within the protections of the due process clauses of the Fifth and Fourteenth Amendments."

Thus, "... justices who want to protect from government intrusion what they consider to be basic rights not otherwise specifically secured in the Constitution have found the language of the due process clause and equal protection clauses sufficiently commodious to suit their needs."

Corwin and Peltason cite the Roe vs. Wade case as the best, really, the worst modern example of a substantive due process approach, noting that "For some time the Court has been applying substantive due process but has been reluctant to admit that it has been doing so." [1]

And, although the Court, in its privacy decisions, has tried to peg the privacy right to earlier Supreme Court cases, the effort is not supported by the either the history of the Constitution or the Court.

[1] [Edward S Corwin, Jack W Peltason, Corwin @ Peltason's Understanding the Constitution, Eighth Edition, Holt, Rinehart, and Winston, New York, c. 1949 @ 1979]

CONCLUSION

The court should adopt the ordinary dictionary definition of "individual" and protect the preborn as persons.

respectfully submitted February 23, 1989

ROBERT L SASSONE, Attorney for Amicus

NO. 88-605
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM L WEBSTER, ET AL., APPELLANTS
V
REPRODUCTIVE HEALTH SERVICES, ET AL.
RESPONDENTS

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California } ss.
City of Santa Ana, County of Orange }

Robert L. Sassone, being first duly sworn on his oath deposes and says:

Robert L. Sassone is a member of the Bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on February 23, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

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v.

Reproductive Health Services, ET A.L.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR HUMAN LIFE INTERNATIONAL AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

HUMAN LIFE INTERNATIONAL INC., a Maryland 501c(3) educational and charitable corporation hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of respondent has not been obtained. Thomas M Blumenthal of respondent stated to attorney for amicus that an agreement of the parties ensured consent if written consent of one party is obtained, so perhaps consent of respondent has just been delayed.

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INTEREST OF AMICUS CURIAE

Human Life International, Inc (HLI) is probably the largest right to life international educational organization with staff and offices in many nations.

With great humility, this Court has declared itself unable to determine when life begins. HLI is perhaps in the best position to find the world's leading expert on preborn human life. HLI hereby submits testimony under oath subject to cross examination by the doctor knighted by the Queen of England for founding Fetology, the science best able to solve the Court's problem. Dr Liley was crowned by his peers with the honor of being called the "Father of Fetology."

After reading this brief, the Court will know preborns are human life and the question is rather: "What respect do we give preborn humans?"

SUMMARY OF ARGUMENT

The present brief is limited to one topic, evidence from Fetology and related Medical Science that preborn humans at all stages of development after fertilization are and must be individuals. Professor Sir Albert William Liley of the University of Aukland Medical School Fetology Department, now deceased, was the world's greatest Fetologist. He is known as the father of Fetology. He was knighted for his accomplishment of founding the medical science and specialty of Fetology. He was the first to do more than cursory study of the preborn human in the womb and developed many techniques such as fetal transfusion, treatment of Rh babies, and many other fetal diseases. He was the first to apply modern technology to

examine and treat preborn humans.

Professor Liley testified May 7, 1974, Abortion-Part V, Hearings Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, 94th Cong. He also testified under oath before the Abortion Commission, New Zealand Parliament, 1975. These two testimonies were transcribed by attorney for amicus into a book, "Tiniest Humans", Library of Congress No. 77-76811 from which book the present brief is taken.

The substance of the present brief includes in Professor Liley's own words under oath subject to cross examination the individual charactistics of the preborn human which establish that the preborn human is an individual.

In a number of genetic and biochemical problems, definite diagnosis can be established as early as the 14th week, and, in the Rh baby, therapy has been undertaken as early as the 18th week of intrauterine life. With advances in technology these limits are being moved back earlier in pregnancy. The division of intrauterine life into segments (zygote, fetus, etc.) is a semantic phenomenon, and is in no way supported by biological or medical fact. We are caring for the same child throughout pregnancy, before as well as after birth.

Because of the facts uncovered by my research, as a doctor I have no alternative but to regard the unborn child as my patient, and to protect and respect his life as I

would the life of any other patient. From my clinical experience, I am convinced that unborn children are individuals and human beings, who should have legal protection, and who are capable of receiving and responding to medical care.

As any high school biology textbook will tell us, life begins at conception and ends at death. In between, life does not develop it is simply there.

What does develop is the morphological structure, the earthly home of life, the physiological performance of that structure, behavioural traits and personality. And, as we increasingly expand into a community of like individuals, we can speak of development of social responsibilities, of ethical

awareness and legal status.

Unfortunately, this expansion of concept is accompanied by a deterioration in fact and specificity. Any modern textbook of embryology will accurately recount the earliest stages of morphogenesis of the human body. A little behind but catching up are accounts of the physiological performance and behaviour of the embryo and fetus.

In other words, when dealing with observation and sensory data there is good agreement. But, as we expand into social, ethical, legal and political fields, hypothesis and conjecture become more evident.

When we say that in early pregnancy the babies role over and over like yoyos, this is not an exaggeration. These conditions of

movement still prevail as late as 28 weeks. After it gets too crowded for the wilder gyrations, we can still see the baby flex and bend his limbs as he pleases. In fact, it is only in very late pregnancy that the baby starts to become short of room.

It is very clear to us that it is a purposeful quest for fetal comfort that determines fetal position. Our interest in this field and this conclusion has been forced on us by our interest in fetal therapy. If you are going to carry out procedures like fetal transfusion, you want the baby lying in a suitable position for it and it helps to know why the babies lie the way they do. Babies lie the way they do for very good personal reasons which are those of fetal comfort.

If the uterus is subaccurate, this relatively common and trivial abnormality of the uterine contour can have relatively startling effects on fetal presentation. No longer is the long axis of this cavity longitudinal, but oblique. The baby obediently lies in the new long axis, the oblique one. He still plays the game according to the rules, the little end at the little end and the big end at the big end.

Severe Rh disease associated with the large placenta and an unusually sited placenta has the same effect as the uterine malformation. It gives you a long axis of the cavity which is oblique, not longitudinal. The baby lies in that long axis, the big end in the big end, and the little end in the

little end. It's a very simple game.

Babies do not lie in these odd positions to make life difficult for the obstetrician or dangerous for themselves or their mothers. They lie in these positions in late pregnancy because of the purposeful quest for fetal comfort. It is the most comfortable position they can find. Now in selecting a position of comfort in late pregnancy, a baby may have chosen a position which is hazardous or difficult or impossible for a vaginal delivery and in which regard the fetus can be accused of a lack of foresight. This, of course, is a trait not unknown in adults.

Those babies who lay as extended leg breeches were laying in those positions because that was the best way they fit in.

Our generation is the first ever to have a reasonably complete

picture of the development of the human from conception. In 1930 the liberation of a human egg from the ovary was first observed. In 1944, through a microscope, was seen the union of the human sperm and ovum. In the 1950s the events of the first six days of life were described, those critical first steps in a prodigious journey.

In the 1960s three further advances occurred. First, as I have said, the direct diagnosis and treatment in a baby before birth became a reality. Secondly, the physical environment and physiological behaviour of the fetus became accessible to study. Thirdly, the genetic code was cracked, the alphabet established in which is spelled out the instructions which

guarantee that every human is unique and different from every human that ever was or ever will be.

These 40 years of discovery put an end to centuries of guesswork and controversy, of ideas of generation, animation, ensoulment, encapsulation.

In this Orwellian situation, where so much semantic effort and logical gymnastics are expended in making a developing human into an 'unperson', modern anatomical, genetic, immunological, endocrinological and physiological facts are a persistent embarrassment.

How much easier to echo that simple statement, 'But there's nothing there yet', without pausing to reflect that if there is nothing

there, then why the unholy rush to remove it? Nevertheless, not everyone is away with the fairies, and for the benefit of those still in touch with reality we can briefly review some aspects of intrauterine life.

Q. What are features which show that the baby has an independent existence in the uterus?

A. First, that he is entirely responsible, not only for his own development, but also for the organization of pregnancy. He has influences while still no bigger than a grain of sugar on the mother whose body weight is measured in kilograms. While this is by no means novel in biochemical or physiological circumstances, as I have said, it is an astounding feat

of power amplification and demonstrates the importance of his own survival to the baby so that he does in fact take over in the human the direct control of the pregnancy.

Q. So this little thing no bigger than a grain of sugar starts off what you might call a cascade reaction?

A. Exactly, by his own performance. Next he organizes, or solves rather, the homograft problem. I think most people would be familiar with the fact that no matter how much you needed somebody else's kidney or heart and no matter how willing they were to let you have one because they had one spare or no longer needed theirs, you simply cannot go around accepting spare part organs from other people,

and yet we have this fascinating situation by which a baby and his mother. who are immunological foreigners, have to tolerate each other's tissues in parabiosis, and it may be a source of some satisfaction that a solution of the homograft problem which so far has defeated the best brains in surgery and immunology, was in fact personally solved by you and me before we were born, or we would not be here today. A Nobel prize awaits the man who remembers how he did it!

We each began life as a single cell. Forty-five generations of doubling of number of cells by growth divisions were needed to reach the 30 million cells of an adult. Of these 45 generations of division, eight, or nearly

one-fifth, have occurred by the time we were implanted in the uterus, 30, or two-thirds, by the time we were eight weeks old, 39 by 28 weeks' gestation, and 41 by the time we were born. The remaining tedious four occupied the whole of childhood and adolescence, and then there were no more.

Q. Could you describe those later cell divisions briefly?

A. It is very simple. One can distinguish several kinds of cell division. There are those that are replacing cells that have been lost or damaged. These are replacement divisions. One can distinguish, also, growth divisions where one cell divides into two, each of those divides into four, and each of those steps in the division is a

generation, as it were, of cell division. This is very like the problem of the grains of wheat on the chess board; one on the first square, two on the second square, four on the third, eight on the fourth, and so on. It is simply a geometric progression. And if one asks how many generations of cell growth division are needed to get from that single cell to the 30 million cells of an adult, then the answer is about 45 generations of cell division. And of these 41, say, have occurred by the time we are born. Therefore, you see, as we spend about 9 months, or three-quarters of a year, in the uterus, and our three score years and ten are something like three-quarters of a century out of

it, it could be easy to think of that intrauterine life as occupying about one percent of our life, which is quite true in a temporal sense. But in terms of growth and development, 41 of those 45 generations of cell divisions have occurred before we were born. In other words, the sort of person we are going to be in terms of our physical growth, our physiological attributes, and our function 90 percent of the excitement is over by the time we are born. Forty-one of the 45 generations have occurred. It is for this reason that we regard the care of pregnant women, and this state of life, as so important, as rapidly growing cells are particularly vulnerable to inimical influences, and if anything does go

wrong this can cast its shadow so far into the future.

Q. Could the EEG reading of a 50 day foetus resemble the EEG of an adult?

A. The EEG of a 50 day foetus does resemble that of an adult under any of a number of anaesthetic agents, but not that of a normal unanaesthetized adult.

These structural changes, of course, are not mediated by any external agency, but internally, directed by the baby who is called the zygote or embryo. In this regard the baby or zygote with his cargo of genetic information is much more than a mere blueprint of a new human. A blueprint is simply a plan, and does not include the machinery to fulfill that plan--but a zygote

does. He even has the power to phenocopy himself, to reproduce asexually as about one in 400 zygotes or embryos does in identical twinning--and there is no known external agency which affects the incidence of identical twins.

However our new human has in hand even greater designs and undertakings than simply his own internal organization and development. He also develops his own life-support system, his placenta, and his own confines, for it is the embryo and fetus who develops his membranes, forms his amniotic fluid and regulates its composition and volume. Women speak of their waters breaking and their membranes rupturing, but such expressions are so much

nonsense--these structures belong to the baby. This simple point is not a play on words, but a practical reality. Tests on the amniotic fluid are tests on the baby, not on the mother.

But even the organization of his own confines does not exhaust the list of achievements of the new individual. His own welfare is too important to permit leaving anything to the chance cooperation of others, and therefore he must organize his mother to make her body a suitable home.

First, and most pressing, he must prevent the menstrual shedding of the endometrium. He does this by producing chorionic gonadotrophin to prolong the normally strictly limited life span of the corpus

luteum, which in turn maintains the endometrium to undergo a decidual transformation.

This is a splendid feat of power amplification, understandable in electronic circuitry and very common in physiology, whereby an embryo barely out of the microgram range influences the corpus luteum in the milligram range, which in turn affects the endometrium measured in grams. Very soon the embryo bypasses the corpus luteum and takes over direct control of the endometrium--from a very early stage of human pregnancy neither the maternal pituitary nor ovaries are necessary for its continued endocrine success.

In this regard the explanations in a dozen textbooks of witch's

milk, of sebaceous retention cysts, of labial hypertrophy and withdrawal bleeding in the baby girl as the result of fetal exposure to high levels of maternal sex hormones are quite wrong. It is the mother who is exposed to high levels of fetal hormones, for these hormones are manufactured by the fetus and his own placenta. These hormones are influential beyond mother's pelvis, for they modify maternal cardiovascular, respiratory and renal function to cope with fetal requirements.

Another crucial environmental problem which must be dealt with is the homograft situation--the fact that the fetus and his mother, inevitably immunilogical foreigners, who could not exchange skin grafts

and could not be safely given a blood transfusion one from the other, yet must tolerate each other's tissues in parabiosis for nine months of pregnancy. Again it is the fetus, not the mother, who copes with the problems. And finally it is the foetus, not mother, who determines the duration of pregnancy, for unquestionably the onset of labour is normally a unilateral decision by the baby.

Q. I wonder if I could put a proposition to you, and if you would comment on it, please. Can we say that the maturation of foetal hormones has an effect on the mother which determines the time of birth--an effect which is biochemical and involuntary?

A. This would be a reasonable proposition in terms of the duration of the pregnancy in weeks and days. On the other hand, in terms of the diurnal variation in onset of labour, this could be affected by external environment rather than being an internally programmed event. Thus the duration of the pregnancy is clearly not something blindly imprinted on a baby's genetic endowment at conception, because obviously it can be

influenced by a number of factors such as foetal illness, and so on. In other words, it is an externally negotiable phenomenon. It is not a predetermined, blindly programmed event.

Q. So you are not intending to impute will or deliberation to the foetus?

A. No, nor in similar circumstances would I impute will or deliberation to an adult.

Q. Is the choice of birth date by the baby a rational decision?

A. No, it is not a conscious or rational decision. Obviously some babies, if we wish to continue in the idiom, are radically mistaken about when they should be born. We are sure we know much better, but the great majority are not mistaken.

The point is that there is evidence that the duration of pregnancy is genetically determined. For instance, in different breeds of sheep, whether it is 147 or 152 days, there does appear to be a genetic component. There is no question also that in the case of the human foetus this is modifiable by a number of agencies, including external environmental agencies--for instance, a virus infection, and a number of infections which can lead to premature labour. But nevertheless it is the foetus which is physiologically responsible for the triggering of labour.

Q. What is the mechanism whereby the foetus triggers off the onset of labour?

A. There are several gaps in

the human story, as I understand it.

Q. In relation to medical or surgical induction, Professor, in effect does the baby eventually take over still and promote the process of labour?

A. In the great majority of instances, yes, provided one is in reasonable proximity to term. It is easy to, as it were, activate the triggers in the baby. There are some other instances, though, in which we appear to be producing the whole labour out of the bottle.

This relationship between a baby and his mother is clearly simply much more than simple biological parasitism. The term parasite, so frequently used to describe the fetus, is often used, not in the limited biological sense,

but with the sociological overtone of describing someone who takes all and contributes nothing. Neither sense is applicable to the foetus. True, he is parasitic on mother for his nutritional requirements. In the same sense many wives could be said to be parasitic on their husbands' incomes; but just as wives would indignantly maintain that they contribute much to a home and a marriage to justify their keep, and that really what is involved is a division of labour, so also does the fetus justify his keep by organizing and maintaining the pregnancy. Such a relationship is more accurately described as parabiosis or symbiosis, and physiologically there is no question who guarantees its success.

Q. To say the baby is parasitic is not correct? A. Not precisely.

This concept, that the fetus is in command of the pregnancy, is hardly news to any mother with an unplanned pregnancy, but the idea is new and the consequences are farreaching in obstetrics. No longer can we understand the physiology of pregnancy if we remain in ignorance of the physiology of the dominant partner in that relationship. All the problems in pregnancy which can be solved by pulling and pushing and cutting have been solved-- the only unsolved problems, spontaneous miscarriage, premature labour, toxaemia and so on, await a better understanding of fetal physiology.

Q. When you say 'a better understanding of foetal physiology'

it seems that the problems you see relate to the foetus?

A. Some of these problems are quite serious for the mother as well--toxaemia for instance.

Q. But the unsolved problems so far as the mother is concerned are physical rather than psychological?

A. There are problems for both, but, as I say, the solution seems to lie in understanding how the foetus goes about his business of organizing pregnancy.

Q. There is nothing further you need to understand about the mother?

A. Far from it. All I would say is that we are farther along in the jigsaw puzzle of the mother's problems than of foetal physiology.

These achievements of the fetus also cause us to reconsider another

point--the concept of maturity. It is perhaps one of the misfortunes of medicine that we study our subject as young adults, and our standards of normality are those of the young adult--usually male. And it is a part of the arrogance to young adults to consider that the only people who matter are young adults. Since maturity equals adulthood, the fetus is, by definition, immature, but immaturity acquires a nasty overtone suggesting inferiority. Thus the tendency has developed to consider the fetus, or neonate, as a poorly functioning adult rather than as splendidly functioning baby. Every age and stage of life has its excellencies and its weaknesses, and fetal life is no exception. We do not regard the fetal circulatory

system, different as it is from the child's or adult's as one big heap of congenital defects, but rather a system superbly adapted to the circumstances under which a fetus lives.

We should not regard fetal and neonatal renal function, assymetric as it is by adult standards (he handles a water load well but not a solute load unless he has plenty of water), as inferior, but entirely appropriate to the osmometric conditions in which it has to work.

We should appreciate that the fetus has a much more prompt and reliable response to hemorrhage than adults, that a fracture which would incapacitate an adult for three to six months will heal in three weeks in a bandage in a baby, that the

ability of a fetus to heal surgical scars or thermal burns would be the envy of a plastic surgeon. In these contexts at least, it would be more appropriate to consider the adult as a poorly functioning fetus.

Even when we accept that it is the fetus who is in command of the pregnancy, that it is mother, not baby, who is the passive partner in the relationship, people might still feel that the fetus is nevertheless but a new superconductor of some endocrine orchestra, a mindless programmed robot controlling his mother. Nothing could be further from the truth.

As the fetus develops structures--including sensory structures, he uses them. Development of structure and

development of function go hand in hand. Indeed, if the function cannot be served without developing the structure, equally, without the stimulus of function the structure does not develop properly. Further, we are aware in extrauterine life that every individual represents an interaction of nature and nurture, of environment and genetic endowment. The same is true in the uterus. The fetus does not live in a metabolic Nirvana, or in a dark and silent world in a state of sensory deprivation. The uterus may buffer, filter, and distort the outside world, but does not eliminate it. Stimuli do reach the baby and he responds to them.

We know that fetal movement is necessary for the proper development

of bones and joints, that the fetus without room to move or without muscles or nerves to move with, is born with severe restriction of range of joint movements. We know that fetal comfort determines fetal position, that changes in maternal position provoke baby to seek a new position of comfort, that contractions and external palpation provoke fetal movement and that the fetus will repeatedly evade the sustained pressure of a microphone or recording instrument. We know how babies change ends in the uterus while they still have room--they propel themselves with their feet, either frontwards or backwards, and how they change sides--with an elegant longitudinal spiral roll, rotating first their heads, then

their shoulders, and finally their legs.

In early pregnancy the fetus is free to move as he pleases, and he does precisely that. He can turn complete flips in one and a half or two seconds. In late pregnancy, with increasing fetal bulk and diminishing amniotic fluid volume, there is less choice, but fetal comfort determines which way baby will lie in late pregnancy and present in labour. Thus the fetus is responsive to touch and pressure, simple facts confirmed by an obstetrician who has ever stroked the palm of a prolapsed arm and elicited a grasp reflex, or the sole of a footing breech and observed the upgoing toe.

Q. In the case of an 8 to 10

week foetus, if you apply pressure will it tend to try to get out of the way?

A. Normally it would be extremely difficult, apart from putting a foreign instrument or needle into the uterus to apply pressure, but with a foetus at the maturity you have a very small foetus in a larger capsule of fluid. However, as the famous work of Dr. Davenport Hooker shows, in his many thousands of feet of film, babies at this maturity are responsive to touch.

The fetus also responds violently to painful stimuli--needle puncture and injection of cold or hypertonic solutions--stimuli which you and I find painful, children will tell you are painful, and the

neonate, to judge from his responses, finds painful.

The discussions that have taken place relating to pain relief in child birth have involved only maternal pain. Considering all that has been written by poets and song writers about the cries of newborn babies, you might think that newborn babies cried for fun. We think newborn babies cry for one reason only, because birth has been a stifling and often painful experience for the baby. We are getting around to the way of thinking that whether or not mother needs pain relief in labour, some babies might well be better off for it.

However, I have been told by advocates of abortion that we have no proof that the fetus actually feels pain. Strictly, they are quite correct. Pain is a peculiarly personal and subjective experience and there is no biochemical or physiological test we can do to tell that anyone is in pain--a phenomenon which makes it very easy to bear other people's pain stoically, which is an important point for obstetricians to remember. By the same token we lack any proof that animals feel pain. However, to judge from their responses, it seems charitable to assume they do.

Q. The question, then, of pain felt by the foetus--it is your personal opinion, I gather from what you say in your paper, that in

effect the foetus does feel pain?

A. I can only say that the foetus responds violently to stimuli which you and I would feel painful. Bertrand Russell once remarked that a fisherman had told him that fish had neither sense or sensation, but how he knew that he would not tell him.

Q. Well, what is the earliest stage at which you have observed this apparent violent reaction on the part of the foetus?

A. In just over 16 weeks, carrying out amniocentesis for very early and severe RH haemolytic disease. Then again, response to irritation, for instance a bristle, has been observed much earlier than this by Davenport Hooker in his monumental foctage of film of

mechanical behaviour responses of very early miscarried babies.

The fetus responds to sound and light in utero. The fetus is startled by flash photography of a pregnant abdomen, and with a fibreoptic conduit and photo-multiplier we can detect the shadow cast by the fetus on the posterior uterine wall. In utero the light is shifted far to the red end of the spectrum and the fetus is using only his rod or low-light intensity vision, but if there is any light present at all there must be activation of visual pathways, because single-rod cells respond to single photons. The fetus lacks any images and sufficient light to practice cone vision, so that at birth he can see but does not know

what he is looking at. Confident recognition of images takes five to eight months of extrauterine life to acquire.

With sound it is different, because intrauterine sounds have pattern and a spectral compostion not very different from extrauterine sounds, and the fetal inner ear or hearing mechanism is of the same magnitude and therefore responds in the same frequency range as childrens' or adults' ears.

If the hearing structure in the child grew with the child to adult size, then babies and children would hear in a different frequency range from adults and the communication gap between generations would be perhaps even wider than it is already.

It is easy to demonstrate fetal responses to external sound, and audiometric curves may be constructed by noting changes in fetal heart rate to pure tones presented by hydrophone or air microphone.

We have done these tests to reassure deaf mothers, for instances, during pregnancy that their foetus did in fact hear.

The fetus lined up under an image intensifier in a quiet room is

startled by a sudden noise--the dropped pot or human voice, including mother's. He responds to the tympanist's contribution or an orchestral performance and to the dentist's turbine drill. Both habituation and conditioning have been demonstrated.

Habituation is the phenomenon by which you can play someone a signal and he starts; you play it again and there is not so much response; you keep it up, and after a while he starts to ignore it. The baby does precisely this. Conditioning is where, having given one stimulus to a baby, you give a second one, and after awhile you get a response to the first signal which you formerly were only getting to the second.

However, it is not simple external sound which bombards the fetus. The pregnant uterus itself is a very noisy place. The loudest sounds to which the fetus is exposed are maternal borborygmi peaking to 85 to 90 decibles, about the intensity of sound of traffic in a busy city street. Reaching and below 55 decibels the content is richer in pattern and meaning, the intermittent voice and the all pervading vascular bruits pulsing in synchrony with maternal heartbeat in the great arteries supplying the uterus. We do not think it entirely chance that babies are lulled by holding them to your chest, or the old wives' alarm clock, or the modern magnetic tape of a heartbeat, that the tick of a grandfather clock

in a library is a reassurance rather than a distraction, that people asked to set a metronome to a rate which 'satisfies' them will pick a rate in the 50- to 90-per minute range, and that the majority of drum rhythms in the world reflect the measured beat of a human heart. We think this rhythm is deeply imprinted on human consciousness from fetal life.

Q. What is the earliest age in development that you have observed response to sound?

A. Personally, 23 weeks. To my knowledge the process has not been looked at earlier in this situation. Again, one has to distinguish a living foetus in the uterus, and if pregnancy continues, and therefore on is apparently dealing with a baby

as it were in good shape as distinct from the very early miscarried baby who is a living but unfortunately dying baby.

The fetus drinks amniotic fluid in a phasic pattern from at least as early as eight weeks' gestation. By the third trimester there is a fascinating variation, some babies coyly drinking 20 ml per hour, and others boozing away at 90 ml per hour.

Many women have noticed foetal hiccups. They were not aware of what they were, and some have been quite worried, particularly if there is an epileptic somewhere in the family cupboard. 'Could the baby be having a convulsion, doctor?' These convulsions have been described, but they are extremely rare. Hiccups are

very common indeed, and women are very much reassured to be told what they are. Some have already guessed.

There are two interesting things to know about the drinking of unborn babies, their variability, and also the general fact that large well nourished babies drink at a high rate whereas little skinny babies, with numerous exceptions, tend to drink at a low rate. But what is even more interesting about this is that it correlates beautifully with independently assessed feeding performance in the nursery. Most nurses and mothers are well aware that some babies really know what their mouth is and what it is for whereas others take 20 or 30 minutes or more to feed, drinking during that time an amount any self

respecting baby would dispose of within two or three minutes. The interesting thing is that the good drinkers in utero are the good drinkers in the nursery and the dainty, tedious swallowers in utero are the tedious ones out of the uterus as well. In other words, it is not just physical traits, it is not just medical conditions which can bridge birth. The behaviour traits also bridge the birth.

Now that we are in a position to measure the swallowing rate, we can also check on the influence of other things on swallowing in utero, for instance the flavor of the amniotic fluid. It so happens that the amniotic fluid does not taste too bad, but it has a rather chemical taste, like photographic

developer. It is not particularly nice, but it is not particularly nasty either and the babies don't seem to mind and quite cheerfully and reliably drink it. It so happens there is another contrasting medium in the uterus which is the oily medium which gets slicked down on the fetal skin like a coat of paint and makes the newborn baby look a little bit like he has chalk on him. This is an excellent protective material, but it tastes terrible, If you put a drop on your tongue or my tongue, we would spit it out fast. If you put a drop on the tongue of a newborn baby, the baby grimaces and cries.

What would happen if we injected this material into the fluid surrounding the baby? We have

measured the swallowing rates of babies over two consecutive 48 to 72 hour intervals. These are essentially repeatable measurements in that we get about the same rate. Every time we inject this material, the fetal drinking rate just crashes. They take just one mouthful and seem to go yuk and just quit drinking.

On the other hand, if we make the fluid taste nice, will they drink more? We have done that with a dozen children. And the interesting thing is that ten of the dozen after we injected saccarin very decisively drank more. We approximately doubled their swallowing rate by sweetening their fluid with saccarin. Two, however, just quit drinking. It will be interesting to follow these

children up. We may have chosen the wrong sweetening agent, because there are some people, myself included, who do not find saccarin in concentration sweet, but intensely bitter. This is a well recognized genetic trait.

He may get hiccups, easily recognized, and as these occur in an episodic pattern, commonly at the same time each day, we suspect that they are related to fetal drinking sessions, and that he is already experiencing some circadian rhythms, of his own or exposed to mother's.

All babies are experienced in swallowing at birth, and some also in suckling. In the neurological examination of the neonate the 'seeking' or 'rooting' reflex is elicited by stroking the circumoral

area of the baby. He turns his head to the side of the stimulus and opens his mouth, obviously a reflex by which he homes in on the nipple, which by its size, consistency and colour is simply a homing device on a positive pressure feed system, the breast.

In so far as it is very common to see fetuses lying with hands and feet in close proximity to their faces, it is not surprising that they elicit a seeking reflex themselves. Therefore, it is not uncommon radiologically, to find fetuses sucking fingers, thumbs and toes, and thumb-sucking has been photographed in the Nine-week abortus.

Q. Are you implying from this that in effect the foetus or the

child at this stage has developed a nervous reflex system?

Well, as Devenport Hooker says on response to stimuli, one does get in the early stages quite a marionette, mechanical type of movement, but afterwards quite a graceful type of response. They are quite well known. They are part of the Leonard Nilssen series.

Many other functions and responses could be described, but always the conclusion is the same--the fetus is young human, dynamic, plastic, resilient, in command of his own environment and destiny with a tenacious purpose.

Q. Now, is it fair to say that your view has been formed largely because you believe that a foetus from its very early stages has a

distinct individual personality?

A. It is certainly true. Were this not so it would be completely farcical to develop programmes for the diagnosis of illness in babies before birth.

Q. And this view of each foetus having its own individual personality, is that just your belief, or does it come from scientific fact in your view?

A. Distinctions can be observed between foetuses before birth, not only in their physical appearance, in their physiological appearance, but also in their activity states, their responses to external stimuli. In other words, it is not just appearance, but also behaviour, by which they can be distinguished.

Q. You say, 'I am convinced

that unborn children are individuals and human beings.' I refer again to the transcript of Professor Hubbard's evidence, 'I would contend that one is not fully human unless one is capable of what I would call a conscious life.' This is something that Dr. Inglis referred to. 'To that extent, I would say that the embryo and the foetus, up to the age of 28 weeks, in not fully human; it is a proto-human if you like. It is incipiently human, but it has not become fully human.' You have already commented on this to a certain extend, Sir William, but I would like to ask you, do you think that this is a valid scientific statement?

A. No; it is a redefinition, which can be made to suit any

purpose.

Q. I am interested to contrast what you said with what Professor Hubbard said. Do you accept that obviously there can be differences of opinion between two experts of your stature?

A. Not only differences of opinion, but some experts even change their definitions one of the most notable being Ashley Montagu, whose book 'Life Before Birth' may be known to many people here. In this book he refers to 'new human being' and 'life beginning at conception'. I could give you numerous references, if you wish. But, now that he is an ardent pro-abortionist, he has taken steps to qualify and abrogate what he said before, and he has now defined

'humanness' not as an attribute but an acquisition; it is something which is conferred on you by society. It is not something about you which makes you human, but it is some accolade awarded to you by society.

Q. If we could limit this particular discussion to the differences in matters of opinion between two scientists, there is nothing wrong, is there, in changing one's mind if something causes you to doubt your first opinion or your first statement?

A. According to the variation, by which it is possible for any social purpose to decide who is human and who is not and whether he is entitled to live or not. I would agree that people have all too often

in human history made arbitrary judgments on this point; but the question is not whether one can but whether one should, and I think some judgments are more charitable than others.

Q. Today you have outlined and described very fully the intrauterine life of the foetus, and because of your study of scientific facts you attach much value and importance to intrauterine life?

A. Could I emphasize, as I said at the beginning, that my interest in the physical and physiological facts of human life derive from the fact that I care for sick babies before birth, and if, for instance, you have to put a needle in the peritoneal cavity of a baby before birth, you cannot do it if the baby

is lying with his back towards you, there is this awkward structure, and if his front is towards you there are arms and legs over the abdomen. We need the baby presenting by flank, and it is this that led us into studies of the facts which influence and determine foetal presentation. We need a baby lying still. We can't carry out these procedures on a baby that is bobbing around like an apple in a barrel of water. This led us to studies of the stirring and disturbance of babies, and what would quiet them down, and these are the same phenomena which would apply to a child after birth. We know if we have to put a needle in a baby we must approach it boldly. It is not just a tentative edging into a baby, because if you

prick the baby he reacts violently. All these aspects of foetal behaviour derive from the fact the baby before birth has a human physiology.

CONCLUSION

For the reasons submitted herein, the Court should hold that the preborn human is an individual and accordingly, should be declared a person for purposes of the 14th Amendment of the United States Constitution pursuant to the definition set forth in Title 1 United States Code Section 1.

Respectfully submitted,

ROBERT L SASSONE

Attorney for Amicus Curiae

NO. 88-605
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM L WEBSTER, ET AL., APPELLANTS
V
REPRODUCTIVE HEALTH SERVICES, ET AL.
RESPONDENTS

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California } ss.
City of Santa Ana, County of Orange }

Robert L. Sassone, being first duly sworn on his oath deposes and says:

Robert L. Sassone is a member of the Bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on February 23, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on February 23, 1989.

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ORIGINAL SIGNED AND NOTARIZED

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET A.L., APPELLANTS

v.

Reproductive Health Services, ET A.L.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR EDWARD ALLEN AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

EDWARD ALLEN hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of respondent has not been obtained. Thomas M Blumenthal of respondent stated to attorney for amicus that an agreement of the parties ensured consent if written consent of one party is obtained, so perhaps consent of respondent has just been delayed.

INTEREST OF AMICUS CURIAE

Allen hereby submits data establishing preborn humans as persons which is believed to be unique according to a search of substantially all prior articles. Among the material, US Supreme Court cases stating "person" includes any and every human being, reconstruction era Congressional

statements, an 1876 Supreme Court DC case contrary to this Court's abortion holdings, Title 1 USC 1 where Congress defined "person" to include "individual" and therefore the preborn and historical data indicating why, a number of cases denying for various reasons that women are persons, etc.

Allen became a police officer in 1936. He graduated from and taught at the FBI academy. During World War II he was on loan to the FBI, assigned to security and anti-sabotage and anti-espionage. After World War II, he served 26 years as a police chief. He was given credit for eliminating organized Mafia type crime in Youngstown Ohio. He wrote the classic book on the Mafia, "Merchants of Menace". He served as an expert for the three major post World War II US Senate Anti Crime Committees. He was appointed by the Ohio

Governor to a state commission. His honesty and successes in law enforcement were praised by a President, nation wide and local media, J Edgar Hoover, and many others. He is a convicted criminal who has served time for trespass at a "safe" abortion clinic where court records indicate the doctor has been sued hundreds of times for abortion malpractice and is believed to have killed six women.

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SUMMARY OF ARGUMENT

The present brief is limited to one topic, the likelihood that Congress had the power to enact and in enacting Title 1 USC Section 1 in 1947-1948 did not intend to exclude the preborn human or any other human life regardless of condition from the definition of "person" therein. If that is the case, this Court should not change the intent of Congress by denying personhood to the preborn human.

Early US History lists 17 points tending to indicate Congress had power to define preborn humans to be persons. The history comprises debates, enactments by Congress and the states about 1870, an 1876 Federal abortion case, and an 1896 US Supreme Court concurring opinion stating: "The term "person" , used in the Fifth Amendment is broad enough to include any and every

human being within the jurisdiction of the republic."

Assuming Congress had power to include the preborn in the definition of "person", is there any reason to believe Congress intended some unusual definition of "individual" which would have excluded the preborn so as to define a class of human beings (the preborn) excluded from the protection of personhood? 1947-1948 was at the height of the War Crime Trial era. Congress would have been aware of War Crime Trial news which had established the Nazi attrocities, the philosophical basis for them, the German safeguards that failed, and the inherent danger of creating a human sub class of Untermenschen without fewer or no rights. Congress would not have defined such an underclass.

If the preceding is true, this Court should hold the preborn to be "persons".

EARLY US HISTORY

Neither the makers of the US Constitution nor those who enacted the Bill of Rights nor those who enacted the 13th, 14th and 15th Amendments to the US Constitution appear to have contemplated the subject of abortion. There is no mention of abortion in the enacted text or in the written records.

In such a case, it is legitimate to study the laws, practices and beliefs of the time and available records of proceedings to attempt to infer the intent of the framers. In doing so, we find the following 17 points:

a. that there are and have at all times material hereto been two major conflicting theories of the origin of rights under law, the most widespread theory that rights are created by the state and then given to the people by the state, and the minority theory,

adopted by the US Declaration of Independence that people "are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted..." Note they are created equal, and the time of creation is before birth and was so known in 1776. The framers could have said "born equal", but chose instead the earlier time.

b. that it can be argued that this Court's Dred Scott and Roe v Wade decisions adopt the majority theory which was rejected by the Declaration of Independence but is routinely held by all totalitarian governments. Some hold the theory directly, others hold that the ruler rules by divine right, and then he implements the majority theory

by his acts.

c. that in 1789 when the original articles were adopted, and in 1790 when the Bill of Rights was adopted, Blackstone was the bible of American lawyers, and Blackstone taught that a "person" was "like us" who had been "formed by God" in the womb [1]

d. that abortion was a crime at common law [2]

e. that in the late 1850's, the American Medical Association began an ultimately successful effort to outlaw abortion. [3]

[1] William Blackstone, "Commentaries on the Laws of England (London, 1765) book 1, ch. 1, and book 4 ch. 14

[2] Robert Destro, "Abortion and the Constitution" California Law Review 63 (1975):1250, 1267-1273

[3] Horatio R Storer, MD, "Why not?"

f. that the leader of the AMA effort was Horatio R Storer, MD, who wrote numerous books on abortion which emphasized the wrongness of abortion because it took a human life, more than the danger of abortion vs childbirth. [4] Storer had no doubt that preborn humans were alive from the moment of conception [5]. Storer used the kangaroo example to prove that birth should have nothing to do with one's right to life and was just an accident of time. Storer knew the difference between conception and implantation [6]. Storer knew that there was life before quickening, knew the significance of quickening and defined quickening [7]. Storer knew one

[3] cont. Boston: Lee and Shepard 1866

[4] ibid. 20-34

[5] ibid. at 28, 29

[6] ibid. at 30

[7] ibid. at 31

could hear the baby before quickening [8]. Storer knew the baby could move before quickening [9]. Storer knew the baby could breath and cry before birth [10]. Storer complained that there had been a wide and sincere ignorance of the true character of the act (thereby explaining the previous lack of enforcement of the right to life of the new preborn) [11]. Storer stated abortion was a crime against the child and a crime against the preborn [12]. Storer stated that it was generally supposed that there was no harm to the mother [13].

[8] ibid. at 33

[9] ibid. at 34

[10] ibid. at 35

[11] ibid. at 35

[12] ibid. at 35

[13] ibid. at 36

g. that in 1865, the AMA gave a special medal for the best anti abortion publication to Storer for his book "Why Not", published in 1866, [14] which book emphasized the wrongness of abortion because it killed a human being as proven by then recent additions to human knowledge about preborn humans and that 1866 saw Congress propose the 14th Amendment to the states. One wonders what medical knowledge has been lost since 1866 to account for the fact that Storer knew so much more about preborn humans and the beginning of life than certain modern doctors and courts. The answer, of course is that the moderns know more than Storer, but adopt false humility when convenient to win a point.

h. that the most important burst of anti-abortion legislation in US history took place between 1860 and 1880 [15]

[14] ibid. at ii

i. that the 14th Amendment was enacted in 1868 and belongs to that anti-abortion era of American politics

j. that as shown by the legislative histories of their abortion laws, about 25% of states ratifying the 14th Amendment also increased protection for preborn humans within about one year of ratifying the 14th Amendment [16].

k. that in 1868 when the 14th Amendment was adopted, the common law made abortion a crime after quickening, but the trend was to make abortion a crime from conception as such states as Connecticut and Pennsylvania had done [16].

[15] then professor now judge John Noonan "A Private Choice" Macmillan, New York (1979)

[16] Legislative History of the abortion laws of the various states indicating modifications

l. that in the 1860s the Federal territories of Arizona, Colorado, Idaho, Montana, and Nevada had all made it a crime to abort and such legislation was subject to the approval of the same congressmen who adopted the 14th Amendment [17].

m. that the debates relating to the 13th, 14th and 15th Amendments and the associated Civil Rights laws contain many criticisms of the US Supreme Court because it separated humanity and both personhood and citizenship in the Dred Scott decision. [18]

n. that said debates contained numerous references to the scope of "personhood" in the 14th Amendment, and all such references by both opposing

[17] ibid. 200

[18] Alfred Avins " The Reconstruction Debates" Wilmington, 1974, 14th Amendment in index

sides in the debates by those who voted for and those who opposed the 14th Amendment agreed that the term "person" was intended to apply as broadly as possible, to "every human being", "every individual", of "every condition of life". [19]

[19] referring to equal protection, "...he is bound to administer it fairly to every man woman and child, of every race and color, of every condition in life" Senator Merrimon, 1875, ibid. at 735; "...the clause of the amendment which he reads has no relationship to citizenship. It covers every human being within the jurisdiction of a State." Senator Thurman 1875 ibid. 733; Referring to equal protection, "Obviously that relates not simply to classes, but to every individual". ibid. 734 The various debates from 1866 to 1875 include many similar statements.

o. that the term "person" both about 1790 and about 1868 and ever since was defined in such a way as to include "human being" as one possible definition of "person". [20]

p. that many, perhaps most of the congressmen voting on the 14th Amendment also were members of Congress when Congress approved an abortion law protective of the unborn for the District of Columbia by enabling the District of Columbia legislative assembly to pass such a law subject to a power in Congress to amend or repeal said law, then when the District of Columbia legislative assembly did pass an abortion law which was enforced, Congress did nothing, thereby tacitly admitting the validity of said law. [21]

[20] various dictionaries with no known exception

[21] United States vs May 9 (1876)..

q. that the Federal Courts, shortly after passage of the 14th Amendment held constitutional said District of Columbia abortion law, stating as part of the opinion that "'An act for the prevention of abortion' ...enacted January 19, 1872" by the District was valid in spite of the fact that defendant was sentenced more harshly under the act than a mere misdemeanor sentence he might have expected under Common Law. The opinion states in part:

"But it is argued that the legislative assembly of this District had no power to pass the act of January 19, before referred to. And this by reason of section 2 of the organic act creating the District, which provides as follows:

'The District is created a government by the name of the District

[21] Supreme Court, D.C. Sept.T., 512

of Columbia, by which name it is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this title.'

What were the precise limits of legislative power granted, or intended to be granted, by section 2, we think unnecessary to inquire, because the power granted is defined with great precision. Section 49 of the same act provides:

'The legislative power of the District shall extend to all rightful subjects of legislation within the District, consistent with the Constitution of the United States and

the provisions of this title, subject to all the restriction and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States.'

Section 50 of the act provides that all acts of the legislative assembly shall be subject to repeal or modification by Congress. And then sections 51-58 contain restrictions limiting the power of this legislative assembly. In none of these restrictions is the assembly prohibited from passing the law in question or any similar law.

This law of the legislative assembly has never been repealed or modified by an act of Congress. It will therefore be seen that the legislative assembly might rightfully pass any law, subject only to the express limitations of the act creating it." [22]

[22] ibid. at 514, 515

Amicus believes United States vs May stands as probably the highest judicial opinion as to the legality of passing abortion laws shortly after ratification of the 14th Amendment and an opinion that Congress saw said abortion law as Constitutional and not so defective as to merit repeal.

The Federal courts have held for a Century that Congress has power to define as persons practically any entity including numerous paper entities far different from a mature human. [23]

[23] Athena Mueller, "SUPREME COURT'S VIEWS AS TO MEANING OF TERM 'PERSON' AS USED IN STATUTORY OR CONSTITUTIONAL PROVISION" 56 L Ed 2d 895, reported under heading of Monell v Dept of Social Services.

Among the non human being type

entities given the status of "persons" by this court are: corporations, associations, the sovereign, foreign nations, states of the Union, cities, unincorporated associations, corporate officers, a municipality or other governmental entity, a political party, agents and corporations of states, a city as municipal utility operator, unincorporated labor unions, an unincorporated association of manufacturers, local governmental entities, a municipal department of social services, the department's commissioner in his official capacity, a city's board of education, and the board's chancellor in his official capacity, liquor dispensers acting as the agent of a state, railroads, bodies politic deriving their existence and powers from legislation. [24] ibid.

Obviously those responsible for the

Bill of Rights and the 14th Amendment had no intention of eliminating abortion prohibitions, or at least some of them would have made an effort to do so, particularly since at the time every state employed the sanction of the criminal law to regulate abortion. [25]

INTERPRETATION

The process of interpretation is often helpful. The framers could never have thought of television when they guaranteed the freedom of speech, but interpretation now makes that freedom include electronic communication.

What this Court says the Constitution means is for the time being what the Constitution means, at least for the time being, and usually permanently. Nevertheless the Supreme

[25] Destro, "Abortion and the Constitution," 1273-1278

Court can be wrong. Many times a later Supreme Court has said that an earlier Supreme Court had been wrong. [26] What the Supreme Court says the Constitution means can do violence to every criterion of history and logic. Instead of developing tne purposes of the framers, the Court can subvert them. But the law of the land, the meaning of the Constitution as a legal document, will be what the Court says until it admits its error or is corrected by a constitutional amendment.

The Court's conviction of its own correctness does not depend solely on its own precedents; if so there would be no change or reversals. Like it or not,

[26] A recent (1978) case involving the Court reversing itself on personhood is Monell v Department of Social Services (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018 reversing a 1961 case.

the Court is engaged in an exchange with its critics who always have the power to try to persuade the Court it was wrong, or who have the power to persuade the President to appoint successor justices who believe the Court was wrong or to elect a President who states that he will appoint justices who will reverse a decision believed to be wrong. This power of the people is the essence of democracy.

ABORTION VOTING PATTERNS

Many polls claim public pro abortion attitudes. While polls can project some things accurately, they can be slanted and should be ignored when better data such as actual voting patterns are available. Polls can and have been used in an effort to change future election results. As an example, why does the Republican dominated Gallup organization poll consistently publish results about

3% more Republican than the Democratic dominated Harris organization? Some have wondered about a 1976 California primary poll which showed Ford close (he was not) and caused Reagan to leave Ohio which then furnished Ford his margin. In 1972, early polls for abortionists indicated they would win initiatives in South Dakota (they lost nearly 4-1) and Michigan (Early October newspaper polls said abortion was winning by over 60%. (Abortion lost on election day 62%-37%.)

What do we see when we look back at Presidential elections since abortion became a national issue? Has the more pro abortion candidate ever won? Is there a correlation between being anti abortion and becoming President?

In 1972, you will recall the slogan "Amnesty, Acid and Abortion" which was pinned on one candidate who then lost 49 states. In 1976, Mr Carter and Mr Ford

were very close on abortion. So was the election. Mr Carter claimed to be a "born again Christian" and made moderate statements about abortion. Mr Ford was perceived (correctly) as having appointed a pro abortion Supreme Court Justice. Mr Nixon was perceived as saying he was anti abortion during elections, then appointing pro abortion Supreme Court Justices. Mr Carter won a close election.

In 1980, Mr Reagan ran on an anti abortion platform and even promised to appoint anti-abortion Justices to this Court, a promise we are about to see if he kept, and he won by a landslide. In like manner, he repeated in 1984 with a similar anti abortion platform against an even more pro abortion opponent.

President Reagan who signed the law making abortion legal in California, then became anti abortion after seeing

the result, actually ran against this Court's abortion decisions and gave the American people an opportunity to reject him in favor of a more pro abortion opponent, but was elected.

The 1988 Presidential election very strongly exemplifies the less than majority popularity of abortion.

In mid August, Bush trailed by a landslide. Bush had previously been perceived as pro abortion, and in fact had been closely allied with the pro abortion population control movement.

Nobody knew what type of platform or election abortion position he would adopt. At the convention, Bush and the platform were anti abortion, and Bush gained more than expected. The media said Bush lost the first debate, but abortion was contrasted at the first debate, and Bush, although allegedly losing, took a strong lead in the polls

which he maintained thereafter.

In 1972 shortly before the finding of the abortion liberty in the Constitution, pro abortionists chose the two states where they felt they had the best chance for success and collected signatures to put the matter before the people. Why did they go to the trouble?

In 1960, there was no right to life movement. In fact abortion was in such disfavor that the word "abortion" was not ordinarily used in the media. It was too dirty, so euphemisms were used instead. In the late 1960s, abortion burst upon the public scene, aided by a birth defect causing drug, new found friendship in the media and courts, no organized opposition, and other factors. Between 1967 and 1970, about 1/3 of the states changed their abortion laws, some by legislative action, some by courts finding the previously unknown abortion

liberty, and one in 1970 via initiative.

After New York in 1970, no state legislature liberalized its abortion law in spite of the introduction of more liberal abortion bills during more than 100 legislative sessions (most states more than once during the three years 1970-1972). In fact, the New York legislature in its next session repealed the 1970 abortion law, which repeal was vetoed. At the time this court found the abortion liberty, the pro abortionists had suffered more than 100 consecutive legislative defeats, in addition to the defeats in the two initiatives of 1972.

The finding of the abortion liberty January 22, 1973 quieted the abortion battle only for a while.

A minority of jurisdictions then began to pay for abortions under medicare or similar programs. Interestingly many of these states did

so without legislative enactment either by judicial order or by interpretation of an ambiguous law.

The strong trend has been for the legislatures and people if given a chance, to stop the funding of abortion. At the most recent elections, the electorate of all three states voting on the matter, Arkansas, Colorado and Michigan voted against abortion. The number of states now funding abortion has dwindled to a tiny fraction.

In like manner, Congress has repeatedly voted against abortion funding, and has repeatedly found new areas in which to eliminate abortion.

WARNINGS ABOUT UNTERMENSCHEN

A great war ended in 1945. Later the victors tried certain of the vanquished at "War Crimes Trials". A major reason for these trials was the definition by the vanquished of certain human beings as "Untermenschen", subhumans having no rights who could be treated in any desired way without regard to the fact that some considered them humans. The victors thought it urgent to warn their descendants of the dangers in certain of the philosophies of the vanquished to prevent a repetition of the crimes against the Untermenschen.

Today many fear that abortion has established a new Untermenschen class. They fear we are too close to repeating the German Untermenschen error. Is there any validity to this fear? Is there any substantial chance of a repetition of something too closely resembling the

Nazi experience?

Some of the warnings were:

"A freedom-loving people will find in the records of the war crimes trials instruction as to the roads which lead to such a regime and the subtle first steps that must be avoided. Even the Nazis probably would have surprised themselves, and certainly they would have shocked many German people, had they proposed as a single step to establish the kind of extermination institution that the evidence shows the Hadamar Hospital became. But the end was not thus reached; it was achieved in easy stages.

To begin with, it involved only the incurably sick, insane and mentally deficient patients of the Institution. It was easy to see that they were a substantial burden to society, and life was probably of little comfort to them.

It is not difficult to see how, religious scruples apart, a policy of easing such persons out of the world by a completely painless method could appeal to a hard-pressed and unsentimental people. But "euthanasia" taught the art of killing and accustomed those who directed and those who administered the death injections to the taking of human life. Once any scruples and inhibitions about killing were overcome and the custom was established, there followed naturally an indifference as to what lives were taken. Perhaps those who become involved in any killings are not to be in a good positions to decline further requests. [27] [27] From "The Hadamar Trial" Forward by The Hon. Robert H. Jackson, Associate Justice, U.S. Supreme Court, and formerly U.S. Chief of Counsel for the Nuremburg Trials, Hodge and Co. 1949

The US prosecution opening statement at the medical trial attempted to warn us, their descendants, as follows:

"It is our deep obligation to all peoples of the world to show why and how these things happened. It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellowmen as less than beasts. The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity. They must be cut out and exposed, for the reason so well stated by Mr. Justice Jackson in this courtroom a year ago: 'The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot

tolerate their being ignored because it cannot survive their being repeated.'"

Expert witness Andrew Ivy MD stated:

"Medical ethics pledges that physicians are conservators rather than destroyers of life. In my opinion medicine is doomed if it ever consents to take part or permits any member in good standing to take part in a program of euthanasia applied for socioeconomic purposes. If euthanasia is ever introduced for such purposes, medicine should have none of it. Medicine should let the persons responsible for introducing it do the killing. Physicians are conservators, not destroyers, of life....

Though I had been in Medicine for thirty years, I realized, for the first time at the Nuremburg Trials, the full meaning and importance of the contributions of Hippocrates and his

school to medicine and human welfare.

Hippocrates contributed the scientific philosophy of medicine as we know it today when he taught that disease is due to material causes and not to evil spirits, witches or the wrath of gods. He contributed a technical philosophy when he taught that diligence, accuracy, thoroughness in observation and skill were essential for success in the practice of a science and art of medicine. He apparently realized that a scientific and technical philosophy of medicine could not survive through the ages unless it was associated with a sound moral philosophy. One cannot conceive of a sound society with medicine that does not have a sound moral philosophy." [28]

[28] Journal of the American Medical Association, Vol. No.3, 1/15/49, page 131 et seq.

Expert witness Leo Alexander, MD stated:

"Even before the Nazis took open charge in Germany, a propaganda barrage was directed against the traditional compassionate nineteenth century attitudes toward the chronically ill, and for the adoption of a utilitarian, Hegelian point of view....

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually

the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitable sick.

It is, therefore, this subtle shift in emphasis of the physicians' attitude that one must thoroughly investigate....

In looking for these early signs one may well retrace the early steps of propaganda on the part of the Nazis in Germany as well as in the countries that they overran and in which they attempted to gain supporters by means of indoctrination, seduction and propaganda....

The question that this fact prompts

is whether there are any danger signs that American physicians have also been infected with Hegelian, cold-blooded, utilitarian philosophy and whether early traces of it can be detected in their medical thinking that may make them vulnerable to departures of the type that occurred in Germany. Basic attitudes must be examined dispassionately....

Physicians have become dangerously close to being mere technicians of rehabilitation. This essentially Hegelian rational attitude has led them to make certain distinctions in the handling of acute and chronic diseases. The patient with the latter carries an obvious stigma as the one less likely to be fully rehabilitable for social usefulness. In an increasingly utilitarian society these patients are being looked down upon with increasing

definiteness as unwanted ballast....

The killing center is the 'reductio ad absurdum' of all health planning based only on rational principles and economy and not on humane compassion and divine law....

The case, therefore, that I should like to make is that American medicine must realize where it stands in its fundamental premises. There can be no doubt that in a subtle way the Hegelian premise of "what is useful is right" has infected society, including the medical portion. Physicians must return to the older premises, which were the emotional foundation and driving force of an amazingly successful quest to increase powers of healing and which are bound to carry them still farther if they are not held down to earth by the pernicious attitudes of an overdone practical realism." [29]

THE GERMAN SAFEGUARDS

Of course, abortion is not identical to the German killing program. Are there sufficient safeguards in US society to prevent drift toward additional killing, so no killing beyond abortion will occur? Accordingly, let us examine the German safeguards which failed.

It was agreed that the scientific writing which prepared the way philosophically for the German killing program and which included safeguards to prevent the killing from being extended beyond desired limits was "The Release of the Destruction of Life Devoid of Value" referred to hereafter as "Release". [30]

[29] Leo Alexander, MD "Medical Science Under Dictatorship", (1949) New England Journal of Medicine 241:39-47

[30] "Release of the Destruction of Life Devoid of Value by the jurist Karl

"One very important conclusion becomes necessary: The full respect of everyone's desire to live, no matter how sick, how tortured and how useless." [31]

[30] cont.Binding and the psychiatrist, Alfred Hoche MD, published in Leipzig (1920). A copy of the original German version from the Harvard University library was translated by attorney for amicus and references are to this translation. The first half, having paragraph numbers beginning with "1" was written by Binding. The second half having paragraph numbers beginning with "2" was written by Hoche. See Nuremburg Trial transcript, "Trials of War Criminals Before the Nuremburg Military Tribunal Under Control Council Law No. 10, page 7633 for statement on this point.

[31] ibid. "Release" 154

"Legislation should be drafted to make impossible the use of any force, even indirect, in breaking down the desire to live as such an action is characteristic of murder and manslaughter." [32]

"Of course, we could never talk about the legalization of euthanasia of a mentally ill person who is quite happy in his state of life." [33]

"The consent or the desire of the patient and not only the seriousness of the condition is a very necessary condition for euthanasia. Both people involved should have correct information. A mere assumption of a hypondriac that his condition is beyond hope should not be sufficient. The person administering euthanasia should also have full knowledge of the

[32] ibid. 155

[33] ibid. 156

background of the person desiring death. [34]

"Persons for whom euthanasia may be considered are only those who are terminally sick and in addition to being terminally sick have the wish for euthanasia. [35]

"As mentioned previously, all euthanasia which breaks the will to live is excluded." [36]

"In going through all the different kinds of ballast life and in meditating about them, we can see that the principle of euthanasia does not apply to the majority of these cases. Even in the time of misery which is upon us, we will never stop to nurse physical defects of people so long as the people are not mentally dead. We will never

[34] ibid. 163

[35] ibid. 176

[36] ibid. 177

stop treating physically and mentally sick persons so long as there is some hope of a changing of their condition for the better. [37]

"It is up to the doctor to see to it that care is taken by technical means to insure the impossibility of any erroneous or abusing action under a legal euthanasia law." [38]

"Of course, it may be said by some that the legalization of euthanasia will open the doors to criminal abuse." [39]

"Persons holding these views must be assured by carefully designed safeguards." [40]

"We must first discuss if the selection of cases can be limited to

[37] ibid. 232

[38] ibid. 242

[39] ibid. 243

[40] ibid. 244

lives definitely worthless for the person himself and for society and if the selection can be done with such certainty that all mistakes and errors are excluded. The problem of selection can only be of concern to the laity. The physician has no doubt about the 100% certainty of correct selection..." [41]

While few if any members of the 1947 Congress read "Release" in the original German, the ideas expressed therein were well known.

Nor can it be argued that the Nazis passed laws going beyond the scope of the limitations demanded by Binding. No laws were passed. There is no written record of any order as wide as the acts that followed. The only document authorizing euthanasia is a letter on Hitler's personal stationary written in October, 1939, but dated back to the

[41] ibid. 245

first day of the war, September 1,1939. This letter would have had the force of law. It stated:

"Reichleiter Bouhler and Dr. Brandt, MD, are charged with the responsibility of enlarging the authority of certain physicians to be designated by name in such a manner that persons who, according to human judgement, are incureable can, upon a most careful diagnosis of their condition of sickness, be accorded a mercy death." [42]

Note the care with which Hitler's letter is drafted. In safeguards, it compares favorably with the abortion holdings of this Court. Note the

[42] Letter taken from "Trials of War Criminals Before the Nuremburg Military Tribunal Under Control Council Law No. 10, Volume 1, 1950, "The Medical Case" page 95

limitations on the persons to whom authority was delegated. Brandt, the leader of the euthanasia program, had much idealism and respect for human life when given this authority. As a young doctor, he had known Albert Schweitzer MD well, was impressed with his theory of reverence for life and had planned to work with Schweitzer as an assistant. The only reason Brandt did not go to work with Schweitzer was that Brandt had been born in France and would have been drafted by the French Army.

Of course as is well known, the killing program was extended and extended.

ATTITUDE OF THE KILLERS

The attitude of the Nazi killers would have been well known to the 1947 Congress that chose to define person to include "individuals" which appears to include the preborn, rather than leave

the word "person" undefined and permit some future Court to try to determine whether "person" excluded or included a particular type of humanity as this Court did in 1973 or perhaps choose a word for "person" which permits the exclusion of selected classes of human life. [43]

One puzzling thing at the trials was the apparent good faith belief of the defendants that they had done nothing wrong, that they were humane and good fellows who were just trying to do their jobs. This attitude of the defendants persisted all the way to their

[43] Title 1 USC Section 1 defines "person" in applicable part as follows: "In determining the meaning of any act of Congress, unless the context indicates otherwise-... the words 'person' and 'whoever' include...as well as individuals;..."

execution, so it was apparently really the way they felt, and not just a show to improve their chance of winning at trial. As they died, they probably felt they had been unjustly condemned.

This Nazi history would have been generally known to members of the 1947 Congress because of massive publicity given factors relating to the Nazi killings shortly previously. Members of the 1947 Congress would have been very sensitive to the danger that even a little bit of killing might get out of hand. They would generally have believed in the importance of respect for innocent human life to a greater extent than Congressmen of any other era. Accordingly, it would have been unlikely that they would have adopted any legislation permitting execution of any innocent human life. It would have been out of character for them to adopt any

sort of limiting language. Accordingly, "individual" would have been put into Title 1 USC Section 1 in 1947 because of its ordinary dictionary meaning which includes every human life from fertilization onward.

It is highly unlikely that that Congress at that time would have depersonalized the unborn because of the widespread revulsion at the total concept of "Untermenschen" and everything the concept stood for. There was widespread agreement with the warnings stated previously herein. There was widespread fear of what would logically follow through human weakness if any human was regarded as inferior. For example, one SS officer was asked if his work of killing had been the fruit of National Socialist doctrine. He replied: "I am of the opinion that when for years, for decades, the doctrine is

preached that the Slav race is an inferior race and Jews are not even human, then such an outcome is inevitable." as stated by Lt. Gen. von dem Bach-Zelewsky, quoted in Leo Alexander, "War Crimes and their motivation: The Socio-Psychological Structure of the SS and the Criminalization of a Society," Journal of Criminal Law and Criminology 39 (1948-1949): 312.

Is there a killing momentum which makes such a result inevitable as the SS officer believed? The Justices of this Court in internal memo and opinion denied that this Court wanted abortion on demand, yet we have it. Is a little bit of abortion impossible once the preborn are depersonalized?

Appellant believes a "little bit" of legal abortion is inherently impossible.

In California in 1967, abortion was

legalized [44] only for certain carefully limited reasons. The mental health reasons were were so carefully limited that it appeared easier to commit a woman against her will than to grant her an abortion for mental health reasons. Yet California almost instantly had abortion on demand. The doctors will teach the patients how to lie to get around any set of limited reasons for abortion just as they did before 1973 and just as lawyers have taught how to lie about divorce requirements to turn limitations such as "only adultery" into divorce on demand. The only practical way to limit abortion is to outlaw it by defining preborn humans to be persons. Self defence could then excuse whatever few surgeries were really required in exceptional cases.

[44] California Health and Safety Code Sections 25950 et seq.

For the nearly two centuries before 1973, "person" in the US Supreme Court meant "human being" which of course would include the preborn. The Court overlooked the obvious inconsistency with slavery. The broadness of "person" was so settled that it was not even a matter of debate. For example, in Wong Wing v US, 16 S Ct 977 at 983, 163 US 228. 41 L Ed 140, Justice Field, concurring, said:

" The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled., and as a consequence, he is entitled to the equal protection of those laws.

This has been decided so often that the point does not require argument. (citing cases)"

Why then did the 1947 Congress see fit to add "individual" to the definition of "person", thereby broadening "person" in Title 1, USC Section 1? Moreover, why did it choose to do it in the odd fashion it did, first defining "person" in 1947 without the definition including "individual" and then adding it in the second year of the same Congressional session?

The most obvious reason is the constant evidence from the widely publicized War Crimes trials that separating any human life from "person" could lead to disastrous results. While certain warnings were only published after Congress by law broadened "person". the same warnings had been repeatedly published in a variety of

forms between 1945 and 1948 and would have been known.

The Congress might have intended to eliminate the possibility that any US court might separate "person" from humanity. Previously, the Canadian Supreme Court in ´IN THE MATTER OF A REFERENCE AS TO THE MEANING OF THE WORD ´PERSONS´ IN SECTION 24 OF THE BRITISH NORTH AMERICA ACT, 1867" March 14 and April 24, 1928 had ruled that women were not persons. A variety of US courts had also ruled that women were not persons for one or more reasons, (even after women had the vote. Among these US decisions were): State v Emery, 31 S E 2d 858, 862, 224 N C 581 (1944); Mashburn v State, 62 So 586, 588, 65 Fla 470; Glidden v Philbrick, 56 Me 222, 227; In re Robinson, 131 Mass. 376, 382, 41 Am Rep 239; Commonwealth v Welosky, 177 N E 656, 661.

CONCLUSION

Considering US history, it is unreasonable to hold that Congress lacked power because of the Right to Privacy or any other provision related to the US Constitution to include the preborn in the definition of "person" of Title 1 USC Section 1. When considering US history at about the time of enactment of Title 1 USC Section 1, it is unreasonable to assume that Congress intended by enacting said Section anything less than giving the protection of "personhood" to every human life from fertilization onward. Considering recent abortion history, this Court should declare the preborn to be persons. Any other decision would repeat the past error, the claim this Court can define Untermenschen.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus

NO. 88-605
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM L WEBSTER, ET AL., APPELLANTS
V
REPRODUCTIVE HEALTH SERVICES, ET AL.
RESPONDENTS

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California } ss.
City of Santa Ana, County of Orange }

Robert L. Sassone, being first duly sworn on his oath deposes and says:

Robert L. Sassone is a member of the Bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on February 23, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET A.L., APPELLANTS

v.

Reproductive Health Services, ET A.L.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PAUL MARX AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

Paul Marx, OSB, Ph D, of Maryland, hereby respectfully moves for leave to file a brief amicus curiae in the present case. Consent of respondent has not been obtained. Written consent of appellant has been obtained. Thomas M Blumenthal of respondent stated to attorney for amicus that an agreement of the parties ensured consent if written consent of one party is obtained, so perhaps consent of respondent has just been delayed.

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INTEREST OF AMICUS

The interest of Professor Marx in this case arises from the fact that Marx, a sociologist and Catholic priest foresaw new problems on the horizon about thirty years ago. He foresaw new, rampant VD blighting millions of lives and killing many. He foresaw families under such social pressures that most would either break up or be unreasonably unhappy and many of the rest would have difficulties because they would base their lives on sociological or philosophical errors.

In response, Marx gave up teaching and since has spent his time publishing, traveling and speaking personally and via media about the proper response to these new problems.

For thirty years, Marx has been on the road most of the time and has

averaged more than a sixty hour work week. Marx has traveled repeatedly to all states and over 70 nations and was the first to raise modern concerns about the modern sexual failures in about 90% of these states and nations. Marx communicates with experts worldwide.

Professor LeJeune, MD, head of the University of Paris Genetics Dept is no ordinary expert. He is possibly the world's most honored geneticist. By his position and his and his subordinates' research accomplishments, he has established himself as the world's leading expert on the topic of this brief.

This Court presently has the power to do what it will to the preborn. As it reconsiders its past abortion decisions, it should have no doubt that science regards the preborn "subhuman

Untermenschen" killed pursuant to its rulings to be fully human beings.

The question is not when human life begins, as some with false humility might claim. The question is how do we treat human life which is weak and vulnerable. Do we repeat past errors when the husband would beat the wife who would then strike the large child who would hit the small child who would kick the dog? Or do we try to really analyze our problems to find lasting solutions which minimize unhappiness and violence?

SUMMARY OF ARGUMENT

The present brief is limited to one topic, evidence from Genetics and related Medical Science that preborn humans at all stages of development after fertilization are and must be individuals. Professor Jerome LeJeune of the University of Paris Medical School Department of Genetics is perhaps the world's leading human geneticist. Among his many discoveries are the genetic basis for Mongolism and numerous aspects of the disease and a probable strategy for a cure. He has been much honored, receiving the Kennedy Award, giving "The William Allan Memorial Award Lecture: On the Nature of Men," American Journal of Human Genetics 22 (1970): 126, etc.

Professor LeJeune testified May 7, 1974, Abortion-Part V, Hearings Before the Subcommittee on Constitutional

Amendments of the Committee on the Judiciary, 94th Cong. 1st Session. He also testified under oath before the Abortion Commission, New Zealand Parliament, 1975. These two testimonies were transcribed by attorney for amicus into a book, "Tiniest Humans", Library of Congress No. 77-76811 from which book the present brief is taken.

After working specifically with mongoloid children, I demonstrated that this disease was due to an extra chromosome, and it was for this research that I received the Kennedy Award from the late President.

With my colleagues in Paris, we have particularly described many different chromosomes of man and of primates like the great apes. This type of study has given a new glimpse into the evolution of species. We are deeply involved in new techniques of analysis, and have achieved specific recognition of the old and the new chromosomes during cell divisions.

We are also working on the effect of super-numerary chromosomes. In mongoloid children, we have recently demonstrated an excess of a specific enzyme, super-oxyde dismutase. The eventual relationship between this trouble and the

mental retardation of the affected child is under investigation. From this research and other investigations on the clinical functioning of the brain we find no indication that appropriate medication is impossible. In other words, on theoretical grounds, we consider that a medical cure of the mental deficiency is worth investigation.

The transmission of life is quite paradoxical. We know with certainty that the link which relates parents to children is at every moment a material link, for we know it is from the encounter of the female cell (the ovum) and the male cell (the spermatozoa), that a new individual will emerge. But we know with the same degree of certitude that no molecule, no individual particle of matter enclosed in the fertilized egg, has the slightest chance of being

transmitted to the next generation. Hence, what is really transmitted is not the matter as such, but a specified conformation of the matter, or more precisely, an 'information'.

Without reviewing the complex machinery of coded molecules like DNA, RNA, proteins, and so on, which are the vehicle of heredity, we can see that this paradox is common to all the processes of reproduction, whether natural or man-made. For example, a statue must be built out of some material, and could not exist if made of pure void. During the casting process, there existed at every moment a contiguity of molecules between the statue and the case, and later, between the cast and the replica. But, obviously, no matter is reproduced, for the replica could be plaster, or bronze, or anything else. What is indeed

reproduced is not the matter of the statue, but the form imprinted in the matter by the genius of the sculptor.

Indeed, the reproduction of living beings is infinitely more delicate than the reproduction of an inanimate form, but the process follows a very similar path, as we will see by another familiar example. On the magnetic tape of a tape recorder, it is possible to inscribe by minute alterations of local magnetism, a series of signals corresponding, for example, to the execution of a symphony. Such a tape, if introduced in the appropriate machine, will play the symphony, although there are no musicians in the machine and even no notes written on the tape. That's the way existence is played!

But, in this analogy, the magnetic tape is incredibly thin, for it is

reduced to the size of a DNA molecule the miniaturization of which is bewildering. To give an idea of this minuteness, we should remember that in this thread every character of each of us is exactly described. Thou shalt have blond hair, hazel eyes; thou shall be six feet tall, and thou shall live some eighty years, if no road accidents intervene! All these instructions giving a full description of a man, are written in a thread one yard long. But the thread is so thin and so carefully packed inside the nucleus of the cell, that it would stay at ease on the point of a needle.

I should probably give you an idea about the amount of information that is written on that thread. Roughly speaking, we can say that it is around 10 to power of eleven number of informations. That is something which exceeds enormously what

you can feed actually on to the biggest computer now in existence. I mean feeding, I do not mean having a delivery done there, but just input in the machine, on the actual memory of the machine, the one which is working. A very big computer, the biggest which we have now, is around a thousand times less powerful than the quantity of information included in the thread of D.N.A.

But it would be also a little too simple to suppose that we can reduce the information on the egg to the information on the tape. Because the egg is by itself the whole tape recorder. The whole machinery is there, so that as soon as the first trigger mechanism functions, the play goes on. And the human symphony starts at its very beginning as soon as the mechanism is triggered.

To give another impression, if we

were to reassemble on this table all these threads which will specify each and every quality of the next five billion people who will replace us on the surface of the planet, this quantity of matter would just about fit in an aspirin tablet. The fertilized egg is comparable to a tape recorder loaded. As soon as the mechanism is triggered, the human work is lived, in strict conformity to its program.

Q. Is it quite fair Professor, to ignore entirely the environmental factors in a person's full growth and development?

A. It is fair if the environmental is not as high.

Q. But in a hostile environment that could be a factor?

A. Oh, if you put a man on the moon without his suit he will not survive but

that would not prove a man cannot live on the moon.

Q. You cannot ignore human development without having regard to the environment in which it has been developed?

A. Oh yes.

Q. Are you using a figure of speech or are you being exact when you say 'thou shalt be six feet tall'. I am interested seriously in whether this in fact is determined right from the start?

A. I am quite serious and accurate in saying that in the sense that we are told that the size of the body is genetically determined with due respect to nature. The size of the population as you know has increased from generation to generation since around a hundred years. And we know that part of it is due to better nourishment of the babies; that's

one thing. But the other thing in that is genetics because the people have crossed, intermarried, so that some genes which were making for smallness or tallness are now spread over the pupulation. The main result is statistically expected to be an increase of the size which it is. We cannot read inside the first cell but if we could, if we were precise enough we would really say he shall be six feet. Yes.

The very fact that we have to develop ourselves during nine months inside the bodily protection of our mother does not change anything, as you can easily observe by looking at the egg of a hen, from which the chicken will emerge. It makes no difference whether he was incubated by the fowl, or by an electrical heating device! The chicken is still a chicken. If one day a child can

be entirely grown in a test tube, the test tube will never believe that the child is its property!

Such a reduction of the human being to its very nature may not be very palatable or intuitively satisfactory, but it accurately reflects the present state of our scientific knowledge. When a new student hears for the first time a symphony, let us say the Little Night Music by Mozart, he must listen to the whole in order to know it. But if he is a music lover, he will recognize Mozart at the first bars, and could tell the title at the second or third bar. It's the same with the human symphony. The specialist can recognize it at its first accents, even if a great number of various movements are required so that its general form becomes evident to everyone.

The infinitesimal threads of the

genetic information are carefully coiled in little rods, the chromosomes, easily visible with an ordinary microscope. They are something like the magnetic tape inside the cartridge of a minicassette. Twenty years ago, one could not have told the cell of a man from the cell of a chimpanzee. If he had been extremely clever he would have said that probably it is an egg of a high organism, but I am even not sure of that. And without any joke we would not have seen any difference between the fertilized egg of a mouse and that of a whale. The eggs look just the same. Around ten years ago we were able to count the chromosomes both in man and in chimpanzee, and it turned out that man had 46 and the chimpanzee had 48. That was not accepted very easily, because to be king of creation and to have two chromosomes

less....! Well, that's one of the examples of the humility of science--humility imposed! But be sure we have corrected that now.

I will try to explain this very briefly because it might be too long; but maybe it will interest you. The precision of the analysis is now much better than it was before. A chromosome around five years ago was seen as something of which you could measure only the length and the position of the point by which the two sister pieces are still held together. This point is the point which allows the two chromosomes to separate and to migrate to the two daughter cells. The new techniques which arose in 1970 make it possible now to see a kind of picture inside the chromosome and recognize each piece of the 23 chromosomes of man and name them by their actual structure. That

has entirely changed our impression about genetics so that just now, if one of our students, taking an advanced course of cyto-genetics, was not able to recognize and tell apart a cell of a chimp from a cell of a man, he would fail in his examination. It is so simple that he is not allowed to ignore that any longer. Indeed, three years ago he would have been allowed to ignore everything of that, just because we were ignoring it also. It shows just how relative is the knowledge of the student compared to that of the teachers.

Now I will stop on that, because it would go too far. Just to make you quiet about the fact that we have two chromosomes less than the chimp. I don't want to leave you with that bad impression. Just to make very short a very long story, we know now, thanks to

the work of one of my assistants, that the chimpanzee has two chromosomes more than we have because they have two chromosomes which are separated, and in man we have a big chromosome which is made by the sum, the joining of the two chromosomes of the chimp. That was a very comforting discovery, and now we are, at least as far as the quantity of the genetic information is concerned, equal with chimpanzees.

There is something more important about that, which is that this link between two chromosomes head to head was impossible. And it is written in all the textbooks, and I have taught that for ten years, that this kind of change was impossible--for very complex reasons which I will not go into. But we know that the reading of the message starts from one point to go to the end of the

chromosome. Now what happens if you join them together is that the two fragments are now not read in man in the same sense they were read in the chimpanzee. The corresponding sequences are now read backwards. That is very interesting because we know from other evidence that the number of genes and the number of genetic differences between man and chimpanzees are exceedingly small. If you count the proteins that we know--we know more than 10,000 of animo-acids and proteins, and chimpanzee and man are similar for more than 99 percent of the formulas of those proteins. And if you look at the D.N.A., at the genetic vehicle, it is the same. We are similar for more than 99 percent of the genetic information.

Then obviously the rational progression which is thus playing on this

basic genetic information cannot express anything. But if we look at the chromosomes, the fact of reading one sentence forward or backward changes immediately the whole signification of the sentence; and very likely one of the segments which is actually in the chimpanzee is just a preposterous sentence, but if you read it in the human way then you get signification. And if we are, and everybody believes we are, an accretion of matter--our body is made up of matter--and if it is nevertheless our body, it is just because the information which has moulded the matter was a human information. Otherwise we would be flies or chimpanzees.

But when we speak about human nature we see another fact, which is that the chromosomes, as precisely as we can look at them, are the same in every human

species. That is, it doesn't matter what is the colour of the skin, the colour of the eyes, the size of the body, the form of the face, all human beings have the same chromosomes. And this is a very interesting consideration. Indeed, it is a necessity, if we think about the way species are made by chromosomal change; so all the people belonging to the same species must have the same chromosomes.

But it gives another notion, which is that if all human beings have the same chromosomes all around the earth, there must be a reason for that. And the reason obviously is that they have the same ancestor. Now if we look back at the origin of the species by changing the way of reading the same general message of life, then obviously the beginning was on a very tiny stem. And if we work out all the equations, it comes out that to build

a new species, chromosome Y needs to start with the smallest number of reproducers, as I told you before. And so it is that the idea of a unique couple does belong to the ensemble of possible solutions.

In fact, curiously, when you want to build a new species, you go deeper than that. And all the new species which have been manufactured by man--they were only in plants--have been manufactured, not only with one couple, but with one individual. The trick is that in some plants you can manufacture the change in the chromosomes--I will not go deeply into technicalities--and you can make them doubled so that they can again fit together. But in plants you can get from the same plant both male and female gametes, so that you can reproduce that new individual and build a species if you

have got the right chromosomal shape. And this is what happens. Hence you have to know, as something which is just very simple, precise and well-known, that the only way to build a new species is to start either with one individual if it is a plant, or with one couple if it is a sexual animal.

Q. We know that the human germ cells are only half a human being.

A. They are not a human being.

But can we say that the early human being is an individual just after fecundation? Does he have the two qualities of an individual: its unity and its uniqueness?

(This is the only part of the body of the brief which is not testimony of Prof. Lejeune. Prof. Lejeune then discusses identical twinning in too great detail for this brief. Fraternal

twins are distinct individuals who have shared the same parents and time in the same womb. Identical twins after twinning are distinct individuals who are the only exceptions to the general rule that each human has a unique genetic code. Before twinning, the fertilized ovum which will divide into identical twins is an individual in the same sense that each one celled animal such as an amoeba is an individual before dividing.

The sperm and ovum are only discardable parts of human beings which when joined in fertilization become a new human individual.)

It must be asked whether common sense can recognize as such a tiny human being. If very early, only the scientist aided by refined techniques, can tell. If, let us say, at two months everybody

knows, and has known for thousands of years.

At two months of age, the human being is less than one thumb's length from the head to the rump. He would fit neatly into a nutshell, but everything is there--hands, feet, head, organs, brain--all are in place. If you look very closely, you would see the palm creases, and if you were a fortune teller, you could read the good adventure of that person. Looking still closer with a microscope, you could detect the fingerprints like Sherlock Holmes--every part is available to give him his national identity card!

The incredible Tom Thumb really does exist. Not the one of the fairy tale, but the one each of us has been.

Abortion is a normal process in imperfect mammals called marsupials. They

have a special pouch on the abdomen, conveniently accommodated to nurture the little. In the giant kangaroo, the abortion occurs at the same stage as the little Tom Thumb in man, and is roughly the same size. The aborted foetus then climbs into the fur of its mother to reach the pouch. The bewildering fact is that the kangaroo mother will let him do so, although she would not allow any other kind of animal to drop in! If the poor brain of a female kangaroo can recognize the tiny creature as a kangaroo being, there is no wonder that geneticists can safely assure you that Tom Thumb is indeed a true human being.

Now the question can be raised whether a developing human being should be protected even if he is affected by a disease.

To take a clear cut example let us study the case of mongolism. By puncture of the amniotic cavity in which the foetus is swimming, only cells can be taken so that chromosomal examination could be performed. If the extra chromosome is found, surely enough the child is affected by mongolism. Hence it has been proposed to eliminate him.

To be precise, such investigation can be made after the sixteenth week of pregnancy and the foetus aborted for such reason. In the United States, for example, foetuses aborted for that reason have been aged from eighteen to twenty-four weeks or sometimes up to thirty weeks.

But it should be kept in mind that looking at the chromosomes of a mongoloid foetus gives us two certainties: one, he is affected by the disease for he has an

extra chromosome and two, he is a human being as all the rest of his chromosomes demonstrate.

Hence the case is not to decide whether to eliminate a disease, but whether we eliminate a human being affected by the disease.

There is no difference whether the mental retardation is caused by a chromosomal accident, a virus infection, or a road accident.

We do our best to keep alive, assist and if possible cure patients suffering from the sequellae of a traffic accident including the sequellae of brain damage. We have to remember that the road of life is long and dangerous and from its beginning to its old age end in every case the duty of medicine is to strive towards healing and not towards killing.

From molecular genetics to

comparative reproduction, nature has taught us that from its very beginning the 'thing' we started with is a member of our kin. Being its own, human by its nature, never a tumor, never an amoeba, fish or quadruped, it is the same human being from fecundation to death. He will develop himself if the surrounding world is not too hostile. And the sole role of medicine is to protect the individual from accidents as much as possible during the long and dangerous road of life.

Q. From your evidence could we conclude that it is a scientific fact that individual life starts from the first moment of conception?

A. That's a very good question sir, and my answer is yes. And the reason is, if I do not say yes, I could not teach genetics. This question is never raised except when you want to discard an

embryo. Never does an expert on mice, cats or cattle ask himself at what moment does begin a mouse, or a cat or a cattle. All of them know that they do begin at fecundation and they teach that to their students. I just repeat that no people working with mice or with cattle or with any living system will wonder at what moment does occur the beginning of the cat, the beginning of the fly. Everybody knows that it is at fecundation. It is only when they question what kind of respect should they have for that tiny new being that they discuss beginning, but scientifically there are no discussions. The beginning is at the beginning. Nobody discusses the mousification of a mouse.

Q. Now, from the first time of fertilization or fecundation, Professor Lejeune, is it correct to say that the

child is a human being and remains a human being right until his birth?

A. As far as I can understand the use of the English word, saying he is a human being is a correct definition.

Q. So, there is no stage of pregnancy later than fecundation at which he suddenly becomes a human being?

A. Oh, that is very obvious sir, because if you start with the egg of a chimpanzee, if you don't look at the chromosomes, it is very much like, when it divides, the medilla of a human being. But everyone knows that a human being will never emerge from a chimpanzee being. We are at the very beginning either a chimp or a man and never can a chimp become a man or a man become a chimp.

Q. From the time of fecundation, is there any stage at which the new human

being, the new human life is a part of the mother?

A. I think not sir, because genetically it is distinct from the first moment of fecundation because half of the patrimony is carried by the sperm, that is the genes of the father, so the child has only one half in common with his mother and the combination, the genetic combination, the genetic makeup of the child is a new one which has never been produced in the history of humanity. That can be calculated easily. Then it cannot be considered at any time as a piece of the mother.

Q. So, from the moment of fecundation he is an entirely separate, individual, human life?

A. I would not say, it is not entirely separated. It is an entirely individual human life, which is

momentarily included inside the body of the mother. Not yet separated from the body of the mother, but I will make my answer precise. It is so obvious it is not a piece of the mother that you can make artificial fecundation and have the ovum separated from the body and the sperm separated from the body, have it fecundated, look at it for a few days so that it divides in a few cells, introduce it to a foster uterine mother and you get an entirely normal individual which has none of the genetic qualities of the mother because the mother in that case is only a foster mother. Here we have the finite and complete experimental proof that the entire process means a new life genetically entirely independent of the mother who can be either the true biological mother as is the best case for a human being, or eventually a foster

uterine mother.

Q. So, putting the matter in simple terms. Professor, would it be right to say that after fecundation the mother really provides the baby with a home until birth?

A. I would say a little more than a home, sir; I would say that she provides the home and the nurture, and I hope also the love.

Q. Just coming to this question of nurture, Professor, would you describe precisely how the mother nurtures the child while the child is in the uterus?

A. It's a very complex system but the first step is not in the hand of the mother. It is in the hand of the tiny human being. At around five days after fecundation, this microscopic human being, one millimeter in diameter, sends a chemical message which forces the

yellow corpus luteum inside the ovary to produce certain hormones so that the menses of the mother will be suppressed. It is in fact the baby which suppresses the menses of the mother and who takes over, if I can say, and it does to her what it likes, and you know it will do it again later. He is really capable of presiding over his own destiny. Now a little later he will bury himself inside the mucosa of the uterus and develop a kind of apparatus that I cannot better describe as a cosmonaut's suit which would make a little bulb which will have a little cord which will go to the big machine and the big machine would be able to take nutrients from the wall of the uterus through a special respiratory system. And it is the foetus which built this extra thing, this extra surrounding of him, this capsule, and the mother just

provides by her blood all the nutrients which can go through the membranes so that the baby can be fed, but the whole machinery, I would say the whole space capsule he has, is built by the foetus.

Q. So the foetus is very much in control of his environment?

A. Not entirely, but most of it.

Q. Does the foetus decide when he is going to be born?

A. As far as we know it seems so. Not in pathological cases, in which the mother has some difficulty, so that the pregnancy could end earlier, but during a normal pregnancy, it seems that the signal, the chemical signals of termination of pregnancy and of going in labour and normal delivery is given by the foetus.

Q. You mentioned that at a very early stage, the 'Tom Thumb' stage I

think you called it, the foetus is capable of movement. May I read you a description written by a doctor of a six week foetus and ask for your comments on that. The doctor who is writing this description describes how during an operation on the mother, he was handed the baby, in the baby's amniotic sac and the sac was intact, in one piece, and was transparent, he could see into it, and the doctor's description is this:

'Within the sac was a tiny, one-third inch human male, swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long tapering fingers, feet and toes. The baby was extremely alive and swam about the sac approximately one time per second with a natural swimmer's stroke.'

Does that, in your opinion, typify the sort of activity that a foetus would engage in at that age?

A. I would guess so. It seems a relevant description.

Q. Now, have you ever heard it suggested that a human conceptus is other than human?

A. No.

Q. You see, you say that it is not a chick or it's not an amoeba, it's not a tumour, it's not a fish or quadruped. I wondered whether somebody suggested that it was?

A. Yes sir, it has been suggested. It was an old theory of Mr. Haeckel, who was supposing that evolution was recorded more or less, inside the embryonic development, and he was supposing that at the beginning the human egg is an amoeba, and later the tiny embryo is a kind of

fish, later a kind of tadpole. The reason why I quoted that, sir, is that it is an old hypothesis which is entirely ruled out by the facts.

Q. Would you know of any scientist who would, today, dispute what you are saying in this regard?

A. No sir, I don't know.

Q. How long ago was it that that person put forward that hypothesis?

A. Around a hundred years ago, sir.

Q. You would have a number of professional colleagues who would not call a conceptus a human being, would you not?

A. It is hard to tell. If I was speaking of the conceptus as a baby, most of them would disagree, and I would myself disagree, but saying a human being, I don't see anybody disagreeing on that.

Q. I am going to suggest to you Professor, that no one would disagree that the conceptus is human. There is no dispute on this at all, but there are valid disputes or disagreements by intelligent and respected people in the scientific world and the medical world who say it is human but we do not call it a human being. Have you colleagues that would fall into such a group?

A. No sir, because I have seen yet nobody saying that a being is not a being.

Q. I haven't heard anyone say that either, Professor, but I am suggesting to you that you may well have colleagues who accept and it would be foolish of course to deny, that the conceptus or the zygote or the embryo, they accept that this is human, and that if left to develop it will become a human being, but they do

not call it a human being at that stage?

A. Oh, that can happen that some people do not call something the way they should. That's very possible sir. I would not argue that.

Q. Yes. But you see, you are saying what they should do.

A. I am very simple-minded, sir. I want to make clear that for me a living system which is developing by its own virtues corresponds to the word 'being'. There is no other word. In French we would say en etre, it means the same thing. Now, if that being is human and if you and the person you are quoting do agree on that, I cannot understand why they cannot agree that this being, being human, is a human being. I am sorry, but it seems to me to be just a matter of knowing what we say. Now, if you want to tell me that some people do refrain from

using that definition, which is a scientific one, because of the implication they see in those words, that may be done, but it's very far away from scientific description. '

Q. You have just used the term that the expression 'human being' is a scientific description?

A. Yes sir.

Q. Do all scientists agree with you in that statement?

A. That a human being is a scientific description? Yes, sir.

Q. That the term 'human being' is a scientific description of a conceptus?

A. Yes, sir. Of a human conceptus.

Q. Yes, of a human conceptus. You say all scientists agree with you on that, do they?

A. I would say that all of them would agree on the matter. Whether they

would pronounce the word as you said is another point. But on the matter they would agree the thing is a being, the thing is human. Sure.

Q. Do I understand you to say that scientifically, there is human life at each stage before birth?

A. Oh, not doubt sir.

Q. I take it that you have read a great deal of the literature on the topics about which you have given evidence, in French and in English?

A. Yes.

Q. In any other language?

A. German, Italian, Spanish, Danish.

Q. Now, the thing, or the conceptus, at the first cell stage is not a being in the same way as there is a being created subsequently in the womb. I suggest to you that when the cell divides it becomes a zygote?

A. It is a zygote as soon as it has become fecundated.

Q. If I can take one of these now while it occurs to me, Professor. Professor Veale will describe the contents of a hen egg as a 'chick embryo'. Would you dispute that description of the contents of a fertilized hen egg?

A. Yes, I would accept it as a chick embryo, and if you were asking me for more precision I would tell you that it is a chicken being.

Q. Now whether you describe it as a chick embryo or a chicken being, you are

in fact describing the same thing, are you not?

A. No sir. While I am speaking about a chicken embryo, I am speaking of a being who has a given age. When I am speaking about a chicken beirg it can have any age. It can be very old. It can be not puber. It can be a tiny chicken or it can be inside the egg. It is not the same thing. In humans I would say a human being for a school boy and for a grown up. But if you ask me whether I suppose a grown up is the same thing as a school boy I would say no. But I would say both of them are human beings.

Q. Professor, would you care to give us your definition first of conceptus. We talked this morning about conceptus, about foetus, about embryo?

A. What we call a conceptus, broadly speaking, is the result of fecundation,

so that all necessary information and all sufficient information is gathered, so that this being can be defined as belonging to such or such kind and being a full member of it, genetically speaking.

Now, when we speak about embryo, it's a little later. It's a matter of age. It has aged and developed itself into the special form we call embryo. When he is a little more grown, after two months, we call him a foetus and when he is just born we call him a newborn. When he goes to school we call him a school boy and so on. Those are stages of development of a certain person.

Q. The one question which falls into this section I suppose is the definition of a human being and I am not sure whether we have a simple, precise definition of a human being as Professor

Lejeune would define a human being. Would you give us a definition of a human being?

A. A human being is a member of our species.

Q. And you would not want to define it any more than that?

A. I am a biologist sir. If I was asked about another species I would give the same answer. Changing the species, indeed.

Q. Professor, before the adjournment we were starting a discussion about a zygote and I think we have established that you would call the conceptus or the single cell formed on fecundation a human being. Accepting your definition for the moment I suggest to you that the conceptus is more than a human being?

A. No. It is a given age of a human being.

Q. I suggest to you that the conceptus or the zygote divides and part of it becomes a placenta, part of it becomes an umbilical cord and part becomes an embryo.

A. That is correct.

Q. Would you call the placenta a human being?

A. I would call it a part of a human being, one of the things a human being is able to make. Exactly as I would call a nail part of a human being and not a human being itself.

Q. Is the placenta part of the human being which is the embryo or part of the human being which is the mother?

A. The placenta is made by the embryo as you know so it cannot be part of the mother.

Q. The placenta is part of the human being that is the embryo?

A. That is one of the parts of the human being like your hair or part of your being, but you cannot be reduced to your hair.

Q. So if you were to describe the human being while it is a foetus you might have to call it the embryo plus the umbilical cord plus the placenta and that constitutes a human being?

A. No, that is..let me think about it. Your question is a little complicated for me...I would consider that the human being is the foetus and that the surroundings he has produced are part of him. Yes, I would say, I do not know the word, a 'disposable' part.

Q. Is trisomy likely to occur in cases of women over a particular age?

A. While the risk of chromosomal disease, especially for trisomy 21, is increased with the aging of the mother,

that is, it is increasing exponentially with the aging, to give an idea, the risk, at the best age for reproduction which is roughly 25, between 23 and 26, the risk is one in 2000 and at the reproductive time around 45 years old the risk would go up to one% maybe 2%.

Q. Moving on now, in the hospital in which you are in charge of the department, I take it that some of the children at least under your control, are suffering from Mongolism or Down's Syndrome?

A. Yes.

Q. Can you tell us anything about the attitude, the happiness, or the quality of life of the children themselves?

A. If they are kept in their family and if they are loved by their parents, I would say they are surely among the

happiest people in the world. They do not worry about anything. They are very easy going, and as far as the child is concerned, I would say he is very happy.

Q. I take it that you could not yourself be party to a termination because you believe that it is the killing of a human being?

A. It is not I believe, sir. It is I am sure, and nobody discusses that when you have a baby at around thirty, perhaps 25 weeks, at that size if you laid him without killing outside the womb, everybody looking at the fellow would not ask himself has it begun to be a human being. Everybody would know that it was a tiny human being dying on the operating table. That is not a belief, sir it's an efficient knowledge.

Q. And you say that, because of the increased knowledge which you have, and

the accepted knowledge that enables you to describe the embryo, and I take your definition of embryo as a human being, that this involves the killing of a human being and because of that fact, you could not be party to it, is that right?

A. Oh, that is right sir. I don't measure the humanness with kilogrammes, with centimetres, but just as the fact they are a member of our species.

Q. Now do you accept that other people can genuinely say that they do not regard the embryo as a human being?

A. Oh, sir, if they say that they do not, then probably they do not. But it is not a reason for me to believe they are right.

Q. No, I am not asking you to believe that they are right. I am asking you do you accept that they can reach this decision in good faith?

A. I don't know that, sir. Who can be inside the brain and inside the heart of the people. We are speaking about scientific fact. It is easy that we get clear with that. Now, if you ask me whether somebody, thinking in another way than I, is bona fide, you are asking me to read in her heart and I cannot.

Q. So that you would not want to pass any judgment on a person who says that in good faith they can terminate a pregnancy but who would also say in good faith that I could not possibly kill another human being?

A. I would consider, sir, that they are making a scientific mistake.

Q. Are they making a moral mistake?

A. I have said scientific mistake.

Q. No, I am asking you, would you say they are making a moral mistake?

A. Now, if we are going to speak

about moral, you would first tell me whether it is moral to eliminate a member of our species, and then I would answer you.

Q. I understand that one of the possibilities of conception is what is called a hydatiforme mole.

A. Oh, no sir. Because it is related with a disease which is called mole hydatiforme, and it is very true that in some cases after fecundation some disease, we do not know really the mechanism of which, transforms the conceptus into a mass of vesicles which can nowhere get any human form. That's very true. It's very rare, but we have to know that this can occur on normal babies so that only vesicles develop on the placenta. Then I would say that an early mole is a process which can kill a human conceptus but not change the nature of

the tiny dead-body. Now, when it was said in the paragraph you quoted that sometimes it happens that the conceptus will not go to term even if undisturbed, that's very true and it does represent maybe one third of all the pregnancies. But I cannot agree that it has no statistical implication. It means that any conceptus has at least two chances in three to survive, but then I would precisely put the point that does not give us any reason to say that the one which eventually would be naturally aborted was not a human being. It's the same thing when you are in front of a corpse. It's not because it is dead that you can say it was not a human being. That has no significance. And I would say that really if abortion sometimes eliminates an already dead human being, that can occur, but statistically

speaking, that is not the prospect of abortion, because if it was supposed that the baby would die by itself nobody would take care about using any process to kill him. Then I think this kind of argument, that a human being sometimes does die in utero is not relevant to the discussion. It is not because sometimes when you are in the woods one of the fellows there could be already dead that you have to try to shoot him.

Q. So you are quite prepared and would want to describe the conceptus that is killed by the development into a hydatiforme mole or that is spontaneously aborted, at whatever stage, you would still want to call that conceptus a human being?

A. I would say it has been a human being, but not for long, early killed, early dead.

CONCLUSION

For the reasons submitted herein, the Court should hold that the preborn human is an individual and accordingly, should be declared a person for purposes of the 14th Amendment of the United States Constitution pursuant to the definition set forth in Title 1 United States Code Section 1.

Respectfully submitted,

ROBERT L SASSONE

Attorney for Amicus Curiae

NO. 88-605
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM L WEBSTER, ET AL., APPELLANTS
V
REPRODUCTIVE HEALTH SERVICES, ET AL.
RESPONDENTS

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California } ss.
City of Santa Ana, County of Orange }

Robert L. Sassone, being first duly sworn on his oath deposes and says:

Robert L. Sassone is a member of the Bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on February 23, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET A.L., APPELLANTS

v.

Reproductive Health Services, ET A.L.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AUSTIN VAUGHN AND CRUSADE FOR LIFE, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

AUSTIN VAUGHN, a Roman Catholic bishop from New York, and CRUSADE FOR LIFE, INC., a Californis 501c(3) educational and charitable corporation hereby respectfully move for leave to file a brief amicus curiae in the present case. Requested consent of respondent has not been obtained. Thomas M Blumenthal of respondent stated to attorney for amicus that an agreement of the parties ensured consent if written consent of one party is obtained, so perhaps consent of respondent has just been delayed.

INTEREST OF AMICI CURIAE

Bishop Vaughn has repeatedly arrested and jailed for trespassing at abortion clinics. Crusade of Life, Inc., Donald S Smith founder and chairman, Beverly

Cielnicki, president, is a US and international Protestant Evangelical 501 (c)(3) right to life organization. It is probably the oldest and is one of the largest Protestant right to life organizations. Amici provide a short summary of early Christian attitudes toward abortion and show why these attitudes should be considered.

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17. Clyde Pharr, "The Interdiction of Magic in Roman Law" 63 Transactions and Proceedings of the American Philological Association 272-73 (1932)	4
18. Plutarch, Romulus 22	5
19. R H Charles, 2 A Critical Commentary and Exegesis of Revelations 178 (1920)	6
20. Theodore Camelot, "Didache," 3 Lexikon fur Theologie and Kirche 369 (1959) and Jean-Paul Avdet, "La Didache: Instructions des Apotres" 197 (Paris, 1958)	7
21. Montagne Rhodes James (1953) "Apocryphal New Testament" Oxford revEd)	10, 11
23. Pedagogus 2. 10. 96. 1, "Die griechischen christlichen Schriftsteller der ersten drei Jahrundert"	12, 22
24. "Embassy for the Christians, Patrologia Graeca" 6.919	14, 32, 33, 34
25. "Corpus Scriptorum Ecclesiasticorum Latinorum" (CSEL)	15, 25, 26, 27, 29, 30, 31
26. T Mommsen, Romisches Strafrecht 613 (1899)	16
27. Apologeticum ad nationes"	17
28. "De Anima" ed. J H Waszink 25.5-6 (1947)	20

Authority	Page
29. Franz Dolger, "Antike und Christendum" vol. 4 at 46	20
31. Cyprian, "Epistle"	22
32. J D Mansi, "Sacrorum conciliorum nova et amplissima collectio"	24
34. "Didiscalia et constitutiones apostolorum 7.3.2, ed Francis X Funk (Paderborn, 1905)	25
37. Augustine "De origine animae" 4.4 (PL 44.527);	26
37. Jerome, "On Ecclesiastes" 2.5	26
40. Palomo Gonzales "El Aborto en San Augustino	29
42. Seneca: "Fragmenta"	32
48. Roger John Huser, "The Crime of Abortion in Canon Law" (Washington, 1942)	36, 37 33-39
50. "Womanly Questions, Die irische Kanonsammlung", F W H Wasserscheben (Leipzig, 1885)	37
51. John T Noonan, Jr, "Contraception" Cambridge, Mass. 1965	37
52. Burchard of Worms Interrogatory"Decretum" 19-4, PL 140.972	37
53. Hans Kelsen, The Pure Theory of Law, trans, Max Knight from 2d ed. (Berkely: U of California Press, 1967)	44

SUMMARY

The framers of the Constitution, Bill of Rights and 14th Amendment were not only men. They were for the most part of that class of men called "Christian men ". In that part of the Douglas papers relating to the abortion decisions, it is obvious this is overlooked. The attitude of the Justices was Kelsen like. They ignored both the possibility of God existing and the certainty that the possibility of God existing colored the intent of the framers of the Constitution, Bill of Rights and 14th Amendment.

Accordingly, the first 38 pages of this brief comprise a quote from John T Noonan, Jr. "The Morality of Abortion" Harvard University Press, Cambridge Mass. (1970, 1972), (according to a professor of such history, the best short summary of early Christian thought

on early Christian abortion teaching), pages 7-19. Noonan was a professor of Law at the U of California when he wrote and is now a Federal judge.

The balance of the brief discusses the depth of Christianity as many of the framers would have known it and believed it, a belief which may still be held by most and color the opinions of many Americans, even many of those Americans who no longer claim or never claimed to be Christians. It is hoped will help the Court understand why many of the framers would not have intended to frame a Constitution, Bill of Rights or later a 14th Amendment which might make unconstitutional a law penalizing abortion, characterized by Pope and many Protestants as an "unspeakable crime". (language more extreme than that used to describe murder because of the innocence and vulnerability of the victim).

The New Testament and the Early Community

The specific Christian teaching on abortion developed in a theological context in which the commands of the Old Testament to love God with all your heart (Deut. 6:5) and to love your neighbor as yourself (Lev. 19:18) were singled out as the two great commandments on which depended "the whole law and the prophets" (Matt. 22:40). The standard for fulfillment of these commandments was set in terms of the sacrifice of man's life for another (John 15:13) and embodied in the self-sacrifice of Jesus. Jesus told the disciples, "This is my commandment, that you love one another as I have loved you" (John 15:32). In terms of his example, the commandment was "a new commandment" (John 13:34). The

Christian valuation of life was made in view of this commandment of love.

The place of children in the Christian community was broadly established in the words of the Lord, "Suffer little children (paidia) and do not prevent them from coming to me" (Matt. 19:14; Mark 10:14; Luke 18:16). In Luke 18:15, the children the Lord welcomed were expressly described as "newborn babies" (brephe). The ethos of the infancy narratives reflected a high interest in infant and fetal life. The infanticide practiced by Herod and its violent threat to the life of Jesus formed the introduction to the life of the Messiah (Matt. 2:1-18). Mary was described as having in her womb what was "from the Holy Spirit" (Matt. 1:18). In Luke she was greeted in pregnancy by Elizabeth "as the mother of my Lord,"

and the "fruit" of her womb was then described as "blessed" (Luke 1:42). The infant (brephos) in Elizabeth's womb "leaps" when Elizabeth is greeted by Mary (Luke 1:40). The interest in the behavior of this holy but not miraculous child of Elizabeth and the interest in the life in Mary's womb reflected the valuations of a community sensitive to the living character of the embryo, and the Gospel accounts must in turn have enhanced that sensitivity. What was unspoken was in its way as important as what was said in reflecting community valuations, attitudes, expectations. It was not necessary in this community to say that a man who protected the state by killing infants was not a good man. It was necessary to say that the first reaction of Joseph to Mary's

unexplained pregnancy was "to put her away" (Matt. 2:19); it was not necessary to say that his first thought was not to procure an abortion.

At the level of specific moral rule, the Apostle Paul denounced the foolish carnality of the Christian community in Galatia (Gal. 3:1-6), reminded them that there was a law which was fulfilled in one word, "Love your neighbor as yourself" (5:14), and set out specific types of behavior which violated this law of love (5:19-21). The works of the flesh included not only "lecheries" and "wraths" but pharmakeia (5:20). Pharmakeia is a term best translated as "medicine" in the sense in which a North American Indian medicine man makes medicine.[17] It is

17. See Clyde Pharr, "The Interdiction of Magic in Roman Law," 63

the employment of drugs with occult properties for a variety of purposes, including, in particular, contraception or abortion.[18] Paul's usage here cannot be restricted to abortion, but the term he chose is comprehensive enough to include the use of abortifacient drugs. The association of these drugs with sins of lechery and wrath was indeed a constant aspect of the Christian approach to pharmakeia (the practice of "medicine") and pharmaka (the drugs employed).

The same association and same comprehensive use of the term appeared in the Apocalypse. The sinners who were

Transactions and Proceedings of the American Philological Association 272-73 (1932). The word is regularly mistranslated as "sorcery" or "witchcraft" in English Bibles.

18. Plutarch, Romulus 22, in Parallel Lives, trans. B. Perrin (New York, 1914-1926).

not saved "did not repent of their homicides nor their medicine (pharmaka) nor their fornications nor their thefts" (9:21). The pharmakai, the medicine men, were condemned by the Lord with the homicides and the fornicators (21:8). Those outside the heavenly city were "the dogs and the medicine-men and the fornicators and the homicides and the idolaters and everyone who loves and practices falsehood" (22:15). [19]

That abortion could have been specifically in the mind of the authors of Galatians and the Apocalypse, and that it was specifically dealt with by the early Christian communities, is

19. "Dogs" may mean simply "heathen," but it was also applied to the sodomitic priests who served Astarte. See R. H. Charles, 2 A Critical Commentary and Exegesis of Revelations 178 (1920).

established by several contemporary writings. The most important is the Didache, or Teaching of the Twelve Apostles. This ancient and authoritative statement of Christian principles in Syria was composed no later than A.D. 100 and may well have been written much earlier. [20] Here a list of precepts was given for the instruction of the Christian: "You shall not kill. You shall not commit adultery. You shall not corrupt boys. You shall not fornicate. You shall not steal. You shall not make magic. You shall not practice medicine

20. The later date is preferred by Theodore Camelot, "Didache," 3 Lexikon fur Theologie and Kirche 369 (1959). An early date, connecting the work with an apostolic mission at Antioch, is preferred by the author of a recent detailed study, Jean-Paul Avdet, La Didache: Instructions des Apotres 197 (Paris, 1958).

(pharmakeia). You shall not slay the child by abortions (phthora). You shall not kill what is generated. You shall not desire your neighbor's wife" (Didache 2.2). In this list of related sins, one sentence expressly prohibited abortifacients. The commands on either side of this sentence dealt with other aspects of the same sin, as the commandments on sexual sins complemented each other. Abortion was ranked as a principle sin included with those sins expressly named by the Ten Commandments.

In the kernal of the Didache, which is probably its oldest part, the Two Ways, the Way of Life was contrasted with the Way of Death. The latter way was followed by sinners who included those who practice "medicine" and those who are "killers of the

child, who abort the mold (plasma) of God." Again there was a complementary character to the acts denounced: pharmakeia, killing of the child, and abortion. The offense of abortion was seen as an offense against God because it attacked what He had made. It was associated with the sinful use of drugs to prevent birth and with the slaying of the child. It may be that both abortion of the mold and killing of the child were mentioned so that any distinction between formed and unformed fetuses would not provide an escape.

The somewhat later Epistle of Barnabas was based on the Didache and provided a commentary by its paraphrases and additons. It put the commandment on abortion in the Didache 2.2 in this framework: "You shall love your neighbor more than than your own

life. You shall not slay the child by abortions. You shall not kill what is generated" (Barnabas 19.5). The proscription was thus related to the love of neighbor. The killing of the fetus to save one's own life was implicitly rejected.

A third writing is of special relevance to the teaching of the canonical Apocalypse. This is the Acocalype of Peter, a species of apocalyptic literature which "ranked next in popularity and probably in date to the canonical Apocalypse of St. John."[21] Here there was a pit of torment for sinners, among them women "who have caused their children to be born untimely and have corrupted the

21. Montague Rhodes James, The Apocryphal New Testament 505 (Oxford, rev. ed. 1953).

work of God who created them." The phrasing was close to the "abort the mold of God" of the Way of Death in the Didache. Some of these women had conceived the children in fornication; others had husbands who were punished with them because "they forsook the commandments of God and slew their children."[22] The offense described was killing what God had made, an offense heightened because it was mothers who had killed their own offspring.

The Fathers

Later in the second century the writing of the "most learned" of the

22. Id. at 510 (James's translation from the Ethiopic text). In the same style the much later Apocalypse of Paul condemns women who "defiled the creation of God when they brought forth children from the womb," i.e., by abortion (id. at 545).

Fathers, Clement of Alexandria, also contained a statement on abortion. In the Pedagogus, Clement, the founder of the first school of Christian theology, sought to present Christ as the supreme educator for Christians and to provide teaching on Christian morality to the turbulent Christian community at Alexandria. He declared that Christians do not, in order to hide their fornication, "take away human nature, which is generated from the providence of God, by hastening abortions and applying abortifacient drugs (phthoriois pharmakois) to destroy utterly the embryo and, with it, the love of man."[23] Here there is the same nexus of ideas found in the first

23. Pedagogus 2.10.96.1, Die grieschen christlichen Schriftsteller der ersten drei Jahrhundert (hereafter GCS).

century. Drugs to destroy offspring are associated with lechery. Their use is condemned not merely because they furnish an aid to sexual sin or incorporate magic, but because they offend God in destroying what He has shaped and because they violate the love of neighbor in destroying the fetus.

The foregoing documents were all addressed to Christian communities containing converts and were directed to impressing the new Christian morality upon them. Other evidence of Christian belief is furnished by the Christian claims addressed to the pagans. The contention was made that Christians are "homicides or devourers of men." The second-century philosopher and Christian convert Athenagoras answered this charge in his apologia

for Christianity to the emperor: "How can we kill a man when we are those who say that all who use abortifacients are homicides and will account to God for their abortions as for the killing of men. For the fetus in the womb is not an animal, and it is God's providence that he exist."[24] The dedicated Christian defense of life at the embryonic stage seemed to Athenagoras the surest proof of the Christian reverence for life.

In a similar vein the lawyer Minucius Felix repelled the charge of infanticide in his apologia (c. 190-200): Who would believe that the tender bodies of infants would be destroyed? "No one would believe it unless he dared it." In charging this crime the

24. Embassy for the Christians, Patrologia Graeca 6. 919 (hereafter PG).

pagans reveal their own conduct. They expose their unwanted children to wild beasts and birds or strangle them. "By drinks of drugs they extinguish in their viscera the beginning of a man-to-be and, before they bear, commit parricide." These things are derived from their gods, for Saturn devoured his own children.[25] The use of the term parricidium is especially striking here. Roman law had no generic term for the "killing of a man," and so Minucius used the closest legal term in use, "parricide," the killing of a near relation, designating a crime punished with great severity by the law. It conveyed the idea of heinous killing at the same time that Minucius expanded its meaning far beyond its recognized

25. Octavius, CSEL 2. 43.

legal meaning to encompass abortion.[26] In describing the pagans' practice, he expressed his own judgment that it was wrong. At the same time he made the suggestion, of much psychological interest, that the Greek myth of a god devouring his children was related to abortion.

In a parallel passage Tertullian in his apologia to the pagans dismissed the charge of infanticide practiced by Christians and asserted: "For us, indeed, as homicide is forbidden, it is not lawful to destroy what is conceived in the womb while the blood is still being formed into a man. To prevent being born is to accelerate homicide, nor does it make a difference whether

26. On the meaning of parricidium see T. Mommsen, Romisches Strafrecht 613 (1899).

you snatch away a soul which is born or destroy one being born. He who is man-to-be is man, as all fruit is now in the seed."[27] The substance is the same as the Two Ways: the mold in the womb may not be destroyed. The offense is expressed as the killing of a potential human, an act which seems forbidden by the commandment, "You

27. Apologeticum ad nationes 1.15. The relation of Tertullian to Minucius is discussed in Marti Sordi, "L' apologia del martire romano Apollonio come fonte dell' Apologeticum di Tertulliano e i rapporti fra Tertulliano e Minucio," 18 Rivesta di storia della Chiesa in Italia 169-188 (1964). Another example of apologetical criticism of pagan inhumanity toward children is provided by Lactantius, Divinarum institutionum 6. His strong terms seem principally aimed at infanticide and the abandonment of children to beasts, but may include abortion and reflect the teaching of the Didache when he says that "with wicked hands they corrupt the works of God." The central thought is, "It is always wrong to kill a man; this animal God willed to be sacred," Patrologia latina 6, 707-708 (hereafter PL).

shall not kill."

In his treatise on ensoulment Tertullian appealed to a mother's experience of the being within her to establish that a living and therefore ensouled being existed in pregnancy: "In this matter, there is no more fitting teacher, judge, witness, than one of this sex. Reply, you mothers, you bearers of children, let the sterile and the masculine be silent, the truth of your nature is sought." He continued the argument by noting that dead embryos were extracted from a womb and asked:

How are they dead unless they were first alive? But still in the womb an infant by necessary cruelty is killed when lying twisted at the womb's mouth he prevents birth and is a matricide unless he dies. Therefore there is

among the arms of physicians an instrument by which with a rotary movement the genital parts are first opened, then with a cervical instrument the interior members are slaughtered with careful judgment by a blunt barb, so that the whole criminal deed is extracted with a violent delivery. There is also the bronze needle by which the throat-cutting is carried out by a robbery in the dark; this instrument is called an embryo--knife from its function of infanticide, as it is deadly for the living infant. This Hippocrates taught, and Asclepiades, and Erasistratus and Herophilus, the dissecter of adults, and the milder Soranos himself,--all of them certain that a living being had been conceived and so deploring the most unhappy infancy of one of this kind who had

first to be killed lest a live woman be rent apart. Of this necessity of crime, Hicesius, I believe, did not doubt, as he added souls to those being born from blows of cold air, because the word itself for "soul" among the Greek relates to such cooling. [28]

Tertullian is here not making direct moral judgments, as he is focusing on the argument that even this kind of fetus has been alive. But the suggestion of Franz Dolger that this passage accepts therapeutic abortion is clearly wrong. [29] What the physicians find necessary Tertullian finds a

28. De anima, ed. J. H. Waszink, 25.5-6 (1947). I have adopted Waszink's learned and helpful suggestions on translation.

29. Franz Dolger, Antike und Christentum, vol. 4, at 46. See the extended refutation of Dolger by Constancio Palomo Gonzalez, El aborto en San Augustino at 221-228 (Salamanca, 1959).

crime, and he uses the strongest terms of vituperation to stigmatize it--"slaughtered" (caeduntur), "victim of a crime" (facinus), "throat-cutting" (iugulatio, a fierce, vulgar term), "infanticide" (infanticidium), "crime" (scelus). His harsh and sarcastic rhetoric deliberately contracts the "careful judgment" of the physician with the "violent delivery" effected like "a robbery in the dark."

In addition to its expression in formal moral teaching and apologias to the gentiles, the Christian belief was expressed in the course of controvery within the Church. Abortior was a serious charge in ecclesiastical disputes. When the ex-slave Calixtus, bishop of Rome, permitted Christian women to marry their slaves though the marriages were unrecognized by Roman

law, some women did not want to draw attention to their union, and used drugs to produce sterility or "bound themselves tightly to expel a fetus already engendered." According to Calixtus' critic and bitter rival, Hippolytus, this conduct was homicide, and Calixtus was responsible for encouraging it. [30] When Novatian broke from Rome because its bishop accepted the repentance of apostates, his foe Cyprian wrote of him that he was himself guilty of serious sin: he had struck his pregnant wife to cause an abortion. He has "committed parricide"; "he has killed a son who was being born." [31] A lawyer like Minucius, Cyprian used the legal term

30. Hippolytus, Elenchos 9.12.25, GCS 26.250.

31. Cyprian, Epistle 52, CSEL 3.619.

"parricide." The charge of a crime inexpiable in life was no doubt especially effective against a man who denied others an opportunity to repent.

As the Church emerged as a legal religion and a social force in the fourth century, the sentiments on abortion so uniformly expressed in the first two centuries of Christian life took the form of legislation. There already existed a rule excluding from the Church for life women who conceived in fornication and committed an abortion. The Council of Ancyra in 314, a gathering of a dozen Eastern bishops representing Syria and Asia Minor, denounced such women, who "slay what is generated and work to destroy it with abortifacients"; but "more humanely" the Council reduced their penance to

ten years. [32] The Council retained the life penance for voluntary homicide, so that the reduction marked a recognition of mitigating circumstances in the character of the crime, while its gravity was indicated by the still severe penalty imposed. In the West, in some contrast, the movement was toward greater sanctions. At Elvira on the Iberian peninsula, a council held in 305 excommunicated women committing abortion after adultery and declared that they were not to be readmitted even at the point of death. [33]

These laws, like the earlier condemnations, made no distinction between the formed and unformed fetus.

32. Council of Ancyra, canon 21, J. D. Mansi, Sacrorum conciliorum nova et amplissima collectio (hereafter Mansi) 2. 5. 19.

33. Council of Elvira, canon 53, Mansi 2. 16.

In the course of the fourth century this distinction, based for Christians on the Septuagint translation of Exod. 21: 22, became a focus for analysis. In the East the Apostolic Constitutions, an apocryphal, set of apostolic canons from Syria, condemned the killing of a "formed fetus." [34] In the West, St. Jerome explained to a female correspondent, Algasia, that "seeds are gradually formed in the uterus, and it is not reputed homicide until the scattered elements received their appearance and members." [35] Augustine, commenting on a Latin translation from the Septuagint, observed that at Exod. 21 the question of ensoulment was usually raised, and "because the great

34. Didiscalia et constitutiones apostolorum 7. 3. 2, ed. Francis X. Funk (Paderborn, 1905).

35. Epistles 121. 4, CSEL 56. 16.

question about the soul is not to be hastily decided by unargued and rash judgment, the law does not provide that the act pertains to homicide, for there cannot yet be said to be a live soul in a body that lacks sensation when it is not formed in flesh and so not yet endowed with sense."[36] This was a distinction accepted out of a cautious agnosticism on ensoulment; both Jerome and Augustine affirmed that, in fact, man did not know when the rational soul was given by God.[37]

As far as Jerome and Augustine were concerned, the theoretical distinction led to no difference in

36. On Exodus 21.80, CSEL 28.147. The old Latin text spoke of "aborting an immature one," A. E. Brooke and Norman McLean, The Old Testament in Greek (1909)

37. Augustine, De origine animae 4.4 (PL 44.527); Jerome, On Ecclesiastes 2.5.

moral disapprobation. They simply adopted language broad enough to condemn both contraceptive acts and acts destroying the fetus after conception. Jerome wrote to his star pupil Eustochium on how to preserve her virginity among the temptations to adolescents in Rome. He denounced those Christian girls who, saying "all things are pure to the pure," had affairs and sought to prevent or conceal pregnancy. Some "will drink sterility and kill a man not yet born". Others will use potions to commit abortions. These are parricides, and as sometimes the abortifacients are fatal to them, too, they go to judgment thrice condemned as adulteresses, killers of their children, and killers of themselves.[38]

38. Jerome, Epistle 22, To Eustochium 13, CSEL 54.160-61.

Here, in the language of Minucius, abortion became parricide, and the age of the fetus was unmentioned.

Augustine in his anti-Pelagian work, Marriage and Concupiscence, analyzed abortion with his usual attention to psychology. Using terms that seem to anticipate modern analyses of sadism, he described it as the work of minds characterized by "lustful cruelty" or "cruel lust." Speaking of the married who avoided offspring, he declared, "Sometimes (Aliquando) this lustful cruelty or cruel lust comes to this that they even procure poisons of sterility, and if these do not work, they extinguish and destroy the fetus in some way in the womb, preferring that their offspring die before it lives, or if it was already alive in the womb, to kill it before it was

born. Assuredly if both husband and wife are like this, they are not married, and if they were like this from the beginning, they come together not joined in matrimony but seduction. If both are not like this, I dare to say that either the wife is in a fashion the harlot of her husband, or he is an adulter with his own wife."[39] Augustine thus condemned three kinds of acts: contraception, the killing of the fetus before it is formed or "lives," and the killing of the live fetus. The analysis was a new approach in treating each of these acts as a sin against marriage.[40]

39. Augustine, De nuptiis et concupiscentia 1.15.17, CSEL 42.229-30.

40. In his El aborto en San Augustino, Constancio Palomo Gonzalez states that Augustine considered abortion to be homicide and entitles one section of this book "Abortion, A Grave Sin of Homicide According to St. Augustine." However, he cites no text where Augustine so teaches. True, Augustine holds every killing of a man to be homicide, as

The preservation of life within the womb also became a reason for restricting what St. Paul in the First Epistle to the Corinthians had set outin terms of justice, the right to

Gonzalez argues at 217. True, Augustine speaks of the infusion of the soul in the uterus by God. True, for Augustine the distinction between formed and unformed, which he accepted from the Septuagint, was not the same as a distinction between souled and soulless (Gonzalez at 141-142). Speaking of embryos "dead" in the womb, which had to be extracted to prevent the death of the mother, Augustine said he did not dare deny that they had lived (Enchiridion c. 86, PL 40.272). In The City of God, Augustine declared he found nothing relevant to the resurrection of the dead which did not relate to "those of all kinds who have died in their mothers' wombs" (De civitate Dei 12.13). This statement, Gonzalez well notes, supposes the belief that the fetus was ensouled at all stages. But while it may be argued from this belief that Augustine should have called abortion homicide, he did not do so, and his reservation can only reflect his uncertainty about the time of ensoulment.

Stronger language is found in Augustine's old teacher, At. Ambrose, who had denounced the use of a "parricidal potion" of married mothers "to take away life before it is transmitted," Hexameron 5.18.58, CSEL 32.184. Ambrose, while speaking thus of parricide, had emphasized in particular the cruelty of mothers in destroying their children and invoked the "piety" of birds to their young to rebuke them.

intercourse within marriage (1 Cor. 7:3-5). Led by Stoic thought to restrict intercourse to procreative purpose along, many Christian writers prohibited the necessarily nonprocreative intercourse of the pregnant. But an additional reason for the prohibition was found in the danger to the embryo that such intercourse was believed to create. Commenting on the pregnancy of Elizabeth in the Gospel of Luke, Ambrose stated the belief that intercourse in pregnancy "contaminated" the offspring.[41] Even more forcefully, Jerome incorporated a quotation from Seneca vigorously attacking intercourse from "affection," not "judgment," and urging restraint at least in pregnancy, so as not to

41. Expositio evangelii secundum Lucam 1-43-45, CSEL 32.38-39.

"destroy the offspring."[42] Thus the risk of abortion became a reason for limiting what St. Paul had described as duty.

The principal texts quoted from Jerome and Augustine were to be the loci classici on abortion in the West. In the East, St. John Chrysostom preached against abortion as encouraged by married men engaged in intercourse with prostitutes: "You do not let a harlot remain only a harlot but make her a murderess as well."[43] In the most definitive statement by a leader of the Greek Christian community, St.

42. Contra Jovinianum 1.49, in Seneca: Fragmenta n. 84, ed. F. G. Haase (Leipzig, 1897). In its original context in Seneca, the injunction not to destroy the offspring could be taken as a warning against abortion of any kind.

43. Homily 24 on the Epistle to the Romans, PG 60.626.27.

Basil of Cappadocia set out in a letter to Amphilocius the standards of the Church as he knew them in the late fourth century. The distinction founded on the Septuagint was rejected: "The hair-splitting difference between formed and unformed makes no-difference to us." "Whoever deliberately commit abortion are subject to the penalty for homicide."[44] The penance, however, was that set by Ancyra: ten years. Unlike Ancyra, Basil did not restrict his condemnation to women who conceived in fornication. Like Jerome he noted that often the potions killed the mothers, too. Like the Didache, he made his condemnation repetitiously: In general, sodomists, homicides, medicine men (pharmakoi), adulterers, and

44. Letters 188, PG 32.672.

idolaters were condemned together: [45] specifically, those were classed as homicides who "gave abortifacient drugs" (amblothridia pharmaka) and those who "receive what entraps the embryo." [46] Basil's comprehensive summing up on abortion in a document later characterized as "The Canonical Letter" was to constitute the fundamental norm on this behavior for the Greek Church. [47]

By 450 the teaching on abortion East and West had been set out for four centuries with clarity and substantial consistency. There was a distinction accepted by some as to the unformed embryo, some consequent variation in

45. Id. at 674.
46. Id. at 678.
47. On the authority of "The Canonical Letter," see J. Gribomont, Introduction to PG 32 (rev. 1960).

the analysis of the sin, and local differences in the penance necessary to expiate it. The sin itself was often associated with lechery, sometimes with marriage. The usual method of accomplishing abortion was by drugs, sometimes associated with magic, sometimes with danger to the user. The motive animating it was seen variously as shame, as avarice, as lust. Although therapeutic and social reasons for abortion were known from the best of doctors and philosophers, these reasons were never mentioned as justification. All the writers agreed that abortion was a violation of the love owed to one's neighbor. Some saw it as a special failure of maternal love. Many saw it also as a failure to have reverence for the work of God the creator. The culture had accepted

abortion. The Christians, men of this Greco-Roman world and the Gospel, condemned it. Ancient authorities and contemporary moralists had approved, hesitated, made exceptions; the Christian rule was certain.

Transmission, 450-1450

In the period from 450 to 1100, when monks and bishops were the chief transmitters of Christian moral ideas, the teaching on abortion was reiterated. It was conveyed by enactments against abortion by local synods. [48] It was conveyed by collections which contained the canons of Elvira or the canons of the more prestigious council of Ancyra. By the eighth century Ancyra was the law of

48. See Roger John Huser, The Crime of Abortion in Canon Law 33-39 (Washington, 1942).

the Frankish kingdom of Charlemagne. [49] It was conveyed by collections which contained St. Jerome on homicide by abortifacients. [50] The penitentials developed by the monks for use in hearing confession regularly prescribed specific penances for abortion, ranging from one to ten years for the killing of an embryo. [51] When interrogatories for use in questioning penitents were devised in the tenth century, questions on abortion were included. [52] The

49. Id. at 21.

50. E.G. in the eighth century, "Simulated Virgins and Their Morals," in Womanly Questions, Die irische Kanonsammlung, ed. F. W. H. Wasserschebe n (Leipzig, 1885).

51. See Noonan, Contraception supra n. 16, at 164. Some penitentials have lesser penalties for the destruction of what is less than an embryo-apparently a reflection of the old distinction between the formed and the unformed.

52. Burchard of Worms, "Interrogatory," Decretum 19-4, PL 140. 972.

early Christian and patristic attitudes were faithfully preserved in the various channels communicating the teaching of past authority and instilling its observance.

AMERICAN CHRISTIAN CHURCH AND ABORTION

The early Christian attitude toward abortion supra, p1-38, is important because, unlike other branches of knowledge, older sources may have been more important in the thinking of the framers of the Constitution, the 14th Amendment and Title 1 USC 1, who were primarily Christian in attitude. Up until about 1930, every major Christian Church not only opposed abortion, but also had such respect for God's role in procreation that they even opposed chemical and mechanical birth control, in part because of the Christian sources cited previously herein.

Between 1900 and 1960, abortion was

regarded as such a despicable crime that it was not usually mentioned by name in the American media, but rather was rather by euphemisms.

In the 1960's, pro abortion sentiment grew until most Main Line Protestant churches favored abortion, at least for the so called hard cases. Many Main Line church leaders publicly advocated abortion liberalization. Evangelical, Fundamentalist and Catholic churches, in contrast, continued to oppose abortion. In contrast to Main Line leaders, most Evangelical and Fundamentalist leaders did not publicly oppose abortion, but substantially limited their acts to internal church activities until about ten years ago.

Christianity is the world's greatest religion in terms of numbers of adherents and in terms of spread. It is the only religion with substantial

numbers in substantially every area of the world. Christianity claims to be Divinely established by Jesus Christ who was the Son of God, was the Second Person of the Blessed Trinity, died for us and rose from the dead. It claims to give the believer a total world view and blueprint for living. While difficulty of change is subjective, Christianity may require the non believer becoming a believer to make more and more difficult changes in life style than any other major religion. As St Paul indicates, if Christ did not rise from the dead, Christians are the most pitiable of people. It follows that if Christ was not God, Christianity is the world's greatest fraud.

The Gospel claims that Christ is the tree and we the branches. Interestingly, since the Main Line Protestant churches accepted abortion, they have been losing

millions of members in the US. Catholics have been holding even. Evangelical and Fundamentalist Protestants have increased substantially in number. This was associated in time with the Main Line churches denying what had been an important Christian belief held by every Christian church which has survived for any substantial period of time. As the Court will know from recent news stories, the recent trend in Main Line Churches has been to recede from the advocacy of abortion that dominated from the late 1960's to recently.

TWO CONFLICTING THEORIES OF LAW

In reading the hundreds of pages of notes of Justice Douglas recently made public which relate to prior abortion decisions and the right to privacy, one notes the absense of any consideration of God or the evil or good of abortion. It is difficult to accurately consider

the US Constitution and Amendments which relate to such a fundamentally religion related problem without considering the religious background which would have been important to the framers. The notes seem to show a consideration only of a number of men who are trying to exert their influence and their personal opinions and prejudices in the most politically effective way possible.

The Douglas notes portray a thinking process very distant from the roots of the framers and the Common law. For instance, one early English judge shortly after Bracton took his head in his hands by telling the King who wanted to try cases that although the King was an educated man, he was not sufficiently experienced in the law to be a good judge. He dared to remind the king of the heirarchy, that Divine law was above the king's law.

This heirarchy was very much on the minds of the many of the framers of our Constitution and 14th Amendment as proven by the Reconstruction debates. America was founded on the belief that rights are given to men by God and men surrender certain of these rights to government. There is a contrasting theory, whose most prominent modern exponent was the Austrian jurist Hans Kelsen. This Court, by eliminating the US abortion law without considering the previously mentioned religious roots, has obviously adopted Kelsen's view, even if never having heard of Kelsen or the long line of scholars who have argued the relative strengths of the two contrasting views.

In Kelsen's view, the legal order is the source of all legal rights and a "person" is merely the personification of such legal rights. [53] In Kelsen's

words, "The physical (natural) person is, thus, no natural reality but a construction of juristic thinking." [54] In substance, Kelsen means might makes right. This disagrees with the US post World War II morality which was used to justify the War Crimes Trials. The Kelsen theory, of course, antedates Kelsen. It contradicts US tradition, but has a substantial basis in US history, especially slavery, oppression of Blacks contrary to Reconstruction Amendments and Civil Rights Laws, oppression of women and certain minorities such as treatment of Chinese especially during the 1800s, treatment of Japanese from 1942-1945, and of course this Court's

53. Hans Kelsen, The Pure Theory of Law, trans. Max Knight from 2d ed. (Berkely: U of California Press, 1967), 95.

54. Ibid., 94

abortion decisions.

COURT SHOULD NOT ALWAYS ACT AS IF THERE WERE NO GOD

Should this Court always act as if there is no God, particularly when analyzing laws forbidding conduct forbidden by Christianity? Should this Court ignore traditional American Christian thought when interpreting language of the framers if it can find a vocal modern minority who call themselves Christian and urge change?

While God has been declared dead by certain theologians, and is often treated as if he did not exist by media and many powerful Americans, it is impossible to prove He does not exist. The main purely logical reasons for believing in God's existance are four:

The first is from causality. The universe, limited in all its details, could not be its own cause, any more

than a clock could assemble itself without a clock maker. There must be a cause, and if the cause itself is caused, each succeeding cause also has a cause until we finally get back to an uncaused cause. If there is no such, once there was nothing, and nothing cannot cause the universe.

A second reason is from intuition. The stamp of God's handiwork is so clearly impressed upon creation and upon man that most people in all nations instinctively believe there is a God. We do not have to convince ourselves that there is a God. We have to persuade ourselves there is no God. And no one attaining such temporary persuasion has been able to find valid reason for it.

The sense of right and wrong is a third reason. If people are nothing more than a set of chemicals thrown together by luck or coincidence, why do we all

have a conscience? Why do even those like the Nazi War Criminals have to proclaim that what they did was right or at least blameless or excuseable if there was blame? why did slave owners have to justify themselves, to force those not believing in slavery to acquiesce in it spreading to new states, to return fugitive slaves, to admit the rightness of slavery, when by so pushing too hard, they knew they might cause and in fact did cause the destruction of US slavery? Why do the abortionists have to push so hard to get others to admit the rightness of abortion? Why do you care so much about this Court and your decisions? If there is no God, what difference will it make in a few years? What difference does it really make now?

A sense of justice is another reason. You who try to do justice must know better than most that justice is

not always done in this world. There should be, there must be a just God who in another world balances the scales.

These arguments were known to at least some of the framers in great detail and would have strengthened their anti Kelsen beliefs. There is no room herein to amplify all the arguments, but to show their strength, first cause will be discussed in greater detail. (We use best available knowledge which admittedly exceeds what the framers knew. The cause argument was well known in detail before the framers, however.)

It cannot be argued that the universe always exi ted or developed without a cause.

We can tell the approximate distance and velocities of galaxies in relation to our own by red shift of the light, and a variety of other clues. Galaxies generally recede from each other at a

velocity proportional to distance, so that we believe about 20 billion years ago the entire known universe exploded from a single relatively small volume.

Could the universe be like a giant accordian, first expanding, then contracting without beginning or end? No. We can tell the concentration of matter in the universe by the rotation of clusters of galaxies and even considering invisible matter, the initial explosion was about ten times more powerful than necessary to ensure that the universe expands forever. Since it cannot ever contract back to the big bang point, it cannot be an accordian like universe alternating expansion and contraction and must have had a beginning and therefore a creator.

We owe our new understanding of the universe to modern scientists, the two most profound theoreticians of which

probably are Einstein and Hawking. Einstein initially appeared brain damaged and was a very late talker and Hawking is severely crippled and unable to physically care for himself. Some think their defects enabled the introspection necessary to play in their minds with sufficiently complex thoughts to think more profoundly. If this court had legalized abortion and the post birth euthanasia made respectable by the same ethic sooner, and their mothers had known of their defects, the two perhaps most important men of the twentieth century might have been aborted or killed "for their own good" after birth when their defects became obvious. Needless to say, Hawkings's thoughts are likely to do more good for humanity than the evil of the inconvenience of caring for him and those similarly afflicted.

In addition to the previous

conditions, it appears that conditions for development of life are restricted so that life would not exist in our galaxy by mere chance. Many unusual factors are necessary for life to develop. Scientists have calculated that within a million or so years mankind is likely to explore the entire galaxy. If there are older civilizations, they should have been here already since even a million years is insubstantial compared to the past life of the galaxy. If they came, in view of the goodness and unusual character of the earth, they should have stayed. From their absense, we can infer that we are almost certainly the most scientifically advanced civilization in the galaxy.

Among other necessary and unusual factors are:

If the big bang had been slightly less powerful, the universe would have

been pulled together by gravity before the formation of the galaxies. If slightly more powerful, the individual atoms would not have formed stars and planets. There are numerous other "lucky" factors about the big bang.

A star must be about the size of the sun. If bigger, it will evolve too quickly and burn out before life develops. If smaller, it will evolve too slowly and not heat up to balance changes in a planet's atmosphere caused by the first life, thereby changing planet surface temperature and causing the developing planet's life to die. Double stars could not develop life, and most stars have companions. If the earth were 1% farther from the sun, it would be a lifeless iceball, while if it were 4% closer, it would be a lifeless slightly cooler version of Venus, but still too hot. The sun as such stars do,

has gradually warmed and is now putting out about 50% more heat than three billion years ago, but changes in the earth's atmosphere generated primarily by developing life have continually balanced the gradual increase in solar activity, keeping earth temperature relatively constant within the range where water is a liquid. What is the chance that in billions of years of history, life would have begun to develop at just the correct time and continue to develop at just the correct rate to continually walk the atmospheric temperature tightrope with a gradually heating sun? Liquid water, with many unusual characteristics found in no other known substance, is the only known substance capable of supporting many reactions necessary to support life.

A planet developing life apparently must be within about 10% of earth's

size. If smaller, it will not retain the required atmosphere (witness the moon). If larger, it will retain too much gas. In addition, early reactions necessary to build up the complex chemicals necessary for life are more likely to work in the direction of destruction of the larger molecules. It appears that the most reasonable chance for life to develop is if there is a tide which can only be caused by an enormous and close moon like ours, which is unlikely to form near an earth like planet. Under best current theories of planet formation, there should have been only one bigger earth, not nearly twin planets like the earth and moon, because of the long term complicated gravity in the earth's vicinity.

In addition, there is no known mechanism making evolution likely to develop intelligent life once life

exists. Why does one go from one celled to multi celled life? From plant to animal? How does one evolve from a chromosome 48 species to a chromosome 46 species and simultaneously rewrite the complex code necessary to differentiate man even from a close relative like the chimp, much less make major changes? Mutation could do it, but the mutant must have a similar mate to breed children and identical twins are of the same sex.

The odds against each of these and other necessary events happening by chance so as to develop intelligent life in a galaxy as we believed existed during the past ten billion years are possibly trillions of times larger than the number of stars in the known universe. It takes less faith to believe in God than a Godless universe.

Amici do not claim to be superior to others. Nevertheless, if one believes in God, amici believe for the following reasons, it is very reasonable to believe in Christianity as most Americans always have. It is the world's largest religion in terms of numbers, and has been for centuries. It is the world's most widespread religion, the only one with substantial numbers of adherents substantially everywhere. It has been the most widespread probably since at least the Fourth Century.

Historically, it is substantially certain that Christ lived. How else explain the beginning of Christianity and its growth during three centuries of persecution by the world's greatest empire, and in spite of the execution of substantially all its early major leaders. How else could new leaders have been persuaded to step forward to their

almost certain future torture death other than by a strong personal belief beginning from the time when many personally knew Christ? Why else ancient churches over the places of his birth, life and death? If Christ lived, he claimed to be God and probably was.

Philosophically, Christianity alone gives an adequate solution and explanation of the origin, condition and purpose of the human race. More Christians have voluntarily given up their lives rather than their faith than adherents of any other religion or movement. Who are these people now going to jail by the tens of thousands for trespass protesting this Court's abortion decisions? Compare the sublimity of the most sublime teaching of the Bible with the best philosophy or teaching from any other source.

Christianity and Christians have

done more to elevate the human race and to better the lot of mankind than any other religion or philosophy. While slavery and other evils were tolerated too long, a disproportionate number of these evils diminished or vanquished as a result of efforts of Christians and Christian nations. Even modern democracy and representative government are to a great extent the fruit of Christians and Christian philosophy.

Some excellent early work was done by pre Christian Greeks, by Arab mathematicians, by Chinese and others, but science is largely a Christian invention. It is the science which is the offspring of Christians and Christianity which has today given substantially the entire world a better quality of material life than ever before.

CONCLUSION

There was good reason then for the Christian belief and the heirarchy of God's law above man's law referred to in the Declaration of Independence and relied on by the framers, and this Court should not continue to ignore such heirarchy in interpreting the work of the framers.

Respectfully submitted,

ROBERT L SASSONE, Attorney for amici

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, ET AL., APPELLANTS

v.

Reproductive Health Services, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR BERNARD N. NATHANSON, M.D. AS AMICUS CURIAE SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF WEBSTER

BERNARD N NATHANSON, MD hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of respondent has not been obtained. Thomas M Blumenthal of respondent stated to attorney for amicus that an agreement of the parties ensured consent if written consent of one party is obtained, so perhaps consent of respondent has just been delayed.

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INTEREST OF AMICUS CURIAE

BERNARD N NATHANSON, MD was one of the primary leaders of the pro abortion movement. He initially favored this Court´s abortion decisions. He presided over the world´s largest abortion clinic, from which data was taken to prove the potential safety of legal abortion done well. He was a founder and leader of NARAL.

Advancing technology in the 1970´s convinced him that the preborn human is an individual, so that he had been wrong in advocating abortion. He wrote of this data in two books. He believes that this data will be of assistance to this Court in this case.

SUMMARY OF ARGUMENT

The present brief is limited to one topic, evidence from Fetology and related Medical Science that preborn humans at all stages of development after fertilization are and must be individuals. This information is subsequent to the information from Professor Liley submitted in another amicus brief. This information is current as of the mid to late 1970´s, but is believed to still be accurate. It convinced Bernard Nathanson, MD, considered by some at one time to be the world´s leading abortionist, that abortion killed a human individual. Dr Nathanson was a founder of NARAL, on its executive committee, and coined many of its most effective slogans. As he states elsewhere in his books, he knows from personal knowledge that some of the

statistical data used to justify abortion was false, dreamed up because it would be effective, and without any basis in reality. He presided over the world's largest abortion clinic after legalization. His clinic developed the statistical data used in court and legislatures to justify the safety of legal abortion.

The present brief, commencing on page 1, except where indicated, is taken from Dr Nathanson's two books, "Aborting America", Library of Congress No. 79-7069 and The Abortion Papers, Library of Congress No.83-081126. Certain information is taken from his two movies, "Silent Scream" a movie of a suction curettage abortion, and "Eclipse of Reason", a movie of a D and E abortion.

I was co-founder of the National Association for Repeal of Abortion Laws (now the National Abortion Rights Action League) in 1969, and served as medical consultant to that organization until my resignation in 1975. As one of the key architects of abortion political strategy in the United States I was responsible for the coining of the many passwords and shibboleths, such as "freedom of choice" and "a private matter between a woman and her doctor," which have too long passed for serious argument in this infinitely complex and incendiary issue.

I was also the world's leading abortionist. I did abortions in New York when they were illegal by claiming they were necessary to

preserve the patient's life. When abortion became legal, I presided over the world's largest abortion clinic. It did 60,000 abortions in the 19 months I presided. Data from my clinic was published in prestigious medical journals and used to prove the safety of abortion in courts and legislatures.

I have also taken a middle position. Quoting in part my article "Deeper into Abortion" from the November 28, 1974 New England Journal of Medicine:

"Some time ago--after a tenure of a year-and-a-half--I resigned as director of the Center for Reproductive and Sexual Health. The Center had performed 60,000 abortions with no maternal deaths--an outstanding record of

which we are proud. However, I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.

There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of the intrauterine life has been the subject of considerable dispute in the past.

We must courageously face the fact--finally--that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of

moral evasiveness.

The phrase 'between a woman and her physician' is an empty one since the physician is only the instrument of her decision, and has no special knowledge of the moral dilemma or the ethical agony involved in the decision. Furthermore, there are seldom any purely medical indications for abortion. The decision is the most serious responsibility a woman can experience in her lifetime and at present it is hers alone.

Our sense of values has always placed the greatest importance upon the value of life itself. With a completely permissive legal climate for abortion (and I believe that we must have such a climate--that abortion must be unregulated by law)

there is a danger that society will lose a certain moral tension that has been a vital part of its fabric. In pursuing a course of unlimited and uncontrolled abortion over future years, we must not permit ourselves to sink to a debased level of utiliarian semiconsciousness."

But the more I learned, the more I moved from pro-choice to pro-life. I now urge this Court to declare what medical science has known for generations, that the not yet born human is an individual and therefore a person.

In mid pregnancy, it is easy to see that the fetus is an individual as shown by my film of a D and E abortion, "Eclipse of Reason." Even about 10 weeks, it is easy to see that the unborn is an individual, as

shown by my film of a suction curettage abortion entitled "Silent Scream." That approximately inch long individual communicates with you. He expresses fear and apprehension when he detects the sound of the suction tip that will hunt him. He shows intelligence when faced with a new situation, he recognizes the best response is flight from superior force and he successfully hides for a time. At first he seems to be winning, but eventually the suction tip removes so much amniotic fluid that he no longer has sufficient space to hide and is caught and sucked apart.

I have written two books, "Aborting America" and "The Abortion Papers" which trace my odyssey. I now quote from them in part in hope

that any reasonable person learning what I learned will come to the same conclusion.

"For those of us in the 1960s who had no identifiable religious convictions and who were now convinced that technology had eliminated the surgical risks of abortion, why should we not then commence to advocate permissive abortion? Admittedly we had some dim, inchoate sense that something was being destroyed. It was something that could be seen on X-ray but not until the end of the fourth month of pregnancy, and it was something that we could hear with a special stethoscope but, again, not until the beginning of the fifth month. Indeed, even the mother herself could not verify that

she was pregnant--that there was something human inside her--until she felt it move in the middle of the fifth month. So to believe that there was something demonstrably human in the uterus at the fourth, sixth, or eighth week of pregnancy was quite simply an act of faith: You couldn't see it, you couldn't hear it, and therefore you couldn't really know it. Sure, some women would abort it, cast it out spontaneously, and then the physician would see it as a meaty mass with a sac of fluid, within which was a tiny, immobile, often disorganizing creature which resembled nothing so much as a tadpole. Even though we accepted intellectually that, undisturbed, this curious creature would

ultimately have gone on to become a human being, it was something else in the early stages of pregnancy. It was as if the creature, more sea urchin than human, dwelt in an ethical sanctuary; so mysterious, so exotic in appearance, so silent in its uterine exile that it could not be a factor in a consideration of the physician's duty to the living pregnant human female.

Ultrasound, or sonography, is a medical success story of the 1970s, ranking with transplant immunology and CAT scanning. It is a diagnostic method which relies on the use of high frequency sound waves passing through the body and giving off echoes as the sound waves hit various tissues of different densities.

Ultrasound, cool and safe, allowed us to measure the ventricles of the brain, the diameter of the great vessels, and the chambers of the heart of the child. And finally in the early 1970s, the refinement known as realtime ultrasound, the continuous projection of the ultrasonic images as a motion picture, revealed the tiny heart coiling and thrusting, the lungs and chest wall expanding and contracting in the familiar kinetics of breathing, and even the eyes moving about in their jerky rhythms.

No more images frozen on a polaroid film, as we had with the old-style scanners; instead, we had realtime, with immediacy and motion, and the child was now moving in our continuum of time. If you doubt the

importance of motion, watch a television program which features nothing but still photographs with a voice overlay; you find yourself yearning for the figures in the photographs to move, to become animate beings in this moment of time. For want of a better term, I will call what is lacking the "dimension of time" (not an original formulation with me; relativists such as Einstein spoke of the dimension of time with a fine disregard for gadgets such as motion pictures and televisions way back at the turn of the twentieth century). Simply put, life is motion although motion is not necessarily life; planets move, and light spurts out in unimaginably speedy waves.

So realtime ultrasound added

two essential elements to the old static black-and-white pictures of the A and B scanners: motion and contemporaneity. Watching the fetus move was exciting enough, but of course we could have constructed time lapse films of the fetus using the static images of the old B-scanner just as biologists do when they wish to study how a flower unfolds. That would have been interesting but always an artifact, a trick. We not only had motion but contemporaneity: The motion of a child was in our time frame, and this realization catapulted us into the world of the unborn, the Era of Prenatality. Communication back and forth was finally a reality.

The first scientific papers based upon the use of realtime

ultrasound began appearing in 1976, and logically concerned themselves with the movements of the child. Amazingly, these early investigations disclosed that the child begins moving at six weeks and the movements, feeble at that stage, are not perceived by the mother. Not until ten weeks following the beginning of fetal movement does the mother begin to perceive the movements herself. And when she finally does begin to perceive them, she only feels one-third of them. Two out of three movements, even in advanced pregnancy, are not felt by the mother. Watching that realtime ultrasound screen we quickly became aware that the child is virtually always in motion during its waking periods. Through the use of

electronic heart monitoring in combination with the imaging of the child with realtime ultrasound, we divined that the child has a fairly well defined sleep-wake cycle of about twenty mintues; it's awake for twenty minutes and then sleeps for twenty minutes.

By 1976, researchers in England, using realtime ultrasound, had demonstrated conclusively that the human unborn actually makes breathing movements in the uterus. This observation had been made many years earlier in animals such as fetal lambs, and many investigators hypothesized that the human unborn also breathed. However, the breathing had never been shown on an imaging apparatus before. Not only that, but the technology in 1976

became sharp enough for us to ascertain that the human unborn breathed on an average of from thirty to ninety times a minute depending on its physical--and perhaps even its emotional--state. In the undisturbed state, the breathing pattern was regular, shallow, and even, but if stress were placed on the fetus, such as a sudden sharp deprivation of the oxygen supply or even a loud noise or a rude jolt to the abdomen of the mother, the breathing became more of an irregular nervous gasp, identical to the respiratory pattern that you or I would adopt if we were suddenly badly frightened, or if someone were trying to strangle us. Of course the unborn doesn't breathe air; it takes amniotic fluid in and out of its

lungs, but the movements of the chest and diaphragm and the various patterns of the breathing are in all essential ways indistinguishable from ours.

Machinery fine enough to detect and even quantify breathing movements certainly was up to the task of watching the heart beat. Training that realtime ultrasound apparatus on the chest of the child allowed us first to appreciate that the heart begins to beat far earlier than our old stethoscopes indicated at seventeen weeks. The realtime machine was even better than the Doppler apparatus which could pick up heartbeats at ten or eleven weeks. The realtime machine saw the tiny heart fluttering at four weeks. This solved a serious problem in the

practice of obstetrics: Sometimes we suspected that an early child had died, but we could not prove this one way or another since pregnancy tests do not turn negative until almost two weeks following its death; now we could look directly at the heart and tell at a glance whether it was beating. From there it was only a short step to beginning a careful study of the heart of the unborn child in order to diagnose disorders. In both children and adults, echocardiography (ultrasound) is now widely used to image the heart and discover structural or functional disorders. In the same way, realtime ultrasound could now be trained on the unborn child's heart. The next step will inevitably be intrauterine

cardiac surgery, of such delicacy that it may have to be done with lasers or some similar fine surgical technique. But rest assured--it will be with us soon.

No organ system is hidden from the relentless probing and pulsing beam of the ultrasound machine. Study of the urinary tract of the unborn child has shown that it is in all ways identical to ours, and complex and demanding surgery has been already performed on the unborn child during pregnancy for obstructions and similar disorders of the urinary tract. The brain, the blood vessels, the bones, and the joints have all been studied, probed, and evaluated. The brain itself has even been operated upon in pregnancy: In cases of congenital

hydrocephalus (water on the brain resulting from faulty formation of the drainage system of fluid which normally surrounds the brain and spinal cord) fetal surgeons, using realtime ultrasound imaging, have inserted tubes into the brain in order to drain off the excess fluid. Thus the brain is spared the accumulating pressure which would ultimately flatten and severely compromise it if unrelieved.

With increasing refinement of the machinery, we are seeing more and more of the unborn child and translating the information we obtain into clinically useful concepts. For example, the ability to watch it move and breathe has allowed us to construct a "biophysical profile" similar in

many ways to an annual check-up examination. By observing the frequency of breathing movements, the pattern of gross movements of the body, the muscular tone, the volume of the surrounding amniotic fluid (we can see the fluid with realtime ultrasound and can fairly accurately estimate the actual amount), and, with the aid of the electronic heart monitoring apparatus, the patterns of the heart rate in response to rest and movement. With these five observations a formula has been worked out to assess quite accurately the health of the child. Thus, in a woman whose baby is overdue or who has some other condition which may threaten her child, ultrasound has now allowed us

to give the baby a "check-up" at appropriate intervals and to deliver the baby in good condition when the check-up examination indicates that we should do so.

The machinery gets more and more refined and delicate. We can even observe the rapid eye movements of the baby beginning at the twentieth week of pregnancy; we can predict how healthy its nervous system will be ten or twenty years from now based upon these observations. Think how fine and exquisitely precise this machinery must be to allow us to make such sensitive determinations!

Recently we have been able to see the sexual organs of the male on the ultrasound screen as early as fourteen weeks. The sexual organs

are identifiable at ten weeks if you could see the baby directly. Now we can predict sex without the amniocentesis procedure. This knowledge has unlimited medical value: Some male babies are afflicted with diseases such as hemophilia whereas female babies never are; thus, in a family in which there is hemophilia and we know this particular baby is a male, we can make the appropriate preparations for this baby in terms of its medical needs after birth (hemophilia does not affect the baby until after birth and indeed usually not until nine months to a year later). But it's a reasonable probability that with the advances in genetic engineering--the ability to insert a healty gene into the

body to replace an unhealthy one such as the one which fails to manufacture the Factor VIII, the missing item in these hemophiliac babies--we shall be able within a relatively short period to correct such a defect before the baby is born.

But there is an even more valuable reason to know the sex of the baby before its birth. In other years, much of the mystique of birth, and therefore the mistaken belief that life begins at birth, was the reality that we knew virtually nothing about the baby before birth, not even such a seemingly simple and certainly fundamental fact as its sex. Now with the masses of information we have of the baby before it is born,

especially the certain knowledge of its sex, the mystery of prenatality is dispelled, and once and for all the myth of life beginning at birth should be entombed forever.

Incidentally, not only can we now ascertain the sex of the baby prenatally with ultrasound, but we now have positive information that female babies can ovulate while still in the uterus. Though it is not a common phenomenon, even the notion that it can happen while the female baby is still unborn is astonishing. It is yet another piece in the increasingly undeniable picture of the unborn child as one of us.

As long ago as 1906 a physician named Cremer was able to pick up the electrocardiogram of the unborn

child with the most primitive machinery. Nothing further was done in this area until the early 1960s when there was again a flurry of interest in the fetal EKG, now utilizing infinitely more sensitive and more precise instrumentation. Even so, it was an interesting though essentially fairly esoteric matter. After all, the unborn child does not have heart attacks or hardening of the arteries while still in-utero. Edward Hon, an obstetrician in California, then devised a method of continuous EKG fetal monitoring by means of a computer which could calculate with the lightening speed characteristic of such technology the instantaneous fetal heart rate from one moment to the next. Consider: If you take your

own pulse and you want to calculate your pulse rate per minute, you would have to keep taking it every ten or fifteen seconds in order to know what the rate is four or five times a minute. To know what the rate is sixty times a minute would be quite simply impossible for you or me. But if we had an EKG machine from which a computer could calculate the interval of time between one heartbeat and the next then the computer could also instantly calculate the heart rate from one second to the next. This is the principle of the electronic fetal heart monitor. In fact, most of the machines now use the ultrasound machine instead of the EKG to pick up the heart action that the computer calculates from. Before

electronic fetal heart monitoring we used to think that the heart rate of the healthy unborn child was pretty well fixed in a relatively narrow range between 140 and 160 (remember the old wives tale about girls' heart rates being faster than boys'). Now we know that the fetal heart rate changes from moment to moment. Indeed, if it doesn't we suspect serious illness. We now know that the fetal heart rate undergoes obvious and drastic changes in response to everything, from being pushed externally through the mother's abdomen, reacting to a loud sound, to being deprived of oxygen. Recognizable patterns have been worked out which permit us to identify sick babies, knowing only the heart rate patterns; we either

treat these babies or deliver them.

The ability to monitor the heart rate of the child from moment to moment has opened the door to studying the reactions of the child to various stimuli other than those which pertain directly to labor and delivery. And of course this machinery is used at present primarily to monitor the baby during the stressful time of birth. Remember, you and I respond to external influences by a change in our heart rate; danger speeds up the heart, pleasure may restore the usual slower rate, and sleep slows it down further. Similarly, we now know that the baby responds to the movements of its own limbs or trunk by speeding up its heart; this is the basis of the so-called nonstress test. We consider that the child is

sick if the monitor fails to show the acceleration of the fetal heart rate in response to its own movements. The child must either be treated promptly or delivered quickly. But we also know that the healthy baby will respond to such annoyances as an automobile horn by speeding up its heart. Dr. Marcello Zugaib in St. Louis devised a test in which an automobile horn is honked next to the baby, and if it is healthy, it will speed up its heart rate by ten to fifteen beats per minute. Other investigators believe that the unborn child can distinguish between individual sounds, such as music or voices. We know that it perceives the sound of the blood periodically rushing through the mother's major blood

vessels; years ago some imaginative person devised a tiny toy which simulates the sound of the maternal heartbeat and is useful for calming fretful babies in their cribs. They seem to remember the sound from their prenatality period.

Electronic heart monitoring has enabled us to precisely identify the sleep-wake cycle of the unborn child. Because the sleep state dulls the reaction pattern of the human, the heart rate remains constant and does not accelerate in response to external noise. The unborn child has a rather constant twenty minute sleep-wake cycle, and in the twenty minutes during which he is asleep, the heart rate does not vary in response to stimuli. But if you doubt that he is asleep, you merely

have to prod him either externally through the mother's abdomen or push on his head during a vaginal examination. Immediately you will see the heart rate speed up and the body movements resume. It is probably not too far-fetched to postulate that the unborn child dreams during these sleep periods. Rapid eye movements characteristic of our own deep sleep periods can be identified in the unborn child, and these eye movements are said to be typical of the dream state. Electroencephalograms (brain-wave technology) seems to confirm that the unborn child dreams during these rapid eye movement periods. To find out the content of the dream, we must await better technology in the near future.

Another piece of new technology that is now in rather restricted use but has enormous potential is the procedure of fetoscopy. Here an exquisitely fine optical instrument is inserted into the uterus through the mother's abdomen, and the child can be viewed directly. No more highlights and shifting shadows as with the ultrasound machine, which for all of its miraculous abilities is still an indirect picture much like a fluoroscopy. With fetoscopy we are looking at the child eyeball to eyeball, seeing it in living color. The instrument itself is about a foot long, and is about one-twelfth of an inch in diameter. There is a light at the far end and an eyepiece at the observer's end. The instrument is pushed through the

abdominal wall and then through the wall of the uterus, carefully avoiding the afterbirth, and literally confronts the child. Sometimes the light is so strong that the child flinches when the light is switched on. Most of the research with this instrument has been done at such centers as Yale University, the University of Toronto, and in Tokyo, but as the instrument itself becomes more refined and obstetricians become more experienced with the technique there is no doubt that it will become in time a rather standard procedure for hospital fetologists. At the present time there is risk of precipitating premature labor or miscarriage with it, and the actual figure for this risk runs about five

percent--not an acceptable figure for casual inquisitive viewing of the unborn child but certainly acceptable where the technique is necessary for the diagnosis of fetal illness.

What can we do with fetoscopy and where is it applicable in fetology? One obvious use for it is in studying the limbs, extremities, eyes, face, and other fine features which ultrasound is simply not able to do at present. The skin can be observed, and skin diseases have been diagnosed in utero. But the main advantage of this technology is the ability to thread two devices through the instrument. First of all, we can thread a fine needle which we can insert into a blood vessel of the unborn child and

actually carry out blood tests on it, even as we can in adult patients. Thus we can diagnose hemophilia, clotting disorders, sickle cell disease, anemia, and a host of other blood disorders. We can also thread through the length of the instrument a biopsy forcep, an instrument which can take a piece of tissue for analysis. In this way, we have been able to actually take a biopsy of the liver of the unborn child and study that organ with its enzymes and complicated chemistry. We have been able to take biopsies of the skin and diagnose congenital skin diseases. We can even take biopsies of the afterbirth itself to determine its health, and whether it will be able to serve and support the child through the entire length

of the pregnancy.

But exciting as this instrument is for diagnostic purposes, think how fantastically useful the fetoscope will be in the future! For treatment of those unborn children with vitamin deficiencies or infections and for those with growth disorders or endocrine disturbances, medications could be given directly into the mouth or even injected right into the skin. For those unborn children with conditions requiring surgery, the instrument could be used to visualize the area to be operated on (a fused set of fingers, a palate which is not developing properly and threatens to become cleft if allowed to continue untreated), and surgery could be carried out via a laser beam or an

ultra fine cautery threaded through the instrument. After all, we routinely perform complicated surgery on the female reproductive organs through the laparoscope, an optical instrument inserted through the naval, and it's not too visionary to believe that in the very near future we will be able to do complex and demanding surgery on the unborn child through the fetoscope.

Amniocentesis is a technique which has also been of great help to the fetologist. It currently has an undeserved bad name because it is often used for search-and-destroy missions on handicapped unborn. However, it has allowed us to identify those babies severely affected with Rh disease and either

to transfuse them with blood while still in utero or else to deliver them in a timely manner. It has permitted us to identify those children who have passed the due date for delivery and are in jeopardy from "post-maturity", a condition which occurs when the due date is passed by two weeks and the afterbirth begins to fail in its many vital functions. We can identify those children with "neuraltube defects", conditions such as spina bifida in which coverings over the spinal cord are imperfectly formed or missing. In the future, fetal surgery and fetal medicine will be able either to reverse these conditions at their onset or to prevent them entirely.

The amniotic fluid is the

environment in which the unborn child lives, very much like our air. We have been able to take samples of that fluid for analysis to determine the health of the fetal environment, as well as to understand better how the unborn child eliminates its waste products, how it manufactures and controls its fluid environment, and a great many other vital functions including the regulation of the quantity and density of the fluid. The fluid is an important protective device for the baby as it shields him from the effects of a direct blow and prevents squeezing or compressing forces from harming him. For example, we know from analysis of dissolved sodium in the fluid that the unborn child replaces the entire volume of its fluid

environment about eight times a day. In short, far from being only a lottery basket for selecting out those handicapped unborn doomed to die by the abortionist's hand, the amniotic fluid is the repository of a wealth of important data which has allowed us to arrive at an increasingly sophisticated view of our state of prenatality.

Another technology which has allowed us to perceive the unborn child directly is hysteroscopy. A hysteroscope is a long slender optical instrument, similar to the fetoscope or even the laparoscope, with a light at the far end and an optical eyepiece at the observer's end. But instead of being thrust directly through the abdominal wall later on in pregnancy, this

instrument is pushed up through the cervix in early pregnancy at four, five, or six weeks. Peering through the eyepiece with the light on at the opposite end, one can see the six week old infant clearly. We can even study the face, fingers, and toes--in fact, the entire young child. Life magazine, belatedly coming to the conviction that the unborn child is an identifiable human being both anatomically and ethically, has published a series of startlingly clear, dramatic photos of the unborn child taken through the contact hysteroscope. One can see the eyes, count the fingers and the toes, and even see the blood vessels of the child through its incredibly fine, translucent skin!

Leaving aside for the moment

the individual technologies, let's look at the unborn child as a whole--holistic fetology, as it were. There is a book published in 1982 by Drs. Ernst Niedermeyer and Fernando Lopes Da Silva entitled Electroencephalography--a long tongue-twister for brain-waveology. The book is published by Urban and Schwarzenberg, and Chapter Nine deals with the development of the brain and the appearance of brain-waves in the unborn child. The authors go on to state that there is unquestionable brain-wave activity at the level of the pons (mid-brain) at ten weeks gestation, and cortical (higher brain) activity at twelve weeks. Actually, brain-waves have been recorded from the unborn child as early as six weeks in other

publications. In an amusing and enlightening article published in the prestigious British Medical Journal on January 26, 1980, Drs. H. B. Valman and J. F. Pearson make the following statement: "The fetus's environment is disturbed by sounds, light, and touch, and he responds to these distubances by moving." The article is entitled "What the Fetus Feels," and it goes on to detail how the fetus responds to loud noises such as the slamming of a door or loud music, how the ultrasound machine used for monitoring the fetus will often provoke the fetus to increased activity, and how the fetus may be able to perceive sound frequencies too high and too low for the adult ear. The authors go on to state that the repeated and frequent

flashing of a light will often quiet an active fetus, that the fetus makes facial expressions and even smiles at eleven weeks, and that it signals its reaction to pain by increasing its heart rate and movement.

Fetology is a science only ten years old. Still, the volume of scientific information and vital data proceeding from it is an unbelievedly massive flow. This book would literally be four or five times its projected length if we were to discuss in detail all the information we have concerning the unborn child. As an example: The Cumulated Index Medicus is an enormous book brought out annually and can be found in any medical library. It lists every scientific

article published throughout the world by subject. In 1981, the Index listed approximately two thousand articles concerning the fetus, on a wide variety of subjects. In contrast, in that same year, 1981, there were only four hundred scientific articles published on the subject of abortion: a ratio of five serious scientific articles on fetology to one on abortion. (I suspect that the large majority of articles on abortion were not published in reputable scientific journals such as the one encompassed by the Cumulative Index Medicus but in such magazines as Mother Jones and Hustler.)

The accumulating weight of evidence for the scientific certainty of the unborn child as a

human being and a legitimate member of the human community has created increasing fissures in the monolithic resistance of the pro-abortion groups.

John C. Flether, from the National Institutes of Health in Washington, D.C., and Dr. Mark I. Evans reported their experiences in interviewing women in the early part of pregnancy who were privileged to watch their infants on the realtime ultrasound screen. The women were asked if they would still entertain the thought of abortion after having seen their babies move, breathe, and do all those inexpressibly endearing things that all babies do, born or unborn. Both women categorically rejected the abortion option, one stating it thus: "I feel that it is

human. It belongs to me. I couldn't have an abortion now."

What sets this article apart from the general run of medical publications is first, its provenance: Fletcher is an ethicist of unimpeachable credentials from the universally respected nonpolitical governmental agency known as the National Institutes of Health. Unlike the Center for Disease Control in Atlanta, a long-time breeding ground for abortion advocates such as Grimes, Tyler, and Cates, the N.I.H. has attempted to preserve a reasonable objectivity in its medical pronouncements. Further, as I stated above The New England Journal of Medicine has been anything but neutral in the abortion conflict.

Thus, for the Journal to have accorded editorial space to this article which undermines the most powerful argument the pro-abortion forces have historically leaned upon--that the unborn child is a sub-human, a creature of lesser worth--is a signal development. The article also suggests strongly that we have misled the ontological point: that there is a phase of our lives spent in a curious sort of imprisonment for a period of nine months which is comparable to other passages in our lives and which the authors term "prenatality." Recall if you will that in my editorial piece in the Journal eight years earlier I had stated that:

"Life...is a continuous spectrum that begins in utero and ends at

death--the bands of the spectrum are designated by words such as fetus, infant, child, adolescent, and adult." Fletcher and Evans have suggested that the first nine months of life--the first band of the spectrum--be called "prenatality." Fletcher and Evans relied exclusively on the technology of realtime ultrasound in assessing their patients change of mind on the question of the humanity of the unborn child and the acceptability of abortion following the viewing of the unborn child on the screen.

Still other observers have chronicled bonding between fathers and the unborn during ultrasound viewing, and more recently Dr. Wulf Utian working in an in vitro fertilization program at the Mount

Sinai Medical Center in Cleveland has documented bonding between the prospective mother and the dividing fertilized egg. When informed that the division of the egg had ceased, that the egg was no longer viable and, therefore, unsuitable for implantation into her uterus, one mother stated that she felt as if she had: "just suffered a stillbirth." Even more astonishing is Utian's entirely unsolicited observation that the medical team conducting the in vitro fertilization program--the physicians, nurses, laboratory technicians, and sonographers--became caught up emotionally in the work to the extent that they experienced a bonding to the developing unborn

themselves. He states it thus: "As eggs are collected and fertilization is attempted in the laboratory, there are strong feelings by the team toward the early cleaving embryo...

My experience with an in vitro fertilization program, although also anecdotal, would confirm that "bonding" may occur even before the embryo is placed in the mother's uterus."

Alpha's biochemical biography begins with implantation. The group of cells that will become the placenta produces hormones that enter the mother's bloodstream and prevent menstruation, now and throughout pregnancy. Otherwise, no life can develop and alpha will "miscarry" and be washed away into

oblivion. It is absolutely the case that the great bulk of developments from implantation and beyond are initiated by alpha. It is thought that even the impetus for the start of labor comes from alpha when it is ready to leave the womb.

The mother is not aware of it, but her body fights against the "invasion" at implantation. It mounts an immune attack because of the different antigenic makeup of the two organisms, mother and alpha. The mother's body instinctively recognizes alpha as a foreign object to be repulsed, just as it does when an alien kidney is transplanted. Alpha thus is clearly--biochemically--an "other", distinct and immunologically different. Immune systems are

exquisitely complex, individualized, and antagonistic to each other; in tissue transplant work, one must go through dozens of matchings to find a feasible "fit."

In the United States, EEG work received little attention until the studies of Bernstine and Borkowski in 1955, 1956, and 1959, which showed EEG tracings beginning at 43 to 45 days. They found that in these earliest graphs, alpha's sleep spindles were not unlike those during the sleep of adults, and later in pregnancy the response to sedatives, stimulants, and oxygen deprivation shown by EEG activity was also similar to that in the adult. In a 1964 paper read at the A.M.A convention, Hannibal Hamlin of Massachusetts General Hospital

applied EEG findings on alpha to the Harvard Criteria for death and stated: "At an early prenatal stage of life, the EEG reflects a distinctly individual pattern that soon becomes truly personalized." EEG research in utero became far more precise in 1969 with the development of new and more sensitive electrodes. Because the line of birth has been made so important by the Supreme Court rulings, I should also mention the work of Lawrence Chik et al, at the Perinatal
Clinical Research Center,
Case Western Reserve University, showing that EEG activity in alpha's brain does not change abruptly at the time that birth occurs.

Is this "human life"? Human it unquestionably is, since it is organically part of the human species. "Life" also fits if we follow the common dictionary meaning (in this case, the Random House, unabridged): that state "manifested by growth through metabolism, reproduction and the power of adaption to environment through changes originated internally".

To say that it is not human life is a statement of faith, one that flies in the face of biology, as statements of faith sometimes do.

Here, Ladies and Gentlemen, look at this television tape and deny that that responsive, thumb-sucking, ear-scratching breathing little fellow (ultrasound is now refined enough to determine

sexual apparatus as well) in there is a human being. Watch him sleep, see him waken with a start, jump at the sound of a noise, cock his ear at soothing music. Draw close as we insert the fetoscope into the uterus and minutely inspect his features, count his fingers, draw blood from his umbilical vein, inject him with thyroid extract for his underactive thyroid, transfuse him with blood for his anemia, and even operate on him for his obstructed bladder and his malfunctioning kidneys. And that's only today's technology! Tomorrow's will be more convincing, more demanding.

Speaking for the "discipline of medicine," we know that there is an independent, self-initiating biological entity from the point

when the sperm unites with the egg, and we are able to discern its presence and activity beginning with implantation. If this is not life, what is?

CONCLUSION

It is a pity that the Court cannot observe the best evidence, that you cannot go to a premature infants' ward and hold an infant older than some in the womb, then observe cousins of their age and younger in the womb via modern technology. Seeing is believing as I learned, and nowhere in the 14th Amendment does it say personhood depends on residence. If the Court does not declare the preborn to be persons, by default it will be defining them as Untermenschen with all that implies, regardless of the fine distinctions of the opinion of the present case.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus

NO. 88-605
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WILLIAM L WEBSTER, ET AL., APPELLANTS
V
REPRODUCTIVE HEALTH SERVICES, ET AL.
RESPONDENTS

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California } ss.
City of Santa Ana, County of Orange }

Robert L. Sassone, being first duly sworn on his oath deposes and says:

Robert L. Sassone is a member of the Bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on February 23, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

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Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SOUTHWEST LIFE AND LAW CENTER, INC., AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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OTHER AUTHORITIES

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Annis, *The Child Before Birth* (1978) 6

Arey, *Developmental Anatomy* (1965) 6

A. Bickel, *Morality of Consent* (1975) 2

Black's Law Dictionary 4th ed. (1968) 6

California Medicine 113: 67-68 (1970) 7

Castiglioni, *A History of Medicine* (2nd Ed.) 8

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L. J. 920 (1973) 2

Garfield, *Privacy, Abortion and Judicial Review: Haunted by the Ghost of Lochner,* 61 Wash. L.R. 293 (1986) 3

Gray, *Anatomy of the Human Body* (25th Ed., 1948) 7

Grisez, *Abortion: The Myths, the Realities, and the Arguments,* (1970) 11

C. Hertwig, *Textbook of Embryology of Man and Mammals* (Transl. 1905) 7

Life, 30 April 1965, *"Life Before Birth"* 7

Lupu, *Constitutional Theory and the Search for a Workable Premise,* 8 U. Dayton L. Rev (1983) 2

Montgomery, *Abortion and the Law, New Perpectives on Human Abortion* (1981) 4

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Noonan, *Morality of Abortion* (1970) 8

Perez, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases,* 71 N.W. V.L. Rev. (1976) 2

M. Perry, *The Constititution, The Court and Human Rights,* 144.1 (1982) 2

Prosser, *Law of Torts* (1964) 12

Rugh and Shettles, *From Conception to Birth* (1971) 6

P. Weiss, *Principles of Development: A Textbook for Experimental Embryology,* 309 (1989) 7

Webster's Seventh New Collegiate Dictionary (1969) 6

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Appellees,

BRIEF FOR THE SOUTHWEST LIFE AND LAW CENTER, INC., AMICUS CURIAE, IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Southwest Life and Law Center, Inc. is a not-for-profit pro-life legal and educational organization formed to provide legal assistance to those involved in protecting the lives of women and their preborn children. The Center has its headquarters in Phoenix, Arizona and responds to legal and law related inquiries from pro-life individuals and groups throughout the Southwest as well as the rest of the nation. The Center has received permission from the Appellants and Appellees to file a brief amicus curiae in support of Appellants in *Webster v. Reproductive Service Inc.,* Supreme Court Docket No. 88-605, which permissions have been filed with the Clerk of the U.S. Supreme Court.

SUMMARY OF ARGUMENT

A. *Roe v. Wade* represents the illegitimate intrusion of the substantive due process doctrine of *Lochner v. New York*. *Roe* is judicial legislation of the most blatant kind and should be overruled along with its progeny. States have the right to legislate to restrict or proscribe abortion and therefore, the Missouri statute should be upheld in its entirety.

B. Medical and scientific data establish the humanity of the preborn child. A human being is a person at law. The Fifth and Fourteenth Amendments to the U.S. Constitution protect the right to life of persons. The Fourteenth Amendment prevents any state from denying the right to life of any person without due process of law. Therefore, this court should rule that the preborn (unborn) child is a person with the same due process right to protection under the Fifth and Fourteenth Amendments.

ARGUMENT

A. *Roe v. Wade*, 410 U.S. 113 (1973) represents an illegitimate revival of the substantive due process doctrine of *Lochner v. New York*, 198 U.S. 45 (1905) and as such has been criticized by leading jurists as nothing more than judicial legislation.[1] M. Perry described the decision as "perhaps the paradigmatic example of a court constitutionalizing non-constitutional values."[2] Critics have argued that Roe "cut fundamental rights adjudication loose from the constitutional text."[3] Members of the court

[1]A. Bickel, *The Morality of Consent*, 27-28 (1975). Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

[2]M. Perry, *The Constitution, the Court and Human Rights*, 144.1 (1982). See also, J. Noonan, *A Private Choice* (1979).Perez, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. V.L. Rev 417, 420 (1976).

[3]Lupu, *Constitutional Theory and the Search for a Workable Premise*, 8 U. Dayton L. Rev. 579, 583 (1983).

have been no less critical of Roe. Chief Justice Rehnquist, in his dissent in Roe, stated that

> "The result [*Roe*] reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in [*Lochner*]. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be compelling. The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Roe* at 174.

Mr. Justice Rehnquist did not find a right of abortion in the Constitution because none exists. The history of state and federal legislation on the subject had been a proper perogative of the states both in the civil and criminal law context. Specifically, his dissent noted incisively that by the time the Fourteen Amendment was adopted in 1868, there were 36 laws enacted by state and territorial legislatures limiting or prohibiting abortions. *Roe* at 176.

Mr. Justice White did not mince words as he described the effect of *Roe*. "A raw exercise of judicial power," Mr. Justice White wrote in his dissent, "an improvident and extravagant exercise of the power of judicial review." *Roe* at 222.

This Court is well aware of the history of *Lochner* and its fall from grace during the 1930's[4] which culminated

[4]*See, e.g. West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *See also* Garfield, *Privacy, Abortion and Judicial Review: Haunted by the Ghost of Lochner*, 61 Wash. L.R. 293, 300. (1986).

in the Court's rejection of substantive due process in *U.S. v. Caroline Products Co.*, 304 U.S. 144 (1938).[5] *Roe v. Wade*, despite protestations from the majority, invalidated 50 state laws as this Court dictated to the states terms and conditions regarding an activity previously considered criminal. In Arizona, criminal abortion prior to *Roe* was a felony punishable by a term in the state prison of not less than two nor more than five years.[6] As with most abortion statutes written prior to and during the 19th Century, concern over evidentiary issues cautioned a less severe penalty when compared to homicide statues.[7]

Mr. Justice Blackmun, however, refused to fully examine the history of such state laws and their roots in both common sense and Anglo-American history. Indeed, Mr. Blackmun went to great pains to provide his own "history" of the law and abortion, a history that conveniently ignored the substantive recognition of the child *in ventre sa mere* at the state and federal level. The result was this incredible statement:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer. *Roe* at 159.

As will be developed in Section B of this brief, the

[5]Court upheld the constitutionality of a federal statute prohibiting shipment of "filled" milk.

[6]A.R.S. 13-3603, Renumbered by Laws 1977, Ch. 142 sec. 99, eff. Oct. 1, 1978. Formerly A.R.S. 13-201; historical note: Pen. Code 1901 Sec. 243.

[7]Montgomery, "Abortion and the Law," *New Perspectives on Human Abortion* (1981).

Court then, and even more so now, had abundant medical and scientific evidence to deduce the underlying and essential concern: the humanity of the preborn child. This court did not need to discuss "potential life", but rather, life with potential. As the *Roe* majority failed to seriously consider the first legal hurdle concerning the child's humanity, it was required to resurrect the ghost of *Lochner* in order to secure not just a liberty of contract — but the liberty to contract for an abortion. However, poorly reasoned cases make for bad law, and *Roe's* judicial progeny have left a wake of despair and confusion at the federal and state levels.

Since *Roe*, the court in its zeal to withstand legislative enactments has, in Justice Burger's words,

> "[gone] so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of State-funded alternatives if she elects not to run those risks." *Thornburgh v. American College of Obstetricians and Gynecologists* (Burger, C. J. dissenting at 783.

In *Thornburgh* the Court, per Blackmun, stated that "the printed materials...seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the *informed consent dialogue* between the woman and her physician." *Id.* at 762. (emphasis added). [This passage is ironic when considered in light of recent testimony concerning the practices at a local Phoenix abortion clinic. The RN-Administrator testified under oath that the *only* time the doctor saw the patient (also referred to as "client") was during the procedure itself. There was no "dialogue" or "consultation" with the women clients by the doctor prior to the abortion. As a general proposi-

tion the doctor did no pre-abortion nor post-abortion counseling for the "clients" of the clinic. See Transcripts from *State v. Schenk, et al.,* Phoenix Municipal Court, Case No. 99611095-OC, Jan. 31, 1989.]

The Court in *Roe* went far afield from its purpose in reviewing the Texas and Georgia abortion statutes. Its action in 1973 declaring all state laws proscribing abortion unconstitutional was an improper and excessive use of judicial power and ought to be restrained. This Court is not bound by the doctrine of *stare decisis* in such situations where the Court has strayed from its constitutional mandate. This Court therefore, in upholding the Missouri statute, should have no consternation over a clear and unequivocal repudiation of *Roe v. Wade* and its progeny.

B. 1. Medical and scientific data establish the fact that the preborn child is a human being. That the Court in *Roe v. Wade,* was unable to determine this reality from the scientific literature in 1973, highlights the questionable logic of the decision. Mr. Justice Blackmun stated in the opening paragraphs of his opinion that "one's philosophy, one's experience...one's attitudes toward life and family and values...are all likely to influence and to color one's thinking and conclusions about abortion." *Id.* at 116. Mr. Justice Blackmun then cited issues of population growth, pollution, poverty and the like as further concerns which complicate the issue. To this rhetoric, the scientific and legal question is asked: what has this to do with whether or not the fetus[8] is a human being and therefore deserving of the protection of law? An examination of medical texts and their

[8]Fetus — [NL, fr. L, act of bearing young, offspring; akin to L. fetus, newly delivered fruitful]: an unborn or unhatched vertebrate esp. attaining the basic structural plan of is kind; *specif.* a developing human from usually three months after conception to birth. *Webster's Seventh New Collegiate Dictionary,* at 309, (C&G Merriam Co. 1969). *See also, Black's Law Dictionary,* 4th Ed. (1968): Foetus. In medical jurisprudence, an unborn child. An infant *in ventre sa mere.*

explanation of the fetus reveal a living human organism whose individual beginning can be traced to an event called fertilization when the male sperm combines with the female ovum to form a single cell medically identified as a zygote.[9] This zygote contains all of the genetic information which will later manifest itself in identifiable human characteristics.[10] Left alone this organism will grow and develop during gestation and after approximately nine months will be born.[11] As the reknowned French geneticist, Dr. Jerome LeJeune, stated before the Separation of Powers Subcommittee of the U.S. Senate Judiciary Committee in May 1981, "Life has a very very long history, but each human being has a very neat beginning: the moment of conception." Even among those who wished to see a legalization of abortion before *Roe v. Wade,* there was an admission that abortion was the taking of a human life. In September 1970, an editorial in California Medicine entitled "A New Medical Ethic" presented the following observation:

> "The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right, and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws,

[9]*See* Arey, *Developmental Anatomy* (Philadelphia: W. B. Saunders, 1965) Robert Rugh and Landrum Shettles, *From Conception to Birth* (New York: Harper and Row 1971).

[10]*See* Annis, *The Child Before Birth* (Ithaca N.Y. Cornell U. 1978).

[11]Life, 30 April 1965, *"Life Before Birth." See also,* Gray, *Anatomy of the Human Body* 56-57 (C.M. Goss, 25th ed. 1948); C. Hertwig, *Textbook of the Embryology of Man and Mammals* (E.L. Mark Transl. 1905); P. Weiss, *Principals of Development: A Textbook for Experimental Embroyology* 309, 14-17 (1989).

and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.[12]

Perhaps it was this "old ethic" which was reflected during the last 1900 years with Western Civilization's acceptance of the Hippocratic Oath[13] as the ethical standard for physicians. Yet Justice Blackmun dismissed this standard as a "Pythagorean manifesto and not the expression of an absolute standard of medical conduct." *Roe* at 132 (citing Edelstein). Unfortunately, it is clear that Justice Blackmun was so obsessed with reversing the abortion laws in *Roe* that all historical and medical evidence acknowledging the humanity of the unborn child would be ignored or twisted to support reversal. Yet some members of this Court have recognized

> "first, that the fetus is an entity that bears in its cells all of the genetic information that characterizes a member of the species homo sapiens and distinguishes an individual member of that species from all other, and second, that there is no non-arbitrary line separating a fetus from a child or, indeed, an adult human being." *Thornburgh v. American College of Obstetricians* and *Gynecologists,* 476 U.S. 747, 792 (1986) (White J., joined by Rehnquist, J. dissenting).

[12]California Medicine, 113: 67-68, September (1970).

[13]The relevant part states, "I will give no deadly medicine to anyone if asked nor suggest any such counsel: and in like manner I will not give to a woman a pessary to produce abortion." *See* Castiglioni, *A History of Medicine,* (2nd Ed., E. Krumbhaer, translator and editor). *See also,* Noonan, "An Almost Absolute Value in History" *The Morality of Abortion,* 1, 307 (J. Noonan, Ed. 1970).

This court should acknowledge the clinical and objective medical evidence and determine that it is not discussing "potential life" but human life with potential. Having recognized the humanity of the preborn, this Court should acknowledge their inalienable right to life.

2. A human being is a person at law. As axiomatic as this statement first appears, its very essence had been challenged in *Roe.* The Missouri Statute, subject of this appeal, attempted to remind us that the U.S. Constitution incorporated the basic values of the Declaration of Independence.[14] This Court in *Palko v. Connecticut,* 302 U.S. 319 (1937), stated that there are rights protected by the due process clause as those which are

> "...implicit in the concept of ordered liberty...principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental...fundamental principles of liberty and justice which lie at the base of all our civil and political institutions...[so that] neither liberty nor justice would exist if they were sacrificed". *Id.* at 325-328.

The right to life is essential to the exercise of any other civil or legal rights. Only human beings can enjoy the right to life as it is understood to apply to persons. Corporations, ships, railroads are all "persons" as created by law, yet none enjoy a right to life in the common

[14]*See, Gulf, Colo. R.S. Fe Ry. v. Ellis,* 165 U.S. 150, 160 (1897). *Monongahela Navagation Co. v. United States,* 148 U.S. 312, 324 (1893).

understanding of the word. Therefore, if "life" as understood in the Fifth and Fourteenth Amendments must apply to persons, these persons must be human beings, which of necessity includes the class of preborn human beings, conceived though not yet born. In *Steinberg v. Brown,* 321 F. Supp 741 (N.D. Ohio 1970), a three judge panel rejected a challenge to Ohio's abortion laws, stating that "once human life has commenced, the Constitutional protection found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it." *Steinberg* at 746-47.

Members of this court have attempted to focus the debate back to the fundamental issue to determine protection for the preborn by questioning the validity of *Roe.* In *Thornburgh,* Mr. Justice White stated, "The time has come to recognize *Roe v. Wade*... departs from a proper understanding of the Constitution and to overrule it." *Id.* at 788. Chief Justice Burger in his dissent said, "No governmental power exists to say a viable fetus should not have every protection required to preserve its life." *Thornburgh,* 476 U.S. at 484 (Burger, C. J. dissenting). Mr. Justice White added that

> "the government interest at issue is in protecting those who will be citizens if their lives are not ended in the womb...the state's interest in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional wisdom. Accordingly, the state's interest, if compelling after viability, is equally compelling before viability." *Id.* at 795.

Mr. Justice Blackmun in *Roe* acknowledged that "if this suggestion of personhood is established, the appellant's case of course collapses, for the fetus' right to life would be guaranteed specifically by the Amendment." *Roe* at 156-157. He then commenced a "literal" reading of the Fourteenth Amendment in order to exclude the

unborn child from the class of persons and thus deny protection. He incorrectly argued that there were no cases which grant such protection. Yet the federal district court in *Steinberg* stated that "a new life comes into being with the union of human egg and sperm cells."[15] A limited reading of the Fourteenth Amendment by Blackmun would invalidate numerous decisions in which the Court applied the broad understanding of the basic equal protections of life, liberty, and property to all persons.[16] A proper reading therefore of the Fifth and Fourteenth Amendments would include a due process right to the basic protection of a right to life. Such a determination would recognize an inalienable right existing in all human beings, whether alive before or after the event of birth.

3. It has been said that our Founding Fathers believed that the right to acquire and own property provided the person with an ability to protect other basic rights in that he could determine what those rights were and then exercise them for his benefit. This right is not given by government, but recognized by government as inalienable or residing with the person. (*See e.g.* Remarks of Justice Kennedy at Midwinter Meeting of American Bar Association Dec. 1988.)

In the history of Anglo-American Common Law, the unborn child has had a right to property as understood by the laws of discent and distribution. In the famous English case of *Thellusson v. Woodford,* 4 Ves. 227, 322, 31 Eng. Rep. 117 (1798), Judge Butler wrote about the rights of the unborn child:

> "Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose

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[15]Steinberg, at 746.

[16]*See, Moore v. City of East Cleveland,* 431 U.S. 494 (1977). *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

of making him answer over in value. He may be an executor. He may take under the Statute of Distribution. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian."

Grisez, in his examination of the unborn child's rights in property law inquired,

> "If an unborn child inherits a portion of land, and this land is sold without the child being suitably represented at a legal process authorizing the disposal of his estate, can the child have the sale set aside? In *Deal v. Sexton,* (1907), a North Carolina court ruled that the child could recover from those claiming this title. Why? The court held that the child was to be allowed to recover because it had not been made a party to the case, and "a person must have an opportunity of being heard before a court can deprive him of his rights..." The court also held "that the inheritance vested immediately in the plaintiff, while *in ventre sa mere,* upon the death of the father..." Both points are important. If the inheritance vest immediately, the right of the unborn child is not merely a fiction contingent for its legal effect upon his later birth. If the rights of the unborn must be protected under the general principle that a person must have an opportunity to be heard before a court can deprive him of his rights, then however much a fictional person the unborn child may be thought to be, his fictional personality entitles him to the due process guaranteed to every person by the U.S. Constitution." Grisez, *Abortion: The Myths, the Realities, and the Arguments,* at 364.

Property law is not the only area wherein the unborn child's persona has been respected. Prosser, in his treatise on Torts wrote,

> "So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by law...
> Viability of course does not affect the question of the legal existence of the fetus, and therefore the defendant's duties; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the state of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs." Prosser, *Law of Torts,* 355, 356 (1964).

When one has examined the various disciplines which recognize the humanity of the unborn child, one is tempted to paraphrase Justice Blackmun in *Roe.* For we can easily resolve the question of when life begins. Those trained in medicine, philosophy and law have examined the empirical scientific data and arrived at a consensus. The judiciary, at this point in the development of man's knowledge, can provide a definite answer. Individual human life begins at fertilization. The unborn child deserves the basic protection of its right to live under the due process and equal protection clause.

Finally, this Court should avoid the temptation to simply reverse *Roe v. Wade* and return the matter to the states, *ante Roe.* Sixteen years have passed since *Roe* and the issue is as controversial as in 1973. While most states will restrict or outlaw abortion, some states through the state court process may continue to allow legal abortion. The equal protection issue then looms before the Court once again. For what is the difference between a four month old unborn child living in a state which allows abortion and an unborn child living in a state which does not permit abortion? Can the latter state in order to protect the child's life, prohibit the mother from

travelling to an abortion state to obtain an abortion?

As there is no physiological difference between children, the accident of location would become the discriminating factor. Location has been an improper tool of discrimination in the past and it would be so today. The Court should therefore take the additional step of recognizing the personhood of the child and return the means of enforcement to the states.

CONCLUSION

There is no valid basis to sustain *Roe v. Wade* and its judicial legislation of the abortion issue. The proper province for regulation of abortion is with the states, provided the states recognize that the Fifth and Fourteenth Amendments apply to the preborn human being. There is no valid legal basis to support the claim that unborn children are excluded from the definition of "person" in the Fourteenth Amendment. The Missouri law should be sustained and the District and Appellate decisions reversed.

RESPECTFULLY submitted this 23rd day of February 1989.

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I hereby certify that three copies of the foregoing brief of the Amicus Curiae Southwest Life and Law Center, Inc. have been sent by U.S. Mail, postage prepaid, on this Twenty-Third Day of February 1989 to:

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AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants

v.

REPRODUCTIVE HEALTH SERVICE, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL RIGHT TO LIFE FEDERATION IN SUPPORT OF APPELLANTS WILLIAM L. WEBSTER, ET AL.

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICUS CURIAE INTERNATIONAL RIGHT TO LIFE FEDERATION IN SUPPORT OF APPELLANTS WILLIAM L. WEBSTER, ET AL.

STATEMENT OF INTEREST OF AMICUS CURIAE

The International Right to Life Federation is a multinational non-profit organization formed to achieve world-wide equal protection for all living humans, from the time their lives begin at conception until their natural deaths.

The Federation's headquarters are located at Av. Ed. Dapples 23—1006 Lausanne, Switzerland. The Federation is incorporated under the laws of Washington, D.C. Board members include: Dr. J.C. Willke (U.S.A.), Mrs. Phyllis Bowman (U.K.), Vice-President; Dr. Silvio Ghielmi (Italy), Treasurer; William Sherwin (Ireland),

Secretary; Peter Barry Martin (New Zealand); Rev. Maurice Wanga (Kenya); Dr. Marie Mignon Mascarenhas (India); Mrs. Jacqueline Owen (Canada), and Mario Zivkovic (Yugoslavia).

The Federation has a particular interest in the case of *Webster v. Reproductive Health Services*, U.S. No. 88-605, because the case profoundly affects the concerns of the Federation's U.S. affiliate, the National Right to Life Committee, Inc.

In addition, the Federation is especially concerned about abortion law in the United States because this nation is the least protective of unborn life of all countries in the developed West. If the U.S. moves back into the mainstream of Western law on abortion, by permitting legislative protection of the unborn, a significant number of lives may be saved. Even if full equal protection for the unborn is not now achieved, the Federation would regard any reversal of *Roe v. Wade*, 410 U.S. 113 (1973) to be an important step in the right direction.

Furthermore, the International Right to Life Federation is concerned to bring international and comparative law to this Court's attention in order to promote greater world harmony and understanding on the divisive issue of abortion.

Through their counsel, both parties have consented to the appearance of this amicus.

SUMMARY OF ARGUMENT

Roe v. Wade is an Aberration in Comparative Western Jurisprudence

The purpose of this amicus brief is to inform the Court that its 1973 *Roe v. Wade*[1] abortion decision has

[1] 410 U.S. 113 (1973).

not been persuasive to the international legal and judicial communities and, therefore, should be reevaluated by this Court. *Roe* remains isolated in its peculiar exaltation of a right to abortion.

Particularly in three of its implicit central theses, *Roe* is out of the mainstream of comparative constitutional jurisprudence. These theses are the following: (1) that abortion rights should be made largely a matter of constitutional law, (2) that the proper abortion policy is to provide no protection for the fetus prior to viability, and very little protection even thereafter, and (3) that we do not know whether the fetus is in fact human and alive. Each of the three arguments which follow focuses upon one of these unusual *Roe* theses.

The set of legal systems used below for comparative purposes is the twenty-member group of developed nations assembled by Prof. Mary Ann Glendon in her recent book *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987). These are: Austria, Belgium, Canada, Denmark, England, Finland, France, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, West Germany, and the United States of America.

ARGUMENT

I. The United States Is the Only Nation to Decide to Constitutionalize a Right to Elective Abortion.

In most nations of the world, abortion policy has not been the subject of constitutional intervention by a high court, remaining determined by a wide variety of legislative schemes, as discussed in the second argument below. Research has revealed only eight significant foreign constitutional decisions relating to the status of abortion. Unlike *Roe*, four decisions have upheld legislative author-

ity in this area, those of Austria,[2] France,[3] Portugal,[4] and the European Commission on Human Rights.[5] Two others imposed only relatively minor limits on legislation protecting the unborn, by no means mandating elective abortion, those of Canada [6] and Italy.[7] Moreover,

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[2] The 1974 Austrian decision held constitutional a law permitting elective abortion in the first trimester, but also indicated that equal protection *requires* the punishment of abortion after viability if post-natal infanticide is punished. Decision of 11 October 1974, Constitutional Court, [1974] Erklärungen des Verfassungsgerichtshofs 221, 234-35 G 8/74. Translation found in M. Cappelletti and W. Cohen, *Comparative Constitutional Law* 615, 620-21 (1979).

[3] The 1975 decision of the French Conseil Constitutionnel held constitutional a law permitting abortion during the first ten weeks of pregnancy in cases of "distress." Decision of 15 January 1975, [1975] A.J.D.A. 134. Translation found in Cappelletti and Cohen, *supra* note 2 at 577.

[4] The 1984 Portugese decision upheld the constitutionality of a law permitting abortion for serious causes: grave and irreversible damage to the mother's health, grave and incurable damage to the fetus, and pregnancy resulting from rape (the last two only during the first sixteen and twelve weeks of pregnancy, respectively). Decision of 19 March 1984, 344 Boletim do Ministerio da Justica 197 (March, 1985).

[5] The European Commission on Human Rights ruled in 1977 that Article 8 of the European Convention, which protects private life against governmental interference, does not invalidate national rules punishing abortion in early pregnancy. *Bruggerman and Scheuten v. Federal Republic of Germany*, 3 EUR. HUM. RTS. REP. 244 (1977).

[6] The recent Canadian decision declares unconstitutional the slow and complex Canadian procedures for certification that a woman may receive a therapeutic abortion, on the grounds that they unnecessarily endanger the health of pregnant women. The majority does not reach the issue of the status of the fetus and does not affirm a broad liberty to abort. *Morgentaler v. The Queen*, 1 S.C.R. 30 (1988).

[7] The Italian decision of 1975 declared unconstitutional a law which punished all but necessity-based abortions, on the grounds that it gave inadequate consideration to the woman's health. The Court specifically approved criminal law limitation of abortion in

two foreign high courts have *struck down* "pro-choice" legislation partially depenalizing abortion, in order to provide *greater* criminal law protection for the fetus throughout [8] pregnancy. Both in West Germany [9] and in Spain [10], the courts have found the unborn child to come within the protection offered by their respective constitutional clauses [11] guaranteeing to "everyone" the right to life. As a result, the German constitutional court explicitly, and the Spanish court implicitly, require that penal law not leave abortion entirely unpunished, even in the first trimester.[12] In a third nation, Ireland, abortion has

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the interest of the fetus, and, in dictum, went so far as to require legislative protection for the fetus when no injury or danger to the mother is involved. Decision of 18 February 1975, Corte Costituzionale, n.27 [1975] 98 Foro It. I (Giurisprudencia Costituzionale e Civile) 515. Translation found in *Carmosina et al.* Cappelletti and Cohen, *supra* note 2 at 612-14.

[8] However, the West German decision, *infra* note 9, does not decide fetal status, nor the permissibility of abortion, during the first thirteen days after conception—for this early period was not governed by the statute upon which the Court was called to rule. [The word "fetus" is used in this brief to refer to the unborn at all stages of pregnancy, from conception onward, even though medical usage is more restricted.]

[9] Decision of 25 February 1975, [1975] 39 BVerfGE 1. Translated into English by Jonas and Gorby, *West German Abortion Decision—A Contrast to Roe v. Wade*, 9 JOHN MARSHALL J. PRAC. AND PROC. 551 (1976).

[10] Decision of 11 April 1985, STC 53/1985 (Pleno). 119 *Boletin Oficial Del Estado* 10 (suplemento, 18 mayo 1985). English summary and discussion found in Richard Stith, *New Constitutional and Penal Theory in Spanish Abortion Law* 35 AMER. J. COMP. L. 513 (1987).

[11] "Jeder hat das Recht auf Leben. . ." Basic Law, Art. 2, Sec. 2, Sentence 1. "Todos tienen derecho a la vida. . .", Constitution of 1978, Art. 15. The Italian decision also seems to ground fetal protection in a similar rights provision. *Supra* note 7 at 613.

[12] See discussion in Stith, *supra* note 10 at 524-27. Both Germany and Spain go on to permit laws which depenalize only "hard-

been strongly restricted by means of a constitutional amendment.[13] These positions are in accord with important international human rights declarations which refer explicitly to legal protection prior to birth.[14]

II. The Democratic Compromises Reached in Developed Western Nations Are Significantly More Protective of Fetal Life Than Is *Roe v. Wade*.

Bt it noted first of all that democratic compromises on abortion have in fact been reached in nations with whom we usually compare ourselves. That is, the oft-repeated statement that there is no political middle ground on abortion is simply false, according to the comparatist Prof. Mary Ann Glendon. Neither "pro-lifers" nor "pro-choicers" are satisfied with most of this legisla-

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ship" abortions, i.e. abortions which occur where continuation of pregnancy is "too much to demand" by penal law (is "unzumutbar" and "inexigible" respectively), referring to complex continental penal law doctrines. Many commentators, however, interpret these courts to be saying only that hardship abortions may be "excused" by law, not that they may be "justified". See extensive discussion in Stith, *id.* at 541-58.

[13] Ireland adopted the following amendment to its constitution in 1983: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." *See* John A. Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.L.U. REV. 371, 385.

[14] Human rights protection in the Western hemisphere includes the unborn. Article 4 (1) of the O.A.S.-sponsored 1969 American Convention on Human Rights (which the United States has signed but, according to information available, not yet ratified) provides: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception." Paragraph 3 of the Preamble to the 1959 United Nations Declaration of the Rights of the Child reads: "*Whereas* the child, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. . ."

tion, but the possibility of further future change makes present compromise less unpalatable. And the majority in the middle, which there as here tends not to belong to either ideological camp, finds in these laws a fair reflection of its values. As a result, she argues, abortion is not the central divisive issue in Europe that it is in the U.S.[15]

Prof. Glendon hypothesizes that the careful avoidance of "rights" language by the legislatures and courts in Europe has contributed to this climate of greater toleration and willingness to compromise.[16] When abortion is there forbidden, the prohibition is often done in the name of the "value" of human life.[17] And, when abortion is permitted, the "depenalization" of, rather than the "right" to, abortion is spoken of. The difference here is one both of substance and of symbol. Rights are litigious in nature, while values are more easily shared. Moreover, in our day rights (particularly "fundamental" rights) have a near-sacrality that cannot fail to shock those who find them abhorrent. The phrase "fundamental right to abortion" seems calculated to maximize injury to the sensibilities of those who respect unborn life. Dean Guido Calabresi has pointed to the need, on sensitive issues like abortion, for the law's rhetoric to reflect the values on both sides[18]—as do the abortion laws and decisions of most other nations. The U.S. Supreme Court should cease to impose its current abortion policy upon the nation precisely because the Court needs to invoke a "fundamental right to privacy" as the constitutional basis for that

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[15] M. A. Glendon, *Abortion and Divorce in Western Law* 40 (1987).

[16] *Id.*, 24, 38. By contrast, the U.S. Supreme Court has not shied from referring to a "constitutional right to terminate a pregnancy" *Bellotti v. Baird* 443 U.S. 622, 639 (1979), also calling it a "fundamental" right *City of Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 419 n.1 (1983).

[17] *See* Stith, *supra* note 10 at 519-32.

[18] G. Calabresi, *Ideals, Beliefs, Attitudes, and the Law* 109 (1985).

policy. In following *Roe*, the Court cannot avoid the inflammatory rhetoric against which Glendon and Calabresi caution us.

According to Prof. Glendon, in those developed Western nations where abortion policy has been determined by democratic mechanisms, rather than by judicial fiat, the following rules prevail: In two countries, abortion remains illegal, except where the defense of necessity is considered to apply.[19] In the great bulk of advanced industrial nations, abortion is available, but only for cause.[20] In only five legal systems outside the U.S. is abortion freely elective, and then only in approximately the first trimester.[21] No nation has followed *Roe* in providing no protection for the fetus during both the first two trimesters, nor in allowing protection thereafter only when the abortion does not contribute to maternal "health" as very broadly defined by this Court to include almost every conceivable reason which a woman would have for a third-trimester abortion.[22] Thus the U.S. remains at an isolated extreme even among nations allowing abortion.

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[19] Belgium and Ireland, as reported in Glendon, *supra* note 15 at 13-24.

[20] Canada, Portugal, Spain, Switzerland, England, Finland, France, West Germany, Iceland, Italy, Luxembourg, and The Netherlands. *Id.* The legal situation in Canada is now in flux due to the decision reported *supra* note 6.

[21] Austria, Denmark, Greece, Norway, and Sweden, with only Swedish law permitting elective abortion until eighteen weeks. *Supra* note 15 at 22-24.

[22] *Roe*'s companion case, which should be "read together" with *Roe* (according to *Roe, supra* note 1 at 165), defines "health" to be related to "all factors . . . relevant to the well-being of the patient." These factors include those that are "emotional", "psychological", and "familial". *Doe v. Bolton*, 410 U.S. 179, 192 (1973). The recent Supreme Court decision of *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) reemphasizes that even after viability there cannot be "any 'tradeoff' between the woman's health and additional percentage points of fetal survival".

III. *Roe*'s Unique Abortion Policy May Be Explained by the Fact that It Alone Has Refused to Describe the Fetus as Human and Alive Throughout Pregnancy.

It is surprising to find such a degree of discrepancy about abortion policy among roughly equally advanced Western nations. Modern life makes like demands upon us all. And our fundamental constitutional values are quite similar.

Indeed, something like an implicit constitutional right of "privacy" is part of the constitutional order even of that country whose high court has imposed the greatest restrictions on abortion.[23] Research has revealed no developed Western nation in which the interests of individual women are denied constitutional protection.

It is the other side of the balance where the difference lies. Constitutional courts do not deeply disagree with *Roe* about the rights of women. But *contra Roe*,[24] those which have clearly addressed the issue of the factual status of the fetus find unanimously that actual (not merely potential) human life exists in the womb and is destroyed by abortion.[25] The West German court's reasoning here is profound:

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[23] Article 2, Sec. 1 of the West German Basic Law reads in part: "Everyone shall have the right to the free development of his personality . . ."

[24] *Roe v. Wade, supra* note 1, calls the fetus "potential life" (at 150, 154), "prenatal life" (at 151, 155), "potential human life" (at 159), "only the potentiality of life" (at 162), "fetal life" (at 163), and "the potentiality of human life" (at 162, 164)—the last referring to the period *after* viability. It also states "We need not resolve the difficult question of when life begins" (at 159), and ". . . a legitimate state interest need not stand or fall on the acceptance of the belief that life begins at conception or at some other point prior to live birth" (at 150). Putting all this together, one gathers that the Court does not know whether "life" (in the sense of "human" life) exists prior to birth. But the Court thinks its potentiality does—in the form of "prenatal" or "fetal" life.

[25] The decisions of West Germany and Spain explicitly recognize the prenatal existence of human life, as discussed *supra* notes 10-12,

> The process of development . . . is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of

and *infra* notes 26-27. The brief French opinion cites as authority the phrase "Considering that the law [permitting some early abortions] referred to this *Conseil Constitutionnel* does not authorize any violation of the principle of respect for every human being from the very commencement of life . . . except in case of necessity. . . ." Decision of 15 January 1975, [1975] *A.J.D.A.* 134, as translated in Cappelletti & Cohen, *supra* note 2 at 577-78. The Italian decision observes that Art. 2 of the Constitution guarantees the inviolable rights of man, "among which must be placed, although with the particular characteristics unique to it, the legal situation of the foetus". Cappelletti translation. *Id.* at 612, 613. ["Concepito" is the actual Italian word here, so a better translation would be "conceptus", emphasizing that the Court is referring to a period including very early pregnancy.] The Italian tribunal later emphasizes obligatory protection for "the life of the foetus [now translating 'feto']," at 614, even while declaring that an embryo is not yet a person, at 613, and that abortions for serious maternal health reasons must be permitted. Corte Costituzionale, Decision of 18 February 1975, n.27 [1975] 98 *Foro It.* I (Giurisprudencia Costituzionale e Civile) 515, 516. Even the Austrian decision, which alone holds that fully elective abortion in the first three months of pregnancy is constitutional, seems to concede "that throughout the whole duration of the pregnancy both the mother's life and the nascent human life constitute constant life", stating that the legislature is constitutionally free to protect the fetus by making abortion punishable. Decision of 11 October 1974, Constitutional Court, [1974] Erklärungen des Verfassungsgerichtshofs 221, 234-35 G 8/74, as translated by Cappelletti & Cohen, *supra* note 2 at 615, 620-21. The Portuguese decision of 19 March 1984 unanimously holds that the constitutional principle of the inviolability of human life embraces "intrauterine human life", even though it goes on to declare a limited disprotection of that life to be constitutional. Decision of 19 March 1984, 344 *Boletim do Ministerio da Justica* 197, 216, 230 (March 1985). Thus all European national constitutional decisions recognize actual rather than only potential human life in the unborn and permit significant constitutional protection for that life, with the precise degree of protection left largely up to the legislature. *See generally,* H. Reis, *Das Lebensrecht des Ungeborenen Kindes als Verfassungsproblem* (Tübingen: J.G.B. Mohr, 1984). In no case is religious doctrine the basis for the finding of life.

> development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection . . . of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living.[26]

The West German court argues that as long as we protect newborn infants, whose human development is significantly incomplete, consistency requires protection prior to birth. Indeed, consistency requires a *theory* of protection which either values the organic continuum of biological human life or else values the still-undeveloped potentiality for higher "phenomena specific to the human personality"—for these are the only non-religious sources of inherent value which the infant possess at birth. In other words, the Court maintains that if we think newborns inherently worthy of protection, the only normative theories available to us also require the protection of life even in the early weeks of pregnancy. The reverse argument must also hold: If we refuse to recognize the existence and value of early prenatal life, we cannot consistently affirm the inherent dignity even of postnatal life.

The German decision concludes that no distinction concerning the right to life may constitutionally be made between the born and the unborn.[27] Other courts have not been so strongly egalitarian, but the recognition that

[26] [1975] 39 BVerfGE 1, 37; Jonas and Gorby translation, *supra* note 9 at 638. *See also infra* note 27 concerning the "inherent" dignity of individual human life.

[27] *Id.* The German court emphasizes that, in opposition to the National Socialist devaluation of individual life, the new federal constitutional order is based upon the concept "that human beings possess an inherent worth" and it demands "unconditional respect for the life of every individual human being." [1975] BVerfGE 1, 67. Jonas and Gorby translation, *supra* note 9 at 662.

human lives are lost in abortion makes legislative protection for the fetus appropriate.[28] Even *Roe* itself implies that if this Court's factual doubt concerning whether the fetus is both human and alive had been removed, protective abortion laws could have been upheld.[29]

Along with its proclamation that abortion is part of a fundamental right, *Roe*'s refusal to concede that human life exists before birth has shocked abortion opponents on this side of the Atlantic. Those opposed to abortion here think that the fact of life is clear and even obvious—and all European high courts agree with them. Unlike their European counterparts, American pro-lifers feel that their courts are not even willing to listen to the clear-cut evidence they present, and this feeling cannot but contribute to their frustration and anger. Since the Missouri legislation at issue in the present case specifically finds that human life begins at conception, reexamination of *Roe* on this point is especially appropriate. If this Court were to recognize that actual human life exists in the womb, or at least that legislative protection based on the judgment that it exists is sensible and legitimate, we could all move toward greater mutual understanding in this area.

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[28] The Spanish tribunal, for example, reasons that human life is a "superior", "fundamental", and "central" value under the Constitution. *Supra* note 10 at 18-19. *See also* Stith, *supra* note 10 at 517-25.

[29] *Supra* note 1 at 159.

CONCLUSION

In deciding to constitutionalize abortion rights, in abolishing virtually all legislative protection for the unborn, and in denying that we know the fetus to be both human and alive, *Roe v. Wade* stands in isolation in Western constitutional jurisprudence.

Wherefore, the amicus curiae prays that this Court reevaluate its original findings in *Roe*, for the reasons stated above, and find for appellants William L. Webster, et al.

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AMICUS CURIAE

BRIEF

No. 88-605 (54)

Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—against—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL COUNCIL OF NEGRO WOMEN, INC.; NATIONAL URBAN LEAGUE, INC.; THE AMERICAN INDIAN HEALTH CARE ASSOCIATION; THE ASIAN AMERICAN LEGAL DEFENSE FUND; COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES; THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; THE NATIONAL BLACK WOMEN'S HEALTH PROJECT; NATIONAL INSTITUTE FOR WOMEN OF COLOR; NATIONAL WOMEN'S HEALTH NETWORK; ORGANIZACION NACIONAL DE LA SALUD DE LA MUJER LATINA; ORGANIZATION OF ASIAN WOMEN; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND; WOMEN OF COLOR PARTNERSHIP PROGRAM OF THE RELIGIOUS COALITION FOR ABORTION RIGHTS; WOMEN OF ALL RED NATIONS, NORTH DAKOTA; YWCA OF THE U.S.A., AND OTHER ORGANIZATIONS IN SUPPORT OF APPELLEES.

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Akron Center for Reproductive Health, 462 U.S. 416 (1983) . . passim

Beal v. Doe, 432 U.S. 438 (1977) . 60

Bellotti v. Baird (I), 428 U.S. 132 (1976) 55

Bellotti v. Baird (II), 443 U.S. 622 (1979) 55

Boddie v. Connecticut, 401 U.S. 371 (1971) 26, 27

Buck v. Bell, 274 U.S. 200 (1927) 30

Carey v. Population Services International, 431 U.S. 678 (1978) 34

Doe v. Bolton, 410 U.S. 179 (1973) 46

Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978) 11

Dunn v. Blumstein, 405 U.S. 330 (1972) 28

Eisenstadt v. Baird, 405 U.S. 438 (1972) 34

H.L. v. Matheson, 450 U.S. 398 (1981) 55

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 26

Harris v. McRae, 448 U.S. 297 (1980) 26, 28

Leigh v. Olson, 497 F. Supp. 1340 (D.N.D. 1980) 57

Lubin v. Panish, 415 U.S. 709 (1974) 26

Maher v. Roe, 432 U.S. 464 (1977) 28, 41

Margaret S. v. Edwards, 488 F. Supp. 181 (E.D.La. 1980) . . . 57

Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), aff'd, 794 F.2d 994 (5th Cir. 1986) . . . 58

McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), rev'd on other grounds sub nom., Harris v. McRae, 448 U.S. 297 (1980) . . 11, 44, 60

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) . . 28, 29

Ortwein v. Schwab, 410 U.S. 656 (1973) 27

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 55

Reproductive Health Services v. Webster, 662 F. Supp. 407 (W.D. Mo. 1987), aff'd, 851 F.2d 1071 (8th Cir. 1988) 58, 59

Roe v. Wade, 410 U.S. 113 (1973) . passim

San Antonio Independent School District v. Rodriguez, 441 U.S. 1 (1973) 22

Shapiro v. Thompson, 394 U.S. 618 (1969) 28

Skinner v. Oklahoma, 316 U.S. 535 (1942) 26, 29

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 30, 55

U.S. v. Kras, 409 U.S. 434 (1973) 27

Women's Health Services, Inc. v. Maher, 482 F. Supp. 725 (D. Conn. 1980), vacated and remanded on other grounds, 636 F.2d 23 (2d Cir. 1980) 43

Zablocki v. Redhail, 434 U.S. 374 (1978) 26, 27

STATUTES

Wash. Rev. Code §§9.02.060 to 9.02.080 (Supp. 1975) 9

Alaska Stat. §11.15.060 (1970) . . . 9

Haw. Rev. Stat. §453-16 (Supp. 1971) 9

N.Y. Penal Code §125.05, subd. 3 (Supp. 1972-1973) 9

Wis. Stat. §940.04(6) (1969) 63

MISCELLANEOUS

Alan Guttmacher Institute, Issues in Brief 12 (1985) 39

Alan Guttmacher Institute, Safe and Legal: 10 Years' Experience With Legal Abortion in New York State 23 (1980) 19, 20, 21, 49

Benditt, Second-Trimester Abortion In The United States, 11 Fam. Plan. Persp. 358 (1979) 49, 50

Binken, Gold & Cates, Illegal-Abortion Deaths in the United States: Why Are They

Still Occurring? 14 Fam. Plan. Persp. 163, 166 (1982) 5, 22, 44

Center on Social Welfare, Policy & Law, Analysis of 1988 Benefit Levels in the Program of Aid to Families with Dependent Children 1, Table 1 (1988) 42

Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Fam. Plan. Persp. 86 (1976) 5

Center for Disease Control, U.S. Dept. of Health & Human Services, Abortion Surveillance Report, 1978 (1980) 48

Center for Disease Control, U.S. Dept. of Health, Education & Welfare, Abortion Surveillance Report 10 (1970) 5

Center for Disease Control, U.S. Dept. of Health & Human Services, 36 Surveillance Summaries 4055 (1987) 45

Committee on Ways and Means, U.S. House of Representatives, 100th Cong., 2d Sess., Background Material and Data on Programs Within The Jurisdiction of The Committee on Ways and Means 428 (Committee Print 1988) 42

Erhardt, Tietze & Nelson, United States:

Therapeutic Abortions in New York City, 51 Studies in Fam. Plan. 8-9 (1970) 12

Gold, Therapeutic Abortions In New York: A 20 Year Review, 55 Am. J. Pub. Health 964-65 (1965). . 13, 18

Gould, Carrie Buck's Daughter, Natural History Mag. (July 1984) 30

Hall, Present Abortion Practices in Hospitals of New York State, 23 New York Medicine 124 (1967) 13

Henefin, Prenatal Screening in Reproductive Laws for the 1990's A Briefing Handbook 133 (Taub & Cohen 1988) 47

Henshaw, Forrest & Blaine, Abortion Services in the United States, 1981 and 1982, 16 Fam. Plan. Persp. 119 (1984) 40, 41, 51

Henshaw, Forrest, Sullivan & Tietze, Abortion Services in the U.S., 1979-1980, 14 Fam. Plan. Persp. 5 (1982) 39, 52

Henshaw, Forrest & Van Vort, Abortion Services in the United States, 1984 and 1985, 19 Fam. Plan. Persp. 67-69 (1987) . . . 41, 42

Henshaw & O'Reilly,

Characteristics of Abortion Patients in the United States, 1979 and 1980, 15 Fam. Plan. Persp. 5, 11 (1983) 37, 38

Henshaw & Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158 (1988) 11

Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services For The Poor, 16 Fam. Plan. Persp. 170 (1984) . . . . . passim

Institute of Medicine, Legalized Abortion and Public Health 64 (1975) 19

Irwin, The New Abortion Laws: How are They Working? 48 Today's Health 21, 23 (1970) 13

Kahan, Baker & Freeman, The Effect of Legalized Abortion on the Morbidity Resulting from Criminal Abortion, 121 Amer. J. Obstet. Gynec. 114 (1975) . . . 22

Lincoln, Doring-Bradley, Lindheim & Cotterill, The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor, 9 Fam. Plan. Persp. 207 (1977) 44

Lin-Fu, Population Characteristics and Health Care Needs of

Asian Pacific Americans in Public Health Reports (1988) 4, 17, 53

Lupfer & Silber, How Patients View Mandatory Waiting Periods for Abortion, 13 Fam. Plan. Persp. 75 (1981) 56, 57

National Abortion Federation, Celebrating Roe v. Wade: Dramatic Improvements in American Health 6 (Jan. 1989) . 41

Niswander, Medical Abortion Practices in the United States in Abortion and the Law 53 (Smith 1967) 11, 16

Official Journal of American College of Obstetrics and Gynecology (Aug. 1962) 14, 19

Pipel, The Abortion Crisis in The Case For Legalized Abortion Now 101 (Guttmacher 1967) 13

Polgar & Fried, The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law, 8 Fam. Plan. Persp. 125 (1976) 12

Ryser, Racial Differences in

Abortion Seeking, 12 Contraception 199-201 (1975) . . 50

Schwarz, Septic Abortion 7 (1968) 10

Shelton, Brann & Schulz, Abortion Utilization: Does Travel Distance Matter? 8 Fam. Plan. Persp. 260 (1976) 39

Sneiderman, Abortion: A Public Health and Social Policy Perspective, 7 Rev. L. & Soc. Change 187, 194 (1978) 19

Star, 1,000,000 A Year: The Growing Tragedy of Illegal Abortion, Look Mag. (Oct. 19, 1965) 12, 14

Swartz & Paranjpe, Abortion: Medical Aspects In A Municipal Hospital, 47 Bulletin of the New York Academy of Medicine 845-456 (1971). 14

Tietze, United States: Therapeutic Abortions, 1963 to 1968, 1 Studies in Fam. Plan. 5 (1979) 12

Tietze & LeWitt, Deaths from Abortions in the United States, 1933-1968 17

Torres & Forrest, Why Do Women Have Abortions? 20 Fam. Plan.

Persp. 169 (1988) 49, 51

Trussell, Menken, Lindheim & Vaughan, The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persp. 120 (1980) 5, 42, 49

U.S. Dept. of Commerce, Bureau of Census, The Hispanic Population in the United States: March 1988, Series P-20, No. 431 (1988) 3

U.S. Dept. of Commerce, Bureau of the Census, General Population Characteristics, United States Summary, 1980 Census Population (May 1983) 39

U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black and Minority Health 71 (1985) 47

U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black & Minority Health 57-58 (1980) 4, 23

U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black & Minority Health 51 (1986) 3, 39

Van Der Tak, Abortion, Fertility, And Changing Legislation: An International Review 72-74 (1974) 10

Woo, Asian In America: Challenges for the Presbyterian Church (U.S.A.), published by the Office for Racial Justice and Asian Mission Development Presbyterian Church (U.S.A.) (May 1987) 4

NO. 88-605

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLIAM WEBSTER, et al.,

Appellants,

-against-

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF APPELLEES

CONSENT OF THE PARTIES

Amici Curiae file this brief with the consent of both parties in support of the position advanced by the Appellees. Letters

of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The more than 100 civil rights, women's, labor and religious organizations joining in this brief as Amici Curiae represent various segments of American society with diverse interests. See Appendix. All Amici share an urgent concern that the Court clearly and unequivocally reaffirm Roe v. Wade, 410 U.S. 113 (1973). They fear that any tampering with the right to abortion recognized in Roe will have a powerful, adverse impact on the liberty, equality and health of poor women and women of color.

SUMMARY OF ARGUMENT

While women of all classes and colors will be endangered by any dismantling of the constitutional framework of Roe v. Wade, 410

U.S. 113 (1973), the burden will fall most heavily and inexorably on poor women, a vastly disproportionate number of whom are women of color--African-American,[1] Latina,[2]

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[1]Of 26.5 million African-Americans in the United States, 34% had incomes below the poverty level in 1980; 18.9% were unemployed. U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black & Minority Health 51 (1986).

[2]According to the 1988 Bureau of Census report on the Latino population:

> About 1.2 million of the 4.6 million Hispanic families, or 26%, were living below the poverty level in 1987...Their poverty rate was about 2 1/2 times as high as that for non-Hispanic families. There has been no significant change in the poverty rate of Hispanic families between 1982 and 1987.

U.S. Dept. of Commerce, Bureau of Census, The Hispanic Population in the United States: March 1988, Series P-20, No. 431 (1988).

Native American[3] and Asian.[4] Women of color were over-represented among the women who died, were left sterile or suffered other

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[3]Although 1.5 million Native Americans constitute less than 1% of the total U.S. population, 29% lived below the poverty level in 1979. 13% were unemployed. U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black & Minority Health 57-58 (1980).

[4]In 1979, of the then 3.7 million Asian Americans, 24.4% had incomes lower than $10,000, 11.9 percent had an income of $5,000 and 10.2% lived below the poverty line. Lin-Fu, Population Characteristics and Health Care Needs of Asian Pacific Americans in Public Health Reports 21 (1988).

These figures do not account for the different economic status among various groups classified as Asian. As one commentator has observed, "it is sometimes difficult to use the term 'Asian' with any precision or significance" because of the "wide diversity of groups that are included under the nomenclature 'Asian', including Burmese, Cambodian, Chinese, Filipini, Hmonmg, Indian, Indonesian, Japanese, Korean, Laotian, Malaysian, Mien, Singaporean, Thai, Vietnamese, and several other groups." Woo, Asian In America: Challenges for the Presbyterian Church (U.S.A.), published by the Office for Racial Justice and Asian Mission Development Presbyterian Church (U.S.A.) (May 1987).

serious medical complications as a result of illegal abortions prior to this Court's decision in Roe v. Wade, and would be similarly effected by its reversal.[5]

Indeed, permissible governmental restrictions on access to abortions for both adult and teenage women already adversely impact on poor and young women.[6] Any further retreat

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[5]In 1972, women of color represented 64% of the deaths associated with illegal abortion. Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Fam. Plan. Persp. 86, 87 (1976). In 1975, after legalization, the percentage rose to 80%. Id. In Georgia, 88% of women who died from illegal abortions between 1965 and 1969 were African-American. Center for Disease Control, U.S. Dept. of Health, Education & Welfare, Abortion Surveillance Report 10 (1970).

[6]See, e.g., Binken, Gold & Cates, Illegal-Abortion Deaths in the United States: Why Are They Still Occurring? 14 Fam. Plan. Persp. 163, 166 (1982) (absence of public funding played a primary role in one third [all women of color] of the deaths from illegal abortions between 1975 and 1979); Trussell, Menken, Lindheim & Vaughan, The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persp. 120 (1980)

from Roe v. Wade will eliminate the safety net provided by relatively inexpensive legal abortions and will force women to undergo the desperation, horrors and dangers of illegal abortion. (Point I)

To illustrate the danger of tampering with the core framework of Roe v. Wade, Amici focus this brief on the suggestion that restrictions on abortion should not be subject to strict scrutiny unless they constitute an "undue" burden on the right to abortion. See Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O.Connor, J., dissenting).

This suggested departure from the Court's jurisprudence of fundamental rights is

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(1977-1978 funding restrictions doubled unmet need for Medicaid abortions); Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services For The Poor, 16 Fam. Plan. Persp. 170 (1984) (42% of Medicaid-eligible women delayed abortion for financial reasons).

inconsistent with the very notion of a fundamental right. The right to abortion is no less vulnerable to hatred, intolerance, prejudice and misunderstanding than any other fundamental right. Only strict scrutiny of all forms of interference can guarantee that necessary burdens on the right to choose abortion are distinguished from superfluous or obstructionist ones. (Point II.A)

To adopt a requirement that the burden be "undue" before strict scrutiny is triggered will permit a vast array of burdensome regulation that will preclude many women, but particularly poor women and women of color, from access to safe legal abortion. Moreover, what constitutes an "undue burden" is

not generally determinable, but depends on conditions which vary greatly from community to community and on the particular circumstances of each woman's life. "Undue burden" is a subjective and easily manipulable standard that will allow courts and legislatures to act on a deep prejudice toward women's right to self-determination and equality. (Point II.B).

Finally, Amici examine the cumulative effect of several specific restrictions which members of this Court have suggested would not meet an "undue burden" standard. (Point II.C)

ARGUMENT

POINT I

THE REVERSAL OF ROE v. WADE WOULD HAVE A DISPROPORTIONATE ADVERSE IMPACT ON POOR WOMEN.

A. Poor Women And Women Of Color Will Resort To Illegal Abortions In Disproportionately High Numbers As They Did Before Roe.

While Roe v. Wade benefited women of all classes, races and ages, its effect on the health and mortality of poor women, particularly women of color, was, and still is, especially significant. At the time of this Court's decision in Roe v. Wade, abortions were illegal in most of the United States.[7]

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[7]Between 1969 and 1973 when this Court ruled in Roe, the restrictive statutes of at least 8 states had been struck down by federal courts throughout this country. See Roe, 410 U.S. at 154-155. Four others had been repealed by state legislatures. Alaska Stat. §11.15.060 (1970); Haw. Rev. Stat. §453-16 (Supp. 1971); N.Y. Penal Code §125.05, subd. 3 (Supp. 1972-1973); Wash. Rev. Code §§9.02.060 to 9.02.080 (Supp. 1975). Before those changes, however, anti-abortion laws did not keep women from

In a majority of states, abortions were permitted only to save the life of pregnant women; in 14 others, more "liberal" laws allowed abortions to prevent grave impairment to the woman's health. Roe v. Wade, 410 U.S. at 118, n.2.[8] For poor women, however, the different legal standards made little, if any practical difference.[9]

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obtaining abortions. While no official data exist on the number of illegal abortions that were performed in the years prior to Roe v. Wade, it was estimated that between 200,000 and 1.2 million women each year obtained illegal abortions. See, e.g., Schwarz, Septic Abortion 7 (1968); Van Der Tak, Abortion, Fertility, And Changing Legislation: An International Review 72-74 (1974).

[8]14 states adopted some form of the American Law Institute model statute which permitted abortions if there was "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse."

[9]By 1967, only three states had laws which permitted abortions for reasons other than to protect the woman's life. However,

Laws restricting access to abortion, however, did not prevent women from seeking abortions.[10] While a small number of upper

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even after doctors began to read statutes with "life-only" exceptions more expansively, to include psychiatric problems and fetal defects, private patients had 20 times more abortions than public patients. Niswander, Medical Abortion Practices in the United States in Abortion and the Law 53 (Smith 1967).

Similarly, in an analogous context, even a broad construction of the term "life-endangerment" to include health considerations (see Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978)) made no difference in access to funded abortions. In 1978, Virginia reported only 9 Medicaid abortions, a decrease of 99.8% from 1979 when Virginia covered 5,200 medically necessary abortions. McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), rev'd on other grounds sub nom. Harris v. McRae, 448 U.S. 297 (1980) (hereinafter "McRae Record" at T.1534).

[10]Nor would similar laws prevent abortions today. Now women of color obtain 31.4% of all legal abortions. Of women who had legal abortions in 1987, 31.9% were unemployed, 25.5% were less than 19 years old, 33.1% had incomes of less than $11,000 and 23.8% were Medicaid covered. Henshaw & Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158, 162 (1988).

and middle class women had access to safe, sanitary abortions in private hospitals and doctors' offices,[11] and some others were able

[11]Two researchers, for example found that

> In the 1960's, prior to liberalization of New York State's restrictive abortion law, an average of 400 legal ("therapeutic") abortions were performed each year. Poor and minority-group women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by white women in the private hospital services on psychiatric indications. Most of the poor and minority-group women seeking to obtain abortions, it may be presumed, were among the 50,000 New York City women estimated to have clandestine abortions annually in the preliberalization years.

Polgar & Fried, The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law, 8 Fam. Plan. Persp. 125 (1976). See also Star, 1,000,000 A Year: The Growing Tragedy of Illegal Abortion, Look Mag. (Oct. 19, 1965); Erhardt, Tietze & Nelson, United States: Therapeutic Abortions in New York City, 51 Studies in Fam. Plan. 8-9 (1970); Tietze, United States: Therapeutic Abortions, 1963 to 1968, 1 Studies in Fam. Plan. 5 (1979).

Nationwide, private patients obtained four

to afford travel to safer illegal providers, poor women, unable to afford the cost of either long distant trips[12] or private doc-

times as many hospital abortions as did public ward patients. Irwin, The New Abortion Laws: How Are They Working? 48 Today's Health 21, 23 (1970). See also Pipel, The Abortion Crisis in The Case For Legalized Abortion Now 101 (Guttmacher 1967) (93% of in-hospital abortions in New York State were performed on white women who were able to afford private rooms); Hall, Present Abortion Practices in Hospitals of New York State, 23 New York Medicine 124 (1967) (one abortion for every 266 births at private hospitals; one for every 989 at public hospitals); Gold, Therapeutic Abortions In New York: A 20 Year Review, 55 Am. J. Pub. Health 964-65 (1965) (ratio of safe and legal hospital abortions, per live births for white women was more than five times that among women of color and 26 times that among Puerto Ricans).

[12]According to one 1965 newspaper article:

> [I]n New York. . .[abortions] cost $800 to $1,500--more and more American women find it economic to seek them outside the U.S. For $953, a Chicago woman can fly round trip to Japan, where abortions have been legal since 1948.
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> An estimated 10,000 U.S. women annually patronized San Juan, Puerto Rico where abortion is illegal, but easy to get.

tors, were forced to resort to illegal abortions under the most frightening, unhygienic and often life-threatening conditions.[13] Permanent loss of reproductive capacity or death were not uncommon.[14]

A reporter for the New York Daily News found that 18 doctors worked in six abortion clinics, "often throughout the night."

West Coast women find it more convenient to go to Tijuana, Mexico, just south of San Diego... Star, 1,000,000 A Year: The Growing Tragedy of Illegal Abortion, Look Mag. (Oct. 19, 1965).

[13]Various methods were employed by women desperate to terminate an unwanted pregnancy and by nonmedical practitioners: "intracervical douche--soap, products advertised for feminine hygiene, etc.; intrauterine foreign body--rubber, plastic, or metal; cathartics with or without quinine; ergot compounds; and corrosives such as potassium permanganate tablets." Swartz & Paranjpe, Abortion: Medical Aspects In A Municipal Hospital, 47 Bulletin of the New York Academy of Medicine 845-856 (1971).

[14]The following case history from an August 1962 article in the Official Journal of the American College of Obstetrics and Gynecology is illustrative of the fate suffered by poor women seeking to terminate unwanted pregnancies prior to Roe.

Because of the generally poor quality of health care available in their communities, women of color were disproportionately repre-

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> C.H., a 29 year old Black woman with three children, was admitted with a history of vomiting, diarrhea, lower abdominal cramps for three days and vaginal bleeding for one day. [She was 10 weeks pregnant]. The cervix was dilated and some tissue was presenting. Her condition was deteriorating, and antibiotics and blood transfusions were administered and a curettage was performed. In spite of this, her condition continued downhill, and on the fourth hospital day an exploratory operation was performed and there was gross pus in the pelvis and a one inch perforation in the top of the uterus. A hysterectomy was performed accompanied by additional blood transfusions. Her condition continued to deteriorate, and death occurred on the 9th hospital day. On the 3rd day a history of intra-uterine douche with a detergent 4 days prior to admission had been obtained.

sented among those who died or were left sterile by illegal abortions. One study estimated that mishandled criminal abortions were the principal cause of maternal death in the United States, in the 1960's, killing 5,000 women a year. Niswander, Medical Abortion Practices in the United States in Abortion and the Law 53 (Smith 1967). However, women of color risked their lives at much higher rates than did white women if they chose not to continue their pregnancy.[15]

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[15]According to one study of "Deaths from Abortions in the United States, 1933-68,":

> Mortality rates from abortion have remained much higher among non-white women than among white women. Moreover, the relative difference in rates between the two groups has increased substantially over the past three decades. In 1933, the mortality rate from abortion was twice as high for non-white women (15.4 [per 100,000 women of reproductive age]) as for white women (8.3); in 1968, it was seven times as

In 1965, in New York, for example, although there were 4 abortion deaths for every 100,000 live births for white women; for non-white women there were 56 abortion deaths per 100,000; for Puerto Rican women,[16] there were

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> high (1.4 compared with 0.2). Although the rates declined for both groups, the decline was relatively much greater for whites than for non-whites. The higher mortality rates for non-white women result, at least to a considerable extent, from the poorer quality of abortionists and of after care available to them.

Tietze & Lewit, Deaths from Abortions in the United States, 1933-1968.

[16]Statistics were not uniformly kept on all races or ethnic groups. In New York, statistics were broken down to identify whites, non-whites and sometimes Puerto Ricans and blacks. In other parts of the country, statistics for whites included Latinas. Additionally, no figures exist for Asian Pacific Americans because up until quite recently, they were submerged in the category of "others". Lin-Fu, Population Characteristics and Health Care Needs of Asian Pacific Americans in Public Health Reports (1988).

61. N.Y.C. Dept. of Health Statistics (Oct. 14, 1969).

The overall maternal mortality rate from illegal abortions reveals a similar disparity. Between 1951 and 1962, that rate was nine times higher for African-American women than for white women in New York City. Gold, Therapeutic Abortions in New York: A 20 Year Review, 55 Am. J. Pub. Health 964-65 (1965). Half of all deaths of women of color associated with pregnancy were due to complications following an abortion, while only one-fourth of all white maternal deaths resulted from such complications. Id.

The health implications of illegal or self-abortions are difficult to measure, because these abortions were so often carried out in secret.[17] One small indicator of the

[17]The health hazards that accompany self abortion are particularly severe. Inserting chemicals or instruments, like coathangers or darning needles into the uterus can cause infection, injury to the membranes of the vagina, perforation of the uterus, injury to other organs, bleeding, and air embolism. Institute of Medicine, Legalized Abortion and Public Health 64 (1975).

gravity of the problem was the number of hospitalizations for problems arising from attempted self or illegal abortions. In 1969, in New York City, municipal hospitals reported 6,524 admissions for septic and incomplete abortions.[18]

A case history recounted the story of a 25 year old Latina woman with three children. She was 4 months pregnant and had attempted to induce an abortion with a crochet hook. After a week of bleeding, abdominal cramping and foul-smelling discharges, she was hospitalized for 31 days. She went into shock, was jaundiced and bruised and went into kidney failure several times. Official Journal of American College of Obstetrics and Gynecology (Aug. 1962)

[18]In 1970, the first year of legalized abortions, the number of admissions for complications from illegal abortions fell to 3,600. Sneiderman, Abortion: A Public Health and Social Policy Perspective, 7 Rev. L. & Soc. Change 187, 194 (1978). See also Alan Guttmacher Institute, Safe and Legal: 10 Years' Experience With Legal Abortion in New

B. Broad Access To Abortions Has Demonstrably Protected Women From The Horrors Of Illegal Abortions.

Following legalization of abortion in New York in 1970, the decline in maternal deaths was sharper and deeper in New York State than in 19 states where restrictive laws were still being enforced.[19] Between 1967-1969 when abortions were not legal in New York, and 1970-1972 when they were legal, the average annual rate of abortion-related death

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York State 23 (1980). These figures actually understate the breadth of the problem because many women suffering similar injuries are treated as outpatients or resort to self help.

[19]Alan Guttmacher Institute, Safe and Legal: 10 Years' Experience With Legal Abortion In New York State 22 (1980). In 1969 there were 24 deaths from illegal abortions in New York City alone. That number fell to 3 deaths in 1971 after abortion was broadly legalized in New York. N.Y.C. Health Services Administration (Feb. 12, 1972)

fell by 51% in New York State[20]. In the 19 comparative states the decline was substantially less--29%. Id. at 17.

After legalization, the change nationally was similar. Despite the drop in the overall number of maternal deaths after Roe,[21] however, a greater percentage of women of color than white women continued to die from illegal abortions. Between 1975 and 1979, several years after abortion was legalized, 82% of the women who died after illegal abortions were African-American and Latina.

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[20]In 1972, the maternal mortality risk for women of color was 27.7 deaths per 100,000 births and only 9.6 deaths for white women. The death rate per 100,000 legal abortions was also more than twice as high for women of color (5.7 for non-whites as opposed to 2.4 for whites). Id. at 21.

[21]Following national legalization the pace of decline was more rapid in the 19 states. In the four years following Roe, the death rate in those states fell to about the same level as in New York. (13 deaths per 100,000 births). Id.

Binken, Gold & Cates, Illegal-Abortion Deaths in the United States: Why Are They Still Occurring? 14 Fam. Plan. Persp. 163 (1982).[22]

This data, and data on health complications from illegal abortions among the poor, even after legalization, suggest that access to abortion must be very broad to ensure against unconscionable discrimination. See San Antonio Independent School District v. Rodriguez, 441 U.S. 1, 20 (1973).[23] Any dilution of Roe v. Wade spells a return to an era when women seeking abortions had to risk

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[22]One third sought illegal abortions because legal abortions were either too expensive or not readily available in their areas. Id.

[23]A study in a major urban hospital near Atlanta, Georgia revealed that at least among medically indigent groups, legal abortion does not entirely displace illegal abortion and that the availability of legal abortion must be very broad indeed to undercut the use of illegal means. Kahan, Baker, & Freeman, The Effect of Legalized Abortion on the Morbidity Resulting from Criminal Abortion, 121 Amer. J. Obstet. Gynec. 114-116 (1975).

their lives in order to obtain one.

POINT II

THE IMPACT OF ADOPTING AN UNDUE BURDEN THRESHOLD WILL BE TO PRECLUDE LEGAL AND SAFE ABORTIONS FOR POOR WOMEN, WHO ARE DISPROPORTIONATELY WOMEN OF COLOR; STRICT SCRUTINY OF ALL SIGNIFICANT BURDENS IS NEEDED TO AVERT THAT IMPACT.

The State of Missouri proposes that even if the Court continues to recognize the right to abortion as fundamental, the Court should adopt a higher threshold for triggering strict scrutiny than for other fundamental rights. Brief for Appellants at 19. Under the proposed standard, unless state regulations constitute an "undue burden" on the fundamental right to choose abortion, strict scrutiny need never be applied and state laws need only be rationally related to any state interest, including the state interest in potential life. See Akron v. Akron Center for

Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting)

Although this proposed change in the standard of review appears to be an innocuous, less sweeping means of undoing the Roe v. Wade framework, the result would be essentially identical to a wholesale judicial rejection of the fundamental right to abortion for most women.

Because equality with respect to the exercise of fundamental rights is a paramount aspect of equal justice, because an "undue burden" standard is indeterminate and subject to arbitrary application, and because it would effectively foreclose millions of poor women, women of color and young women from the ability to exercise their fundamental right, this Court should reject any modification of the threshold for the application of strict scrutiny established in Roe v. Wade

and reaffirmed in Akron.

A. Strict Scrutiny Of All Significant Burdens On The Fundamental Right To Abortion Is Required Under The Equal Protection Clause In Order To Avert Disproportionate Impact Based On Wealth And Race.

This Court has recognized that seemingly small burdens on the exercise of fundamental rights may preclude their enjoyment by the poor or people of color. Only strict scrutiny of all state-created obstacles can assure that the right to a safe, legal abortion will not be precluded for those without great resources or special connections.

Strict scrutiny is required under the liberty prong of the due process clause because of the preciousness of the fundamental right and its vulnerability to social prejudice and intolerance. The principle of equal protection also justifies strict scrutiny: it requires that fundamental

rights be guaranteed equally to all.[24]

This Court has shown special solicitude for the disproportionate impact of fundamental rights-restrictive legislation on the basis of wealth or class. Thus, the Court has invalidated relatively minor financial restrictions on electoral participation, not because the poor are a suspect class, but because it is essential to guarantee the right to vote equally regardless of wealth.[25] The right of privacy has been likewise protected against such disproportionate

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[24]See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971); cf. Harris v. McRae, 448 U.S. 297 (1980) (equal access is guaranteed against state-created obstacles; even though it does not require affirmative governmental support).

[25]See, e.g., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) ($1.50 poll tax held impermissible burden); Lubin v. Panish, 415 U.S. 709 (1974) (candidate filing fee held impermissible burden).

impact. In Boddie v. Connecticut, 401 U.S. at 383 the Court invalidated a $45 filing fee for divorce because of the state's monopoly over the means of obtaining a divorce and the fundamental nature of the privacy interest.[26] In Zablocki v. Redhail, 434 U.S. at 387, the Court struck down a statute conditioning the right to marry on a judicial determination that support obligations were not in arrears and not likely to be affected. While finding that the statute created an impermissible procedural burden for those who could afford it, the Court emphasized that for the poor, the statute would operate as an absolute bar. Id. at 388.

From a constitutional perspective, there is no difference between a statute imposing a

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[26]Contrast U.S. v. Kras, 409 U.S. 434, 450 (1973) (upholding filing fees for bankruptcy) and Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (upholding appellate filing fee).

filing fee and one which increases the cost of abortion. The added cost and its preclusive effect is imposed by the state and is not simply a consequence of an individual's poverty.[27] Strict scrutiny of any significant increase in cost is the only way to assure that only necessary costs, carefully tailored to a compelling interest, will be imposed so that the preclusive effect of state regulation on the poor will be kept to a minimum.

In assessing whether a restriction has an impermissible effect on the exercise of a fundamental right, the Court examines its deterrent as well as its penalizing effect. Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, 415

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[27]Contrast Harris v. McRae, 448 U.S. 297, 317 (1980); Maher v. Roe, 432 U.S. 464, 475 (1977).

U.S. 250 (1974). Poor women will be significantly deterred from seeking legal abortions by burdensome regulations. Moreover, even for those women who should succeed, the added cost, procedural hurdles and delay, which escalate health risks and emotional distress constitute a penalty on the exercise of the right. Id. at 255-256 (increased health risk from delayed health care is a penalty on the right to travel).

Finally, it is critical to stress the importance of assuring equality in the exercise of procreative rights. Skinner v. Oklahoma, 316 U.S. at 541. In Skinner, the Court recognized the danger of giving the state power to select who was eligible to reproduce. The power to force unwanted pregnancy is no less destructive of the dignity of women and their right to shape their lives, express their values or create

their families. To eliminate strict scrutiny of burdensome regulation in this area invests the state with power to coerce the child-bearing decisions of the poor.[28]

B. An "Undue Burden" Threshold For Strict Scrutiny Of Abortion Restrictions Is Indeterminate And Will Lead To Confusion, To Prejudice Or To No Standard At All.

There is a sensible and necessary simplicity in the standard for strict scrutiny in Roe v. Wade and its progeny. Regulations,

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[28]Justice O'Connor has made clear that the degree of scrutiny should not be influenced, as Justice White suggests in Thornburgh v. A.C.O.G., 476 U.S. 747, 795 (1986) (White, J., dissenting), by the presence of fetal life, but rather that the presence of fetal life should affect only the second part of the strict scrutiny test. This threatens the right of women, particularly poor women, women of color and disabled women to choose to procreate as well as to abort. The ignominious history of involuntary sterilization in this country counsels against any watering down of the standard of review. See Buck v. Bell, 274 U.S. 200 (1927); Gould, Carrie Buck's Daughter, Natural History Mag. (July 1984).

which have no significant impact on the right to abortion are acceptable so long as they are rationally related to an important state health objective. Akron, 462 U.S. at 430. Once a regulation imposes an identifiable or significant burden on the right--once it has an impact on the woman's ability to make or effectuate her choice--it must be examined under the compelling state interest test. Akron, 462 U.S. at 434, 435. While there is an element of indeterminacy in the assessment of whether a regulation constitutes a significant burden, the test makes clear that anything which adversely affects the cost, timing, and accessibility of abortion is suspect. It requires neither complex value judgments about the degree of impact nor individualized determinations. It is a rule that is capable of general application.

To require instead that a regulation be

"unduly burdensome" is subject to a myriad of variables. On what basis does a court make this judgment? When does the burden of a waiting period become undue? At 24 hours? At 72 hours? One week? One month?

Moreover, it is impossible to establish a clear national standard because the question as to whether a regulation is unduly burdensome will vary from community to community, from state to state. It will vary according to the circumstances of each individual woman.[29]

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[29]Take, for example, a hospitalization requirement. In State X, where hospitals have established freestanding abortion clinics, it may not increase the cost of first trimester abortion; in State Y, it may add $2000. In State X these hospital clinics are operative in every sizeable town. In State Y, there is only one provider and most women must travel 200 miles or more, necessitating overnight accommodations. For a woman of means in State Y, with no children or childcare, with job flexibility and a supportive family or friends, the hospitalization requirement may not be an "undue", in the sense of preclusive, burden; for a

Beyond the differences in women's familial, work, geographic and financial circumstances, an "undue burden" standard permits courts to pour their own moral beliefs and prejudices into this critical threshold determination. Hostility to abortion is fueled not simply by beliefs about the sacredness of the fetus, but also by anger at abortion as a symbol of women's taking some control over their lives--their decisions to be sexual, to reject or defer childbearing, or to chart a life's course that does not submit to the traditional notion of woman's role. For some courts, the operative, albeit improper, question is not whether the burden is undue or unfair,

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teenager, a woman on welfare, an assembly line worker, a school teacher, a single mother or a battered woman, the hospitalization requirement forecloses access to legal abortion. Is it enough that it unduly burdens some women's access? Will every woman's situation be subject to medical, judicial or some other form of review?

but rather whether the risks, inconvenience, frustration and shame involved in obtaining an abortion--i.e., the punishment--is enough.[30] This Court has announced the impropriety of dictating forced pregnancy as punishment for even "illicit" sexual activity. See, e.g., Eisenstadt v. Baird, 405 U. S. 438, 448 (1972); Carey v. Population Services International, 431 U.S. 678, 695 (1978); Roe v. Wade, 410 U.S. at 148.

Amici agree with the Solicitor General that the effect of an "undue burden" standard would be arbitrary decisionmaking. Brief for

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[30]The Solicitor General's position in this case is illustrative. For him, denial of abortion would be an "undue burden," if the abortion resulted from rape or incest or perhaps from contraceptive failure. See Brief for the United States at 22, n. 16. A woman's sexual practices--whether she abstained or practiced sex--would be open to examination in every case. In many cases, she alone would bear the burden, stigma and terror of this inquiry although her pregnancy resulted from contraceptive failure or other circumstances beyond her control.

the United States, at 22. The substitution of an "undue burden" standard for the current "significant burden" standard as the threshold for strict scrutiny will not only eviscerate the right to abortion; it will lead to inconsistent and irrational results in legislatures and courts. It will transform the current and workable threshold into a wholly unpredictable and highly prejudicial one.

C. The Cumulative Impact Of Restrictive Regulations Which Would Be Permissible Under An "Undue Burden" Standard Will Effectively Preclude Abortion For Poor Women Who Are Disproportionately Women Of Color.

The effect of state regulations that restrict abortion, both individually and cumulatively, would be to create virtually impenetrable barriers between a woman and her ability to obtain a safe, legal abortion. Such obstruction would not save potential human life, but rather would force poor women and women of color to resort to illegal abortion with its resultant risks of death, maiming, trauma, and familial, social and economic disintegration.

1. Laws Requiring That All Abortions Be Performed In Hospitals Would Effectively Preclude Abortions For Poor Women And Women Of Color.

It has been suggested that a requirement that all abortions be performed in hospitals, might not be found to be an "undue burden,"

and therefore, might be upheld under minimal scrutiny. See Akron, 462 U.S. at 466-67 (O'Connor, J., dissenting). Amici will examine the adverse consequences of this requirement in order to exemplify the preclusive effect of an "undue burden" threshold for strict scrutiny on poor women and women of color.

a. Poor Women Do Not Have Access To Hospitals For Abortions.

To require that abortions be performed in hospitals[31] will place an added burden on the already inadequate delivery of health care to

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[31]In this case, Missouri's regulation does the opposite, i.e., it bans all abortions, even those which are privately funded, from being performed in public hospitals. This, too, will have a greater impact on women of color than on others. 28% of abortions obtained by women of color were performed in hospitals as opposed to only 17% for whites. Henshaw & O'Reilly, Characteristics of Abortion Patients in the United States, 1979 and 1980, 15 Fam. Plan. Persp. 5, 11 (1983).

the poor. For general health care, poor families are dependent on public hospitals which are severely overcrowded and understaffed.[32]

Even though hospitals are the ordinary source of medical care for the poor,[33] access to abortions in hospitals is limited and in most communities unavailable. In 1979-1980 only 17% of all public hospitals in the United States reported doing at least one abortion and only 22% of all abortions took place in hospitals, with a mere 32% of those hospitals providing abortions after 14 weeks

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[32]Twice as many African-Americans and Latinos as whites reported hospitals and health clinics as their usual source of medical care. U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black & Minority Health 189 (1986).

[33]Henshaw & O'Reilly, Characteristics of Abortion Patients in the United States, 1979 and 1980, 15 Fam. Plan. Persp. 5, 11 (1983).

of pregnancy.[34] For Native American women who live on reservations,[35] and African-American women in the rural South,[36] there

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[34]Henshaw, Forrest, Sullivan & Tietze, Abortion Services in the U.S., 1979-1980, 14 Fam. Plan. Persp. 5, 6, 11, 12 (1982).

[35]Almost half a million Native Americans live on reservations and in historic trust areas. U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black and Minority Health 58 (1986). Yet no Indian Health Service clinic or hospital were permitted to perform abortions even when there was private payment until 1982. Then federal regulations permitted abortions at Indian Health Service facilities, but only when the woman's life is endangered. Alan Guttmacher Institute, Issues in Brief 12 (1985).

[36]Almost 3.9 million African-Americans live in rural areas in the United States. U.S. Dept. of Commerce, Bureau of the Census, General Population Characteristics, United States Summary, 1980 Census Population (May 1983). A 1974 study in Georgia, found that the further a woman must travel to obtain an abortion, the less likely she is to get one. Distance especially disadvantages Black women, most of all, Black teenagers. Shelton, Brann & Schulz, Abortion Utilization: Does Travel Distance Matter? 8 Fam. Plan. Persp. 260 (1976).

has been even less access. To require that all abortions be performed at hospitals would severely restrict the numbers of abortion providers. Additionally, it would render abortion inaccessible to women in most communities in the country.

b. Hospitalization Requirements Will Increase The Cost of Abortions By At Least Five Times.

If states are permitted to require hospitalization for abortion throughout pregnancy, the cost of an abortion will increase artificially.[37] The cost of

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In 1982, because of inadequate services, Mississippi and Arkansas had low abortion rates (respectively 9.3 and 12.9 for every 1000 women aged 15-44) in spite of having large African-American populations, which normally utilize services at a relatively high rate. Henshaw, Forrest & Blaine, Abortion Services in the United States, 1981 and 1982, 16 Fam. Plan. Persp. 119, 122 (1984).

[37]Costs imposed by unnecessary regulation are state-created obstacles to abortion and thus distinguished from costs borne as a consequence of a state's refusal to fund abortion. Akron, 462 U.S. at 444, n. 33

abortions in hospitals is at least five times greater than the cost of clinic abortions.[38] Although a first-trimester abortion in a clinic costs $200-300, the same abortion in a hospital costs $1200-1300. The cost for women who require second-trimester hospital abortions is even greater.[39]

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citing Maher v. Roe, 432 U.S. at 474.

[38] In 1989, a first-trimester clinic abortion costs $200-300, a second-trimester clinic abortion costs $350-400 (for pregnancies of 13-16 weeks) plus $100 for each week thereafter. An abortion done in a hospital adds $1000 to that cost. National Abortion Federation, Celebrating Roe v. Wade: Dramatic Improvements in American Health 6 (Jan. 1989). See also Henshaw, Forrest & Van Vort, Abortion Services in the United States, 1984 and 1985, 19 Fam. Plan. Persp. 67-69 (1987) (in 1986, average cost of a clinic abortion was $208; of a hospital abortion, $735); Henshaw, Forrest & Blaine, Abortion Services In the United States, 1981 and 1982, 16 Fam. Plan. Persp. 119, 125-126 (1984) (in 1984, hospital abortions cost two to four times more than clinic abortions).

[39]At 20 weeks, a hospital abortion could cost $1850. National Abortion Federation, Celebrating Roe v. Wade: Dramatic Improvements in American Health 6 (Jan. 1989).

The cost of an in-hospital first-trimester abortion would be almost four times the average monthly AFDC payment ($375) for a family of three[40]. Medicaid-eligible women who receive an average of $375 per month for themselves and their children cannot afford $200-$300 for a first-trimester clinic abortion.[41] Yet many women, living in states

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[40]Committee on Ways and Means, U.S. House of Representatives, 100th Cong., 2d Sess., Background Material and Data on Programs Within The Jurisdiction of The Committee on Ways and Means 428 (Committee Print 1988). For some women, the cost would be 10 times their monthly AFDC payment. A family of three in Alabama receives $118 per month; in Louisiana, $190. Center on Social Welfare, Policy & Law, Analysis of 1988 Benefit Levels in the Program of Aid to Families with Dependent Children 1, Table 1. (1988).

[41]Henshaw, Forrest & Van Vort, Abortion Services in the United States, 1984 and 1985, 19 Fam. Plan. Persp. 63 (1987) (average is $213). At current clinic rates, at least 20% of Medicaid-eligible women do not obtain abortions. Trussell, Menken, Lindheim & Vaughan, The Impact of Restricting Medicaid Financing For Abortion, 12 Fam. Plan. Persp. 120, 128 (1980).

which do not fund abortions, have managed to pay this sum by using all or part of their meager grants for daily living expenses.[42] Increasing the cost to $1200 or $1300 will foreclose that option, making illegal abortion, once again, the only choice for

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[42]Medicaid-eligible women pay for abortions wholly or in part out of their daily living expenses. Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services for the Poor, 16 Fam. Plan. Persp. 170 (1984).

In one study, of 144 poor women seeking abortions, the 63% able to raise money to procure abortions did so by not paying rent or utility bills, pawning household goods, diverting food and clothing money from their meager grant or journeying to other states to obtain lower rates or fraudulently using a relative's insurance. Women's Health Services, Inc. v. Maher, 482 F. Supp. 725, 731 n.9 (D. Conn. 1980), vacated and remanded on other grounds, 636 F.2d 23 (2d Cir. 1980). If the children of the poor are homeless and hungry now, when abortion is safe and legal, countless more will suffer if regulations multiply the cost of abortion.

poor women.[43]

The increased cost of abortion is only part

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[43]Indeed, between 1975 and 1979, 33% of those women who sought illegal abortions, and died as a result, did so because legal abortions were too expensive or not readily available in their area. Binken, Gold & Cates, Illegal-Abortion Deaths in the United States: Why are They Still Occurring? 14 Fam. Plan. Persp. 163 (1982). According to the Center for Disease Control, a Mexican-American woman who had two previous Medicaid abortions died after an illegal abortion in 1977 because she was unable to pay $100 for a safe and legal abortion. McRae v. Califano, 491 F. Supp. 630, 658 (1980), rev'd on other grounds sub nom. Harris v. McRae, 448 U.S. 297 (1980).

Further, when the Hyde Amendment was passed, the Center for Disease Control ("CDC") estimated that if publicly-funded abortions were restricted in all states, 5 to 90 additional deaths would result each year. McRae v. Califano, 491 F. Supp. at 655. CDC found that in 1977, the first year of reduced Medicaid benefits, there was an increase in the number of illegal abortion deaths for the first time since 1972. Id. at 658. Additionally, it was estimated that a two week delay, due to difficulties in obtaining funds, would increase abortion deaths of Medicaid-eligible women by 60%. Lincoln, Doring-Bradley, Lindheim & Cotterill, The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor, 9 Fam. Plan. Persp. 207, 213 (1977).

of the financial burden created by a hospitalization requirement. The cost of travel, of overnight stays, of childcare and of lost time from employment need to be factored in.[44] The impact of a hospitalization requirement would fall especially heavily upon teenagers from poor families or those with no independent access to resources.[45]

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[44]See Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services For the Poor, 16 Fam. Plan. Persp. 180 (1984).

[45]Women under 20 had 27% of all abortions in 1983, 41% of which were performed after 16 weeks. Center for Disease Control, U.S. Dept. of Health & Human Services, 36 Surveillance Summaries 4055 (1987).

c. Complicated Preconditions Preclude Access.

Hospital requirements may also entail additional bureaucratic hurdles to abortion. Before Akron, 23 states required the approval of a hospital committee for second-trimester abortions. Akron, 462 U.S. at 426, n.9. Prior to Roe v. Wade many states required that abortions be approved by hospital committees and that the attending physician's judgment be confirmed by two other physicians. Doe v. Bolton, 410 U.S. 179, 199 (1973).[46]

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[46]Before Roe, poor women were less likely than privileged women to be certified to obtain abortions, even when treated in the same institution. Thus private patients in New York were about four times as likely to get certified for medical non-psychiatric conditions as poor patients. McRae Record at T.3523. In 1964, for example, there were 14 times more certifications for rubella at University Hospital than at Bellevue, the public part of the same hospital. Id.

Similarly, applications for life-threatening psychiatric reasons were approved

Poor women have less access to private doctors than do women of means, and rarely have a doctor who advocates for them. Illegal abortion would, therefore, look far less difficult than the prospect of finding and convincing up to six private doctors

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only for private patients before 1973. McRae Record at T.3529. Yet the stress of an unwanted pregnancy makes poor women all the more desperate. One study, of 90% of the poor women who got abortions at Bellevue Hospital between 1969 and 1970 found that 37.7% attempted either an illegal or self-induced abortion and 11% tried to commit suicide. Id. at T.3538, 3554.

This disparity also occurs in treatment of medical conditions, even though women of color suffer more from the conditions. For example, African-American women have higher rates of diseases that cause complications in pregnancy, including diabetes, cardiovascular disease, high blood pressure, and vaginal cancer than other women. U.S. Dept. of Health & Human Services, 1 Report of the Secretary's Task Force on Black and Minority Health 71 (Aug. 1985). One out of ten Black women is a carrier of sickle cell anemia. Henefin, Prenatal Screening in Reproductive Laws for the 1990's A Briefing Handbook 133 (Taub & Cohen 1988).

(three on abortion committee; the providing physician; and two more).[47]

d. Delay Which Results In Increased Danger To Life And Health And In Increased Costs Would Be Inevitable.

Requirements that increase the cost of abortion will also endanger women's health by delaying the performance of the procedure. Each week of delay in obtaining an abortion increases the risk of serious health complications by 20% and the risk of death by 50%.[48] Legalization has allowed most abortions to be performed earlier.[49] While only 10% of all abortions between 1972 and 1977 were second-trimester abortions, 57% of the deaths following legal abortions involved late abortions.[50] Between 1972 and 1977 African-American women having second-trimester abortions were three times more likely to

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[47]Hospital committees present other dangers as well. Before 1973, approval by a hospital abortion committee was often conditioned on the woman's agreement to have a concurrent sterilization operation. McRae Record at 476.

[48]Center for Disease Control, U.S. Dept. of Health & Human Services, Abortion Surveillance Report, 1978 (1980).

[49]In the six years following legalization of abortion in New York, the rate of second-trimester abortions performed fell by 50%. Alan Guttmacher Institute, Safe and Legal: 10 Years' Experience With Legal Abortion in New York State 19 (1980).

[50]Benditt, Second-Trimester Abortion In The United States, 11 Fam. Plan. Persp. 358 (1979); Torres & Forrest, Why Do Women Have Abortions? 20 Fam. Plan. Persp. 169 (1988). Among women who experienced abortion complications requiring a hospital visit, those who were Medicaid eligible in non-funding states had a two to four week-later average gestational age than did those who were not poor. Trussell, Menken, Lindheim & Vaughan, The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persp. 120, 129 (1980).

die than white women.[51]

African-American, young, single and poor women were significantly more likely than others to have later abortions.[52] In 1982, Medicaid-eligible women had abortions two to three weeks later than others and 42% said that they delayed pregnancy testing or abortion for financial reasons.[53] Of the 29% of women who delayed abortion due to problems in making arrangements for them, 60% said they needed more time to raise money, 33%

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[51]Benditt, Second-Trimester Abortion in the United States, 11 Fam. Plan. Persp. 358, 359 (1979).

[52]Ryser, Racial Differences in Abortion Seeking, 12 Contraception 199-201 (1975).

[53]Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services for the Poor, 16 Fam. Plan. Persp. 170 (1984). Since the Medicaid cutoffs, delay has increased for poor women. 50% had abortions at 10 weeks or later compared to 37% in 1977. Id.

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

51 & 52

poor women seeking abortions.[57]

For example, by contrast to the clinics established to provide abortion and family planning services, hospitals must handle the broad range of medical emergencies and health crisis. Abortion, a simple and safe procedure when done under appropriate conditions, must therefore compete with life-threatening situations for medical attention and time.

Beyond that, clinics provide an anonymous context for abortion whereas the confidentiality of hospital records is more dubious. Moreover, because hospitals are larger and deal with many health issues, women are more likely to run into employers or social

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[57]Asian Pacific women, whose medical needs and problems, have never been properly assessed because of cultural and language barriers, will be further disadvantaged. See, e.g., Lin-Fu, Population Characteristics and Health Care Needs of Asian Pacific Americans in Public Health Reports 21 (1988).

workers who may use knowledge of their abortion against them. By contrast, abortion clinic records are guarded and clinics provide environments which assure anonymity.

2. The Cumulative Impact Of Many Restrictive Regulations Will Further Deny Access.

Rigid in-hospital requirements are only one example of a broad range of regulations that would result from an undue burden standard. Each additional requirement which escapes strict scrutiny increases the physical, emotional and economic burdens. They must not be considered in isolation from one another.

In addition to hospitalization, a number of regulations struck down by this and lower courts under the Roe v. Wade framework, might not be considered sufficiently burdensome as to trigger strict scrutiny analysis. Intrusive and distorted "informed consent"

requirements designed to frighten women from obtaining abortions, and onerous record-keeping and public disclosure requirements, which were intended to harass patients and providers, were struck down in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). These and more preclusive parental consent and notices rules,[58] or more intrusive spousal consent or notice requirements, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), might survive an unduly burdensome threshold.

That these and other requirements burden the choice of poor women and women of color is suggested by several additional examples. Some states or localities may require waiting

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[58] See Bellotti v. Baird (I), 428 U.S. 132 (1976); Bellotti v. Baird (II), 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981).

periods of varying lengths as a precondition for a legal abortion. Akron, 462 U.S. at 416. Depending on the length of the waiting period,[59] and the number of weeks pregnant, women will suffer increased risk to health because of delay. Once again, the impact will fall most severely upon the most vulnerable. When Tennessee mandated a waiting period, low-income women incurred a 48% increase in the cost of abortion, as opposed to a 14% increase for higher-income women.[60]

Obviously, where women must travel great distances, such as in North Dakota, the cost of two trips or two overnight stays could

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[59]A 24-hour waiting period can result in an actual two to seven day delay depending on the days that particular services are available in the area. Akron, 462 U.S. at 450.

[60]Lupfer & Silber, How Patients View Mandatory Waiting Periods for Abortion, 13 Fam. Plan. Persp. 75 (1981).

become prohibitive.[61]

Anti-abortion statutes have also increased costs by mandating expensive and unnecessary requirements. In Louisiana, the state required frequent warrantless inspections of clinics, restrictive licensing and hospitalization. Margaret S. v. Edwards, 488 F. Supp. 181 (E.D.La. 1980). After this statute was declared unconstitutional, Louisiana enacted a new law requiring, among other things, mandatory hospitalization, a waiting period, ultra-sound testing for every abortion

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[61]In North Dakota, where there was only one provider, one court found that these additional expenses placed a "significant and substantial burden on a large number of women, especially on women in areas of western North Dakota who would have to travel over 400 miles to obtain an abortion." Leigh v. Olson, 497 F. Supp. 1340, 1347 (D.N.D. 1980).

41% of all jobholders reported losing an average of $32.00 in pay because of the required second visit. Lupfer & Silber, How Patients View Mandatory Waiting Periods for Abortion, 13 Fam. Plan. Persp. 75, 77 (1981).

(adding $60-$195 to the cost in 1984) and that physicians personally counsel patients.[62]

In the Webster case before this Court, Missouri requires useless[63] and expensive viability tests which risk the health of the pregnant woman and substantially increase the cost.[64] Whereas these requirements are

[62](This adds to the cost by requiring 20 to 30 minutes of the physician's time for each patient and reduces the quality of the counseling). Margaret S. v. Treen, 597 F. Supp. 636, 659-660 (E.D. La. 1984), aff'd, 794 F.2d 994 (5th Cir. 1986). In Ohio, doctors were also required to personally obtain informed consent from each patient. Akron, 462 U.S. at 416.

[63]Tests to determine fetal weight are unreliable and inaccurate; they are not medically appropriate until much later in pregnancy than at 20 weeks, when they are required by statute. Similarly, amniocentesis is contrary to accepted medical practice until 28-30 weeks. Webster, 851 F.2d at 1075 n.5.

[64]One test for "viability" is amniocentesis which, in Missouri, costs $200 to $250. Record at Maulik, T. V.1, 43, Reproductive Health Services v. Webster, 662 F. Supp. 407

plainly unconstitutional under the current framework, they could multiply and yet survive deferential and often "toothless" minimal scrutiny.

3. The Cumulative Effect Of An Undue Burden Threshold Will Force Poor Women To Resort To Illegal Abortions.

Any one of these requirements could tip the balance and lead a woman to take the drastic, but less procedurally complicated step of illegal or self-abortion. Certainly this will be the result in states whose hostility to abortion will be expressed through several expensive, intimidating, unnecessary, and time consuming restrictions.

The social and psychological costs of forcing women to choose between illegal

(W.D. Mo. 1987), aff'd, 851 F.2d 1071 (8th Cir. 1988). Another test for "viability", which determines fetal weight, adds $125 to $250 to the cost. Webster, 851 F.2d at 1075 n.5.

abortion or life-shattering and often dangerous involuntary pregnancy are incalculable.[65]

The pain of poor women who face this constitutionally intolerable choice was articulated by Justice Marshall:

> An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses serious threat to her health and even her life. See n.1 supra. If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chances of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time childcare for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the

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[65]See McRae v. Califano, 491 F.Supp. 630, 681-690 (E.D.N.Y.), rev'd sub nom. Harris v. McRae, 448 U.S. 297 (1980) for comprehensive findings on the dangers of coerced child-bearing, particularly for poor women.

> direction of her own life will have been lost.

Beal v. Doe, 432 U.S. 438, 458-59 (1977) (Marshall, J., dissenting).

CONCLUSION

In 1973 in Roe v. Wade, this Court recognized that a woman's decision whether or not to terminate her pregnancy is a fundamental right. In doing so, the Court was not "creating" a fundamental right where none existed. Rather, the Court was merely recognizing a fact that was painfully obvious to women--that without the ability to control their reproductive lives they were stripped of the right of self-determination that is a given for men. Because of the fundamental importance of the decision whether or not to bear a child, women have historically been willing to risk their very lives in order to have an abortion and will continue to do so.

Nonetheless, this Court is being asked to undo what was done in Roe v. Wade and rule that the rights of a fetus are equal to or greater than those of the woman that must carry it. In essence, this Court is being asked to rule that states can legitimately force a woman to bear a child against her will.

In the 16 years that have passed since Roe v. Wade, nothing has occurred to justify such a change. The same moral and religious debates rage now as before, although they may be more strident now than in 1973.[66] The

[66]In striking down Connecticut's re-enacted criminal abortion statute in 1973, the court in Abele v. Markle, 351 F. Supp. 224, 231 (D.Conn. 1973), recognized the nature of the conflicting views as follows:

> No doubt in the opinion of many people the nature of a fetus as a human being is a matter of absolute moral certainty. In their view, perhaps in the view of some of the legislators who enacted this statute, abortion is considered the deliberate

same legal debate continues.[67] The same need exists for women with unwanted pregnancies to be able to obtain safe legal abortions. In fact, the only change that has occurred since 1973 is the composition of this Court and that surely can not justify the destruction

> killing of a human being. We do not doubt the sincerity of those who hold this view, nor minimize the depth of their conviction in this regard. But under the Constitution, their judgment must remain a personal judgment, one that they may follow in their personal lives and seek to persuade others to follow, but a judgment they may not impose upon others by force of law.

[67]When this Court considered the constitutionality of the Texas abortion statute, other state legislatures had, like Missouri in this case, sought to save their laws by enacting preamble justifications stating that "the public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception...." Abele v. Markle, 351 F. Supp. at 226. See also Wis. Stat. §940.04(6) discussed in Roe v. Wade, 410 U.S. at 159 n. 55. This Court rejected those efforts. "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." Roe, 410 U.S. at 162.

of a right so fundamental to more than one-half of the population.

Because controlling one's reproductive life is so critical to a woman, regardless how this Court rules, it cannot and will not stop abortions. By permitting states to "burden" the choice to have an abortion, or to make abortions illegal once again, the Court can only make them unsafe--to force women, and particularly low income women, back to back alleys and butchers, back to coat hangers and catheters. Neither this Court nor the states can "protect" unwanted fetuses; they can only maim and sacrifice the women who carry them.

For the foregoing reasons, the Court should reject the invitation of the United States and the State of Missouri to withdraw constitutional protection for a woman's abortion choice and affirm Roe v. Wade.

Dated: New York, New York
March 29, 1989

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Counsel for Amici Curiae gratefully acknowledge the assistance of Sabrae Jenkins, of the Religious Coalition for Abortion Rights; B. Mullings, Sonia Martinez, and Dorothy Zellner of the Center for Constitutional Rights; and Jane Quimby, a second year student at Rutgers University School of Law-Newark in the production of this brief.

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A WOMAN'S PLACE of Doylestown, Pennsylvania provides shelter, counseling and legal advocacy to victims of domestic violence. Often, these are women with several young children who have no other resources. As part of our philosophy of empowerment for women, we are committed to reproductive and medical assistance for all women, regardless of their economic status.

* * *

The ABUSE AND RAPE CRISIS CENTER of Towanda, Pennsylvania, has, for ten years, provided services to victims of domestic violence and sexual assault in Bradford County, Pennsylvania. We support the right of victims of rape and incest to receive safe, legal abortions if they so choose.

* * *

ACTIONAIDS in Philadelphia, Pennsylvania provides direct services to two thirds of the

people with AIDS in the Delaware Valley. Additionally, we provide support and assistance to their spouses, lovers, family members and care givers. Access to abortion services can be crucially important to women who are positive for the AIDS virus.

These women often need abortion services in order to save their own lives, as continued pregnancy can further endanger an already damaged immune system. They also need equitable medical coverage, including abortion, in order to have a true moral choice with regards to one of the most heartbreaking and difficult decisions -- that of whether or not to bear a child who may have AIDS. Because women at high risk of AIDS frequently discover their own HIV positive status <u>as a result of</u> giving birth to a child with AIDS, access to comprehensive reproductive health care, including abortion,

becomes a matter of paramount importance. For medical, moral and emotional reasons these women cannot reasonably be required to carry future, inadvertent pregnancies to term.

* * *

AIDS EDUCATION TASK FORCE at St. Luke's/Roosevelt Hospital Center, in New York City, is an interdisciplinary group that provides ongoing AIDS education programs for all hospital staff. We wholeheartedly support every woman's right to safe, legalized termination of pregnancy as clearly outlined in <u>Roe v.w Wade.</u> The overturning of this decision would be a clear violation of the right to individual self-determination. In addition, it would strike a devastating blow to the country's entire health care field, even now reeling from the dual epidemics of AIDS and widespread drug usage.

The obvious scenario will find untold numbers of women once again relying on illegal, unsafe abortion procedures to terminate their pregnancies. A cursory check of most hospital records will attest to the numerous hospital admissions and protracted length of stay (and deaths) that were the result of the "no abortion" era. The AIDS Education Task Force hereby supports the "women of color" brief re: Webster.

* * *

The ALLIANCE AGAINST WOMEN'S OPPRESSION, headquartered in New York City, is a national multi-racial, lesbian and straight women's organization that works for equality and justice for women. Since 1978 we have worked for medicaid funding for abortions to assure that poor women, mainly Black and Latin, have access to all family planning options. We have helped to organize

local and national activities in support of abortion rights.

* * *

The ALL-PEOPLES CONGRESS, based in New York City, is a national organization with chapters in communities in many major cities whose women members are Black, Latina, Asian, Native, white, students, lesbians, workers, unemployed, disabled, seniors, single heads of households and those on fixed incomes. It totally supports a comprehensive federal program of guaranteed reproductive rights and health care for all women, which includes safe, legal, affordable abortion. It opposes overturning this fundamental right as it would seriously impact upon millions of women, especially the poor, and young and Black, Latina, Native and Asian women.

* * *

The AMERICAN INDIAN HEALTH CARE ASSOCIATION is representative of the 35 urban Indian health programs nationally to provide health care to over 200,000 American Indians annually. The purpose of the American Indian Health Care Association is to work towards improving health status to American Indians to the highest possible level. The vast majority of urban Indian patients are low income and generally without alternative health care services and delivery. The American Indian Health Care Association recognizes that it is a woman's right to choose in terms of birth control and pregnancy.

* * *

The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), founded in 1974, is a non-profit organization that addresses the legal needs of Asian Americans in New York

and nationwide. AALDEF works with immigrant, low-income, and monolingual Asian American women, both in its general work and through its Women's Project. We believe that the framework established by Roe v. Wade has been beneficial to this segment of the Asian American Community, which is part of the community of poor women, working women and women of color represented by this amicus effort, and therefore join this brief in support of plaintiffs-appellees in this case.

* * *

The ASSOCIATION OF LATINO ATTORNEYS (ALA) in New York City is an association of activist lawyers, law students, and other legal workers committed to the political, social and economic empowerment of the Latino community in the United States. ALA recognizes the oppression of women within society. We are particularly sensitive to

the historical discrimination against Latinas and other women of color. ALA seeks to protect the human and civil rights of all Latinos, promote equality among men and women, and to effect fundamental social change. ALA as amici in this case requests that the Supreme Court re-emphasize the rights recognized in Roe v. Wade, protecting the right of all women to control their lives and their futures.

* * *

The BLACK WOMEN'S AGENDA, INC. (BWA) in Washington, D.C. is a coalition of national Black women's organizations dedicated to equity and equality for Black women and their families. The BWA firmly believes that reproductive freedom is essential to our advancement.

* * *

The BRIDGE PARTNERSHIP PROJECT, RCAR OF ILLINOIS represents women of color, both religious and secular, who agree that abortion should remain a legal option. We feel that the attempt to legislate as scientific fact a specific time when life begins, in the face of many religious views which differ widely, is an infringement of our constitutional rights. Further, as the least economically powerful, women of color are most oppressed by restrictive abortion laws. Women of color must be represented in this argument.

* * *

The BROOKLYN PRO-CHOICE NETWORK is an independent organization that supports the right of all women to protect and determine their mental and physical health, regardless of economic status. Some of its goals are to insure women's choice as to when and if to

bear children, maintenance of access to safe and legal abortion, and distribution of information on women's health issues. The Network supports these goals through petitioning, tabling, holding open meetings and forums and working with other local and national groups to organize and support pro-choice demonstrations and actions.

* * *

The BROOKLYN WOMEN'S MARTIAL ARTS, INC. teaches self-defense skills from its 150-member school to over 750 women each year in the New York Metropolitan area. A large majority of the participants in its program are women of color and low-income women. In order for women to control their bodies and their lives, access to legal abortion -- like the right to defend oneself against threats and assaults --is absolutely necessary.

* * *

The BROOKLYN YWCA (YOUNG WOMEN'S CHRISTIAN ASSOCIATION) is part of the oldest worldwide women's membership organization dedicated to empowering women. The Brooklyn YWCA works to carry out the national YWCA imperative "to eliminate racism" and as such opposes any effort to restrict the access of poor and young women to quality health care services, as well as any attempt to deny them their right to reproductive freedom.

* * *

The BRONX NATIONAL ORGANIZATION FOR WOMEN of Bronx, New York feels that every woman has a right to choose. So far no one is telling men what to do with their bodies. As older women of color we have seen many women suffer in more ways than one. We certainly do not need to go back to the old ways of torture. Give all the women a chance to choose whether to have or not have children.

* * *

The CATHEDRAL CHURCH OF ST. JOHN THE DIVINE is the seat of the Bishop of New York and is located on one corner of the Harlem community. With a ministry to thousands of New York residents, the staff of the Cathedral counsels and works directly with many women and girls, most of whom are low-income and working women and women of color. It is clear that there is already a great difference in the medical assistance afforded women of the middle and upper income levels and those at the lower end of the spectrum. The Cathedral confronts regularly the trauma of this disparity and any proposed changes in the laws governing abortions, such as the Missouri law (Weber v. Reproductive Health Services, Inc.), would add a disastrous burden to the overall well-being of many of these women.

* * *

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR), a litigation/education organization located in New York and Mississippi, was founded in 1966. Born of the civil rights movement and the struggles of Black people in the United States for true equality, CCR has litigated for voting rights, civil rights, and the fundamental and necessary right of each woman to obtain access to safe and legal abortion. CCR decries the disproportionate and potentially devastating effect that the limitation or loss of the right to abortion will have on women of color and low-income and working women, and we urge this Court to protect the right to accessible, safe and legal abortion in their names.

* * *

The CENTER FOR LAW AND SOCIAL JUSTICE at Medgar Evers College (CLSJ) is a research and

advocacy institution created in 1985 to meet an existing need within the City of New York for a civil rights, social justice and legally oriented institution. CLSJ litigation and projects deal with civil and human rights issues such as education, health care, housing and the quality of life in communities of color. Preserving the constitutional rights to an abortion insures that women of color who choose an abortion are not choosing to risk their life and health, as was the case prior to 1970. Therefore, CLSJ joins with amici in urging this Court to reaffirm Roe v. Wade and the strict scrutiny standard of review announced in that decision and followed by its progeny. The continued effectiveness of our efforts to reach the goal of a society in which women are guaranteed equal protection under the law requires such a ruling by this Court.

* * *

The CENTRE COUNTY WOMEN'S RESOURCE CENTER of State College, Pennsylvania believes that whether a woman chooses motherhood, wifehood, an individual career, or a combination, her choice should be respected, and she should be provided with the necessary resources to reach her full potential in the areas of development she prefers. Her right to choose abortion should be respected and protected by the constitution.

* * *

The CENTRE DE SANTE DES FEMMES is a women's health clinic in Geneva, Switzerland attended by nearly 2,000 clients. We support the right to choose a safe, legal abortion. It is important, even essential, that women can have this choice. Outlawing abortion will increase maternal mortality.

* * *

The CHILD CARE LAW CENTER in San Francisco, California is the only legal services organization in the country exclusively dedicated to expanding the supply of affordable, quality child care. It has a particular emphasis on serving the needs of low-income women, and as such it strongly supports the rights of low-income women to have equal access to necessary services, whether they are health services which include abortion, or family support, such as child care.

* * *

The CHINATOWN HISTORY PROJECT in New York City seeks to document and interpret the history of Chinese-Americans in the New York City area. It is deeply concerned with the historic lack of economic, social and medical options available to our community and opposes, therefore, any further restrictions

on the right of women to choose abortion.

* * *

CHOICES WOMEN'S MEDICAL CENTER is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion and pre-natal care. Since its founding in 1971, Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care to its patients and fighting politically to retain the right to choose.

* * *

The COALITION OF 100 BLACK WOMEN OF D.C., INC. is a non-profit consortium of professional African-American women with a shared goal of improving the quality of life for black women and their families in the Washington metropolitan area. The D.C. Coalition endorses the "women of color" brief

because, regardless of our individual views on abortion, we must have the right to choose and we must have that right protected.

* * *

The COLUMBIA LAW WOMEN'S ASSOCIATION (CLWA) is a group of law students, professors, and members of the Law School administration of Columbia University in New York City concerned with both the role of women in the legal profession and how the law affects women's lives. To this second end, members provide legal assistance for battered women, organize pro-choice activities, and keep the Law School community informed of current decisions and events.

* * *

The COMISION FEMENIL MEXICANA NACIONAL, INC. in Los Angeles, California is the oldest and largest Hispanic women's organization in the United States. Historically, we have

worked diligently to maintain reproductive freedoms for all women, but specifically for Hispanic women. Our organization is dedicated to the advancement of Latin women socially, politically, economically and through education. Our organization firmly believes that maintaining reproductive freedoms is crucial to our advancement.

* * *

The COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES is a not-for-profit organization in New York City dedicated to promoting and strengthening the Hispanic family. In our community education efforts we seek to heighten awareness of issues such as domestic violence, teen pregnancy and child abuse and neglect. Clearly our goal is to mobilize our community in effective prevention strategies for these and other problems which afflict our community. Key to being able to confront

these myriad problems is the need for quality and equitable medical care. We oppose the denial of access to health services including abortion for Hispanic women.

* * *

The COMMITTEE OF INTERNS AND RESIDENTS (CIR) is the nation's oldest and largest housestaff union, representing over 5,000 interns, residents and fellows in New York, New Jersey and Washington, D.C. For over 30 years, the CIR's struggle to improve residents' working conditions has been inseparable from its fight for quality patient care. The CIR strongly supports the right of all women tc safe, legal birth control and abortion.

* * *

The COMMITTEE OF WOMEN OF COLOR, PRESBYTERIAN CHURCH (USA), located in Louisville, Kentucky is a committee of racial

ethnic women responsible for advocating, monitoring, planning and designing programs in response to issues in church and society impacting women of color and for facilitating the full participation of women of color in the church life. Its purpose is to work as women of color to help shape the corporate conscience of the church and society in order to eliminate racism, sexism, classism and ageism as they impact the lives of women of color and the lives of others.

* * *

The COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180 represents 8000 public sector workers in New York City. Seventy-five percent of the members are women; a majority are women of color. Many of the workers are involved in the delivery of services through municipal social service and health care facilities to the poor for whom this decision

would have the greatest impact. An unfavorable ruling in this case could restrict the Union's ability to bargain health benefits for its members.

* * *

The D.C. RAPE CRISIS CENTER was established in 1972 to provide services to sexual assault survivors. The Center is interested in this case because we maintain a strong concern for issues that affect women, particularly low-income women and women of color. We believe that issues of economics, health, justice, education, etc. are all intertwined. Though our primary focus is violence against women, we consistently support actions that promote justice for women, which includes the right to reproductive freedom.

* * *

The DISABLED IN ACTION OF METROPOLITAN NEW YORK (DIA) strongly supports the right of women to choose not to have a baby and to obtain safe and affordable abortions. The prevailing prejudice of professional health care providers, however, is that disabled women are incapable of having and raising a healthy child. Thus, the right to choose to have a baby and not to be sterilized is equally important to disabled women. DIA, representing disabled people, participated in a complaint to obtain equal access to health care along with other groups representing women, racial minorities, older people and poor people.

* * *

The DISTRICT 65, UAW (TECHNICAL, OFFICE, AND PROFESSIONAL DIVISION) represents 10,000 workers, the majority of whom are women, and includes many single parents in the New York

metropolitan area. We are committed to improving our lives in the work place and in the community. Many of our members are struggling for their survival and the survival of their families. It is on their behalf that we passionately support the right to choose. Our members are often the lowest paid employees in the work place, usually recently organized. The difficulties endured to support their families are overwhelming. The right to choose is a sacred right; it is the right to survive.

* * *

The EDUCATION COMMITTEE OF 100 BLACK MEN OF LOS ANGELES is concerned with motivating and assisting Black youth to succeed academically. As such, we have long understood the causal connections between unwanted pregnancy and the inordinately high drop-out rate of women of color, their lack

of educational attainment, and their resultant dependency on social welfare and their lack of economic viability. We strongly believe that female reproductive rights are essential to the individual and we strongly support the "women of color" brief.

* * *

The FEDERATION OF FEMINIST WOMEN'S HEALTH CENTERS in Los Angeles, California is a national organization whose purpose is to promote reproductive rights for all women. The Federation coordinates the work of its member women-controlled clinics which provide women's health services, including abortion services and health education based on the self-help model.

* * *

The FEMINIST WOMEN'S HEALTH CENTER of Atlanta and Athens, Georgia is a non-profit organization established by women in 1977 to

advocate, promote and protect reproductive rights for all women. Our goal is to enable women to make informed choices about their health care and reproduction through the provision of self-help health education and gynecological services. We work with others locally, nationally and internationally to insure that women have the information and power to control their bodies and their lives. Historically when abortion has been made illegal and/or inaccessible all women are denied the right to control their bodies and their lives and poorer women suffer disproportionately.

* * *

The GAY MEN'S HEALTH CRISIS, INC. (GMHC), based in New York City, is the nation's oldest and largest community-based AIDS service, education and advocacy organization. As of January 1989,

approximately 4% of GMHC's 2,471 active clients were women. The majority of our female clients are women of color. GMHC is concerned that our female clients and women in general affected by the HIV epidemic be able to make their own medical decisions and that one option that must be available is a safe and legal abortion regardless of a woman's financial status.

* * *

The HISPANIC HEALTH COUNCIL is a research, training, and advocacy organization devoted to the improvement of the health and mental health status of Latinos, especially in the Hartford and Northeast region. Specifically, the Council seeks to reverse the current quality and quantity of health care services by improving them through information collection, education to providers, and advocacy at the local, state,

and federal level. The Council has numerous projects on child abuse prevention, maternal-child health, reproductive health, substance abuse prevention, and AIDS research and prevention.

* * *

The INSTITUTE FOR COMMUNITY RESEARCH, INC. has as its mission the improvement of the quality and availability of critical information to underserved people in the Hartford, Connecticut capitol area and beyond. The Institute collaborates with organizations and institutions working in African-American, Puerto Rican, West Indian, and other ethnic and ethnic minority communities, as well as poor and working class communities. The Institute historically supports the access of low-income women and women of color to equal resources and services. Recognizing the

complex social and economic factors that result in un-anticipated pregnancies among women of color and the lack of societal supports which women of color and poor women in general face in attempting to raise un-anticipated children; and the intolerable psychological and physical consequences of illegal abortion faced by poor women all over the world, the Institute supports the right of poor women and women of color to information about abortion and other reproductive health issues, and to the constitutional right to reproductive health self-determination, including the right to abortion and abortion counseling, and appropriate public financing to support these choices.

* * *

The INTERNATIONAL AGENCY FOR MINORITY ARTIST AFFAIRS (IAMAA) is a nationwide

membership organization based in New York City which serves as an arts, cultural and social service agency. One of our primary concerns is the promotion of women's rights. Our founder is Queen Mother Moore, who is now 91 years of age, and Ms. Flo Kennedy, attorney and feminist leader. The Executive Board of the IAMAA fully supports the freedom of choice of women pertinent to abortion and stands firmly against any modification of the Roe decision.

* * *

The JUDSON MEMORIAL CHURCH in New York's Greenwich Village is affiliated with both the American Baptist Church and the United Church of Christ. In 1967 it founded the Clergy Consultation Service on Abortion, a national organization of ministers, rabbis and nuns who counseled thousands upon thousands of women with "problem pregnancies" and referred

those who chose abortion to physicians willing to perform them despite the law. The Clergy Consultation Service on Abortion disbanded in 1973 when the Supreme Court decision in Roe v. Wade was handed down.

* * *

The JUNIOR LEAGUE OF BROOKLYN welcomes all young women regardless of race, color, religion or national origin, who demonstrate an interest in and commitment to voluntarism and community service. The purpose of the Junior League is exclusively educational and charitable; and is to promote voluntarism and to improve the community through the effective action and leadership of trained volunteers.

The Junior League of Brooklyn recognizes the critical need for a just and humane environment which enables each woman to achieve her personal, professional and

community goals. Specifically, we support legislation for the equal rights of women, including the ratification of the Equal Rights Amendment to the Constitution of the United States; reproductive freedom, family planning and other health care issues pertaining to women; equal opportunities for employment and advancement; economic security and training options for homemakers; equal access to credit.

* * *

LATINOS CONTRA SIDA of Hartford, Connecticut, is an independent organization which provides Latinos with AIDS/ARC and who are HIV positive and their family members education, outreach, counseling and support. AIDS affects everyone, especially Blacks and Hispanics of low socio-economic income.

* * *

The LOS ANGELES FEMINIST WOMEN'S HEALTH CENTER is a non-profit health center that provides quality specialized health care and self-help information for all women in a non-judgmental, compassionate and respectful manner. We encourage a better understanding of our bodies and enhancement of good health in a safe, private atmosphere that is woman-controlled. We are strong advocates for reproductive freedom!

* * *

The LOS ANGELES GAY AND LESBIAN SCIENTISTS is an organization of scientists and technical professionals who have always been interested in the issue of the right to privacy as a constitutional protection. We also deplore any discrimination based on minority status or economic status. Just as the AIDS crisis has affected our community's right to privacy and access to all possible

medical treatment for the disease, so we perceive the potential discrimination in denying a woman's right to privacy and medical choice a terrible crisis of injustice.

* * *

The METRO D.C. COALITION FOR CHOICE in Washington, DC has as its purpose the mobilization of local support for the reproductive rights of all women and to represent the unique needs of the residents of the District of Columbia in the area of reproductive rights. Women of color make up a large percentage of the D.C. population, so we feel it is important to endorse this brief.

* * *

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF) is a national civil rights organization based in Los Angeles and

established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. In this context, MALDEF has advocated on behalf of Hispanic women for equality of access to health services and facilities. Any restriction on a woman's right to choose an abortion will have a disproportionate impact on the Hispanic community's self-determination and ability to obtain equality of opportunity.

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The MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION of Washington, D.C. is committed to improving the quality of life for all Hispanic women.

* * *

MICHIGAN REPUBLICANS FOR CHOICE in Grand Rapids, Michigan is a statewide organization

of approximately 1000 men and women. They support the right of a woman to decide when to bear children and when not to bear children. They believe in the right to privacy and believe that right is supported in the constitution.

* * *

The MINORITY PRISON PROJECT of Memphis, Tennessee works for the protection of the men, women, and children imprisoned in the United States. We work to try and regain the rights for these humans, under the Constitution, that is denied them daily.

* * *

MOBILIZATION FOR YOUTH HEALTH SERVICES, INC. is a non-profit community-based organization of 400 clients and over 700 employers in New York City. We are dedicated to providing human home care services for our

clients, the elderly and the handicapped. Ninety per cent of our employees are low-income minority women. A reversal of the right to choose a safe, legal abortion would deny low-income minority and other women an aspect of fair and equitable medical coverage.

* * *

MY SISTER'S PLACE of Washington D.C. is a shelter for battered women and their children. For ten years we have sheltered, advocated for, counseled with and been a friend to 2000 women and children who have been forced to leave their homes in order to find physical safety, peace of mind, and the right to make their own choices. My Sister's Place is a vehicle to self-determination for women whose right to choose has been invalidated. The right to self-determination, including how it extends to

the right to choose abortion, is the principle upon which we are founded.

* * *

The NATION INSTITUTE of New York City is a non-profit foundation founded in 1966 which undertakes research, educational programs and other projects concerned with civil rights and civil liberties, particularly those protected by the First Amendment. The Supreme Court Watch project of The Nation Institute is an example of our commitment to these issues.

* * *

The NATIONAL ACTION FORUM FOR MIDLIFE & OLDER WOMEN, INC. in Stony Brook, New York was founded nine years ago by a group of professional volunteer women to inform the dramatically growing numbers of women over forty about health, economic and social issues of importance to them. The national

and international newsletter, Hot Flash, goes to thousands of women throughout the United States, and thirty other countries of the world. One of its goals is not only to empower women with knowledge, but to oppose inequitable treatment of women of all ages. Reproductive freedom is important to all women of reproductive age, for themselves, their adult daughters and granddaughters.

* * *

The NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP) of Atlanta, Georgia was founded as a self help and health advocacy organization to improve the chronically poor and declining health status of Black women and their families. Today it consists of a network of 88 developing and established chapters in 24 states, serving a broad-based constituency of almost 2000 members. The purpose of the NBWHP is the definition, promotion, and

maintenance of health for Black women, including full reproductive rights, the essential authority of every woman to choose when, whether, and under what conditions she will bear children. Because too many single family households in the United States are headed by Black women living in poverty, possessing less educational and job training opportunities, enduring inadequate, often non-existent child care services, subject to substandard housing conditions, and lacking access to appropriate health services of any kind; wherefrom, more than half of all Black children are poor, born of mothers receiving inferior, if any, prenatal care, suffering the highest rate of infant mortality and neo-natal deaths in the Western world; and because we lack fail-safe birth control methods, adequate human sexuality education, and suffer also the highest rate of teenage

pregnancy in the Western world, we firmly insist upon continued access to safe, legal and affordable abortion. Restrictive abortion laws exacerbate the low socioeconomic status of women of color and the passage of such will further impugn the dignity of Black womanhood, leaving sterilization as the only publicly funded and permanent birth control method available to women of color. The lives of Black and other women of color will be disproportionately damaged as we are forced to rely on publicly funded health facilities where they exist.

* * *

The NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR, formerly the Lesbian Rights Project) in San Francisco, California is a non-profit, public interest law firm dedicated to eradicating sexual orientation-based discrimination. For over a decade, NCLR has

represented women in both state and federal courts in their efforts to preserve the privacy and integrity of their personal and family lives. NCLR attorneys have authored numerous law review articles and publications on privacy-related issues.

* * *

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL), based in New York City, is an activist legal organization of Black lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. NCBL and its chapters throughout the country have been actively involved in the continuing struggle for equal rights for women. We are deeply concerned over the prospect that the Court will abolish or further limit a woman's constitutional right to choose abortion. Therefore, we urge this Court to affirm the

decision below and reaffirm the principles enunciated in Roe v. Wade.

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The NATIONAL COUNCIL OF NEGRO WOMEN, INC. (NCNW), headquartered in Washington, D.C., is an umbrella organization of national organizations. It was founded in 1935 by Mary McLeod Bethune. From its inception NCNW has sought to harness the collective strengths of Black women in the struggle for civil and human rights. It has a half century of civil rights leadership and public service on behalf of women and their families in the United States and in developing African countries. Teenage pregnancy, health protection, job training, juvenile justice, education, career advancement, entrepreneurship, hunger, malnutrition and international development education are current program emphases. NCNW embraces 33

national organizations and 254 chartered community-based sections with an outreach to 4 million women in all walks of life whose mission is inspired by Mary McLeod Bethune to "Leave No One Behind."

* * *

The NATIONAL INSTITUTE FOR WOMEN OF COLOR (NIWC) of Denver, Colorado is a private, non-profit organization established in 1981 to promote educational and economic equity for all women of color (Black, Hispanic, Asian American, Pacific Islander, American Indian, and Alaska Native). NIWC has been a long-standing advocate of a woman's right to choose. More importantly, NIWC views reproductive choice as one aspect of a full range of reproductive health care services and recognizes the need to make these services accessible to women of limited economic means as well as to women of diverse

racial and cultural backgrounds.

* * *

The NATIONAL LAWYERS GUILD (NLG), founded in 1937, is a national organization based in New York City which represents 7,000 legal practitioners in 200 chapters throughout the United States.

Throughout its long history, the NLG has been proud to represent people of color in their struggles for dignity and justice, and has taken pride in the increasing numbers of women in its own ranks and in the legal profession.

The NLG remains firmly committed to the proposition that each individual must have real opportunity and real autonomy. Without options and without choices to make, specifically without access to safe and legal abortion, women of color and women generally will be unable to exercise the necessary

autonomy to have meaningful and productive lives.

* * *

The NATIONAL MINORITY AIDS COUNCIL is a national organization dedicated to creating a greater response among people of color to HIV/AIDS in our communities. The Council has as its primary focus leadership. As such we take stands on issues impacting on minority health. Therefore, we recognize the importance of supporting increased access to public health, and a national focus on public health for all women.

* * *

The NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS is a union with headquarters in New York City which represents about 3,000 staff attorneys, social workers, paralegals, and clerical personnel around the country. Our members provide free legal assistance to

low income women in various civil cases, including matters related to domestic violence, health services, government benefits, and housing and homelessness issues.

* * *

The NATIONAL RAINBOW COALITION, NEW YORK STATE CHAPTER is a broad-based coalition of multi-racial ethnic, socio-economic and issue-oriented people from across the state of New York that are fighting for a better social environment for all the people of this state, particularly the "have-nots" in our society. We believe that women, particularly women of color and poor women, must have the right to safe legal abortions, and that access to legal abortions must be maintained. Furthermore, we believe that "the intentions of governments are written into the budgets." With this in mind we believe that the federal

government and the government of the state of New York must continue to provide funds for poor women to obtain abortions.

* * *

The NATIONAL URBAN LEAGUE, INC., founded in 1910, is the premier social service and civil rights organization in America. The League is a non-profit, community-based agency headquartered in New York City, with 113 affiliates in 34 states and the District of Columbia. Its principal objective is to secure equal opportunity for African-Americans and other minorities in every aspect of American life. The National Urban League supports women's legal right to medically safe abortions, and full access to comprehensive reproductive health services for African-American women and their families.

* * *

The NATIONAL WOMEN'S HEALTH NETWORK (NWHN) in Washington, D.C. represents over 8,000 individual and 300 institutional members. The membership is composed of women, including providers, consumers, physicians, professional women, older women and women of color. The Network is a resource on health issues, providing information to members of congress involved in health issues and testimony to the Food and Drug Administration on issues affecting women's health. It is also an advocacy organization representing the needs of its members for access to services and information, including the service of and information about abortion.

* * *

The NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC) of Washington, D.C. is a nonprofit organization supporting the appointment and

election of women to public office. NWPC also supports legislative initiatives at state and national levels to insure fairness and equity for all Americans. As an organization comprised of white women and women of color working together, we recognize and work to overcome the particular problems faced by women of color, particularly those who are poor, in receiving adequate health care and in safeguarding their right to choice in reproductive decisions.

* * *

The NATIONAL WOMEN'S POLITICAL CAUCUS, New York State Chapter is an organization whose platform includes support for pro-choice (all levels of choice) candidates for political office and lobbying for medicaid funds to fund abortions.

* * *

The NATIVE AMERICAN COMMUNITY BOARD of Andes, South Dakota works with Native American women in areas of health education and advocacy issues pertaining to health and reproductive rights. We have assisted over 1000 Native American people over the last year.

* * *

NEW DIRECTIONS FOR WOMEN (NDFW), a feminist newspaper in Englewood, New Jersey, is committed to publishing the many voices of feminism. We believe the diversity of the women's movement must be seen as one of its strengths. NDFW believes that when we understand the pervasive force of sexism, we will act to effect change. We support every woman's right to reproductive control. We wholeheartedly support Roe v. Wade and urge the Court to leave it intact.

* * *

The NEW JEWISH AGENDA (NJA) is a national organization headquartered in New York City committed to progressive human values and the building of a shared vision of Jewish life. We affirm the value of life and the right of all children to be born into a loving and caring environment. Women should be free to choose when and under what conditions they bring life into the world. The question of a woman's right to have an abortion involves complex moral and religious issues. In the case of Jewish law, abortion is not only permitted but mandated in certain circumstances. NJA will fight to retain safe, legal abortions and opposes depriving poor people of choices available to others.

* * *

The NEW YORK ASIAN WOMEN'S CENTER, INC. is a battered women's shelter program serving primarily battered women and their dependents

in the Asian communities of New York City. We are committed to creating safe options for women, including issues concerning reproductive choice. Some of the women that we work with rely on public funding for abortion services; without such funding these women's lives are in serious jeopardy.

* * *

The NEW YORK GRAY PANTHERS is an intergenerational non-profit organization. One of our commitments is anti-discrimination in all its forms. We are interested in improving the system to attain equal rights for all.

* * *

The NEW YORK PRO-CHOICE COALITION is composed of individuals and organizations dedicated to winning full reproductive rights for all women. We call for safe, legal abortion, medicaid funding of abortion for

poor women, access to birth control and health care, economic parity for women, affordable housing, and for the elimination of forced sterilization of Black, Puerto Rican, Native American and poor women.

* * *

The NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE is a membership organization of battered women's shelters, safe home projects, counseling and advocacy organizations and individuals committed to empowering women and helping them to lead violence-free lives. The Coalition is an inclusive organization that works with all women, regardless of race, class, ethnicity or sexual orientation. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. This includes every woman's right to reproductive choice

and to medical assistance.

* * *

The NEW YORK UNIVERSITY LAW WOMEN is an organization of female law students. As a legal organization for women, we are committed to maintaining legal rights for other women and for ourselves. Through projects such as the Battered Women's Project and the Women in Prison Project, we face the inequitable treatment of women of color and low-income women by the legal system. On behalf of ourselves as women of a variety of races and income levels and on behalf of those we seek to assist, we strongly oppose any further restrictions on the rights of women to take control of their own lives and bodies.

* * *

The NEW YORK WOMEN AGAINST RAPE (NYWAR) is a feminist, non-profit women's

organization dedicated to ending sexual violence. NYWAR provides services through crisis intervention counseling, community education and organizing. NYWAR addresses the needs of under-represented populations, including women of color, lesbians and adolescents. In our work we are constantly confronted with the different treatment afforded women of privilege by the criminal justice and other systems. We strongly oppose the current inequities and the broadening of this gap in accessibility to health care services should Roe be overturned.

* * *

OAKHURST PRESBYTERIAN CHURCH of Decatur, Georgia asserts that both our local church and our denomination support the right of all women to have access to safe and legal abortions. While none of us applaud

abortions, we do affirm that the final decision must be made between a woman and God.

* * *

ORGANIZACION NACIONAL DE LA SALUD DE LA MUJER LATINA/NATIONAL LATINA HEALTH ORGANIZATION of Oakland, California was formed because we felt strongly that we ourselves needed to do something about the quality of our health, about the injustices, neglect and racism we as a group have suffered. Our physical selves suffer when our mental and emotional selves do not feel in control. Our health issues have not been addressed. Lack of awareness on the part of the medical profession and the language barrier have had a major impact on our access to medical care.

A reversal of Roe v. Wade would be most detrimental to Latinas and other women of

color. Our access to abortion services and related reproductive care is already limited due to the language barrier. We need to expand services, information, and health education on sexuality and birth control that is culturally relevant and in our language so that we can make healthful educated decisions and are able to give informed consent. There has to be an end to discrimination based on race and class related to access.

* * *

The ORGANIZATION OF ASIAN WOMEN in New York City is comprised of Asian women from various ethnic backgrounds concerned about issues affecting our communities. We sponsor educationals on and organize in coalitions on anti-Asian violence, immigrant workers' rights and the rights of the undocumented, domestic violence in Asian communities, the sexual exploitation of Asian women here and

abroad, and reproductive freedom, including access to inexpensive and safe abortions.

* * *

The ORGANIZATION OF PAN-ASIAN AMERICAN WOMEN is a national organization based in Washington, D.C. and founded in 1976 which seeks to combat discrimination and to achieve equal opportunities for Asian Pacific American women.

* * *

The PERMANENT COMMISSION ON THE STATUS OF HARTFORD WOMEN (PCSHW) represents all women in the City of Hartford, Connecticut. The Commission advocates for the rights of women in all areas of need, including health, employment, housing and day care, and is charged with working toward elimination of gender-based discrimination. The PCSHW endorses the women of color brief because poor women and women of color have the fewest

resources and therefore depend on public health care facilities.

* * *

PLANNED PARENTHOOD OF ATLANTA AREA (PPAA) provides confidential services to women in the Atlanta area. PPAA supports a woman's right to choose abortion as a matter of privacy and personal choice. Approximately 70% of PPAA's clients are women of color.

* * *

PROJECT AWARE (Association for Women's AIDS Research and Education) in San Francisco, California is an epidemiologic and educational research study group focusing on women at high risk for HIV infection in San Francisco and the local Bay Area. Over one thousand women have been evaluated; many are of low income, have been pregnant, are pregnant, or anticipate pregnancy and have

fundamental decisions to make in situations of active HIV infection or ongoing risk for HIV infection. Providing full information about reproductive choices is essential to the health and welfare of the mother and her current or possible pregnancies.

* * *

PROJECT CHOICE: AIDS EDUCATION FOR CO-DEPENDENT WOMEN OF COLOR in Oakland, California is involved with providing AIDS education to women who choose relationships with partners who are generally addicted to alcohol or drugs. The focus is to assist women to learn how to negotiate safe sex and needle-sharing practices to avoid contracting the HIV virus. It is imperative for women who, despite all efforts, become HIV positive and are pregnant to have access to appropriate medical assistance and have a choice to abort a child with a 30-50% chance

of being HIV positive also. Safe affordable abortions must be available for women of color who choose them.

* * *

The PUERTO RICAN COMMITTEE AGAINST REPRESSION in New York City is dedicated to the struggle for the self-determination and independence of Puerto Rico, and to challenging racist and oppressive conditions in the U.S. Reproductive rights is of crucial importance to Puerto Rican women, inasmuch as 38% of them have been sterilized, many against their will, due to inadequate access to birth control and abortion.

* * *

The PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND is a national organization based in New York City dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos. The Fund's

litigation efforts focus on the areas of employment, education, housing and voting rights, with a particular emphasis on safeguarding the rights of Puerto Ricans of low economic status. Puerto Rican women and other women of color are particularly vulnerable to discrimination and therefore the Fund supports efforts to protect their rights. The Fund opposes any efforts to overturn or in any way restrict the rights recognized in Roe v. Wade.

* * *

* * *

The RAINBOW LOBBY, INC. is an independent citizen's lobby working to strengthen and preserve democracy nationally and internationally. The majority of people in the United States support the right of a woman to choose an abortion. The Lobby is concerned about the enormous gap between the concerns of the majority of people in this

country, i.e., for abortion rights for all women, and the public policy actually legislated by Congress. Our elected officials are more and more unaccountable to ordinary citizens, their constituents, and thus we don't hear any outcry against the Supreme Court's decision to take the Webster case.

* * *

The ROCKLAND FAMILY SHELTER, located in Spring Valley, New York, provides services to victims of domestic violence, sexual assault and homeless women and children. As a result of their victimization, many of the women with whom we work have lost their jobs and other financial resources, placing them at high risk of inadequate health care. These women are unable to afford health care services equal to those available to women of privilege. Our agency strongly opposes any

legislation which will continue to perpetuate such inequities.

* * *

The SAN FRANCISCO WOMEN LAWYERS ALLIANCE is a progressive, activist bar organization that was founded in 1983 to provide a vehicle through which women lawyers could address women's issues and have an impact in the community. It provides a forum where women lawyers can work together on substantive legal and political projects and contribute their skills to enhance the position of women in our society. One of the issues of particular concern to our membership is freedom of choice and reproductive rights for all women.

* * *

The SAN FRANCISCO WOMEN'S CENTERS/WOMEN'S BUILDING is a community organization serving the public in various

ways. We are concerned and active around issues for low-income and working women, especially women of color, single mothers, older women, disabled women and lesbians. One of our ongoing commitments is to reproductive and medical assistance to all women, regardless of their economic status.

* * *

The SANTA FE HEALTH EDUCATION PROJECT serves Santa Fe and rural northern New Mexico offering services in education, advocacy and organizing. Our goal is to develop effective self-help groups capable of solving local health problems. We believe that everyone should have access to good medical care which includes reproductive care and the right to a safe abortion.

* * *

The STAFF AT DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY, PENNSYLVANIA: We are 100% of

the staff at the Domestic Violence Center of Chester County in West Chester, Pennsylvania. We provide a hotline, safe housing, and comprehensive counseling to battered women. Our Center served 743 women and 144 children from July 1, 1987 to June 30, 1988. A great many of the women we serve are single parents with low incomes. These women must struggle to procure fair access to services, including health care services. We strongly oppose inequitable treatment for low-income women denied fair access to medical services including abortion.

* * *

STOP ABUSE FOR EVERYONE, INC. in Clarion, Pennsylvania, provides services to victims of domestic violence. Our agency's main goal of empowering women is based on providing options and encouraging women to make their own decisions. Taking away a woman's choice

for an abortion is disempowering and therefore we strongly oppose any action which contributes to this oppression of women.

* * *

STUDENTS AND YOUTH AGAINST RACISM is a national organization based in New York City with chapters nation-wide whose women members include students and youth from many communities -- Black, Latino, Asian, Native American, white, lesbian, disabled, employed, unemployed, poor and heads of households. It organizes against racism and all forms of discrimination in this society. It strongly holds that full reproductive rights and quality health care is the right of all young people and that safe, legal abortions and birth control must be guaranteed and available to <u>all</u> youth, with Medicaid funding for those who need it. To deny safe, legal abortion would seriously harm the health of

and discriminate against untold numbers of young women, especially the poor, unemployed, and Black, Latin, Asian and Native American who, without the funds to obtain safe abortions, would have to resort to dangerous, health-threatening abortions.

* * *

The UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national labor organization based in Pittsburgh, Pennsylvania committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages, working and living conditions. The UE is fighting for expanded child care programs and parental leave policies to enable working parents to make their fullest contribution to both society

and their families, and at its last convention declared that the Union "supports the right of women to choose to terminate a pregnancy or otherwise control their own bodies without interference and regardless of economic status."

* * *

UNITED LABOR ACTION (New York City) is a national network of unionists, labor activists and unemployed workers, whose members, including many women, are of all nationalities who organize for workers' rights, with special concern for the poorest and unorganized. It supports the right of working women to have their right to privacy in making personal decisions about their lives as one aspect of having an equal place at the work place and in society. It views that working women must be guaranteed choice in reproductive matters with safe, legal,

affordable abortions, Medicaid funding, if needed, and decent jobs, pay equity, child care, parental leave and low-cost health care in order to decide whether or when to have children. Poor and working women have always had abortions; many died as a result prior to Roe v. Wade. To deny this right would hurt millions of working women, especially the poorest -- service workers, part-time and temporary workers, and minimum-wage earners, of which 60% are women. It would fall heaviest upon and discriminate against Black, Latina, Asian and Native American women who form a disproportionately high number of the poorest workers and would again be forced to resort to unsafe abortions.

* * *

The UNITED PROBATION OFFICERS ASSOCIATION is an organization that represents over 700 probation officers in New

York City. Each day we come in contact with those in this city who have the least access to the benefits of an affluent society. These are the mothers and young women whose only access to abortion will be through the illegal "back alley abortionist" if there is any restriction on public funds for abortion. We therefore strongly oppose any laws which would restrict equal access to abortion for women regardless of their economic status.

* * *

The URBAN LEAGUE OF GREATER HARTFORD, INC. is an equal opportunity organization, non-partisan and non-profit. Its mission is to enable Blacks and other minorities to live on a par with all other Americans. The constitutional right to abortion must not be denied to any woman because of income, race, ethnic background or the community in which she lives. The proposed unavailability of

abortion counseling, hospital/clinic-based abortions will directly lead to increases in unwanted pregnancies, child abuse and neglect, poverty, dropout rates, and the birth of addicted infants and those born with AIDS.

* * *

The WOMANCARE CLINIC in San Diego, California is a non-profit health center that provides quality specialized health care and self-help information for all women in a non-judgmental, compassionate and respectful manner. We encourage a better understanding of our bodies and enhancement of good health in a safe, private atmosphere that is woman-controlled. We are strong advocates for reproductive freedom!

* * *

WOMEN FOR RACIAL AND ECONOMIC EQUALITY (WREE), located in New York City, has its

purpose the fight against racism and for achieving economic equality for women. WREE's philosophy is outlined in its Women's Bill of Rights. WREE is a grass roots, multiracial and multi-cultural organization. Although its members come from all economic levels, WREE is primarily concerned with the needs of working class women. One of WREE's Bill of Rights is "the rights to reproductive freedom, including federally funded birth control and abortion upon demand, sex education and an end to experimentation and sterilization abuse." We fully support the brief of women of color.

* * *

WOMEN OF ALL RED NATIONS, MINNESOTA in Minneapolis, Minnesota works for the personal and political empowerment of Native women on the grassroots level. We aim for sovereignty and self-determination for our people. It

has been our experience that when women are denied the basic human right to control our own bodies, we are vulnerable to many kinds of abuse. Women of color in particular must retain the means to resist genocide.

* * *

WOMEN OF ALL RED NATIONS, NORTH DAKOTA in Fort Yates, North Dakota has monitored the Indian Health Service policy regarding the sterilization procedures available. Congress has mandated a report from IHS on this. Tubal ligation is the only major surgery available at IHS facilities. Statistics remain the same as ten years ago for sterilizations.

Native American populations have been decimated by many factors. As one of the most regulated populations, indeed, in the world, Native Americans exist by the policies of the National Government. Many of those

regulations do not allow for the choice, participation or development of their own programs. As Native American women who are concerned with the sterilization of our population, so we are greatly concerned with the imposition of not having the freedom to choose abortions. The Women of All Red Nations is committed to the freedom to choose in any situation.

* * *

The WOMEN OF COLOR PARTNERSHIP PROGRAM OF THE RELIGIOUS COALITION FOR ABORTION RIGHTS, located in Washington, D.C., is a national effort to educate women of color concerning public policies surrounding the issue of reproductive choice and its disproportionate affect on women of color. As the injustices of racism, sexism and classism engulf the day-to-day choices available to African-American, Latin

American, Native American and Asian/Pacific American women, access to reproductive health care affects every element of our lives. This program seeks to identify and address not only reproductive rights issues but also reproductive health care concerns from the unique perspectives of women of color to include: (1) the right to choose or not to choose abortion; (2) family planning and all methods of birth control; (3) teen pregnancy; (4) prenatal care; (5) child care; and (6) medical abuses against women of color.

This organization is extremely concerned about the continued existence and perpetuation of illegal abortions, sterilization abuse, forced Caesarian sections, the use of Depo-provera, and the lack of sufficient prenatal care for women of color. The economics of this country dictates that the "haves" may choose to

purchase whatever health services they may need or want. The "have nots" hold very few choices in their lives and in many instances must rely on the federal government. We are concerned about the numerous public policies which create a negative impact on the ability of women of color to make a difficult decision, the unnecessary sacrifices that she and her family may have to make because of a lack of resources and the degradation that she must undergo to carry out her decision. We believe that all women, regardless of race or class, should have access to a safe and legal abortion. Lastly, we believe that the right to choose abortion is a personal decision to be respected and made in consultation with a woman's doctor, her family, with spiritual guidance but without governmental interference.

* * *

The WOMEN'S ACTION ALLIANCE, located in New York City, is a national organization founded in 1971 dedicated to the full equality of all women. While we work toward this end by providing educational programs and services to women and women's centers around the country, we recognize that any progress toward equality is impossible when women do not maintain the right to control their own bodies. The right of all women to a safe and legal abortion, regardless of race or economic status, is intrinsic to any notion of gender equality and a central tenet is the struggle of women everywhere for individual dignity and self-determination.

* * *

The WOMEN'S ACTION ALLIANCE, INC. WOMEN'S CENTERS AND AIDS PROJECT in New York City works extensively with community-based organizations serving women of color, young

women, and low income women. We are keenly aware of the importance of maintaining a full range of reproductive options for these and all women. If abortion services or access to abortion were to be restricted, these women would have no alternative but to seek dangerous alternatives to safe and legal abortion. A return to the days of back-alley abortions would indicate a shameful and dangerous disregard for the lives of women in this country.

* * *

The WOMEN'S AIDS PREVENTION PROJECT of Atlanta, Georgia is a non-profit education and outreach service that provides information and opportunity to prevent the spread of HIV, AIDS and other sexually transmitted diseases in women. The Women's AIDS Prevention Project is operated by women for women who are interested in having more

control of our health care, our bodies and our lives through wellness and through choice. We work towards promoting empowerment in women of color in order that we may end oppression of women including the denial of funds and access to abortion and other reproductive choices. It is our interest that women of color have equal access and opportunity to choose our reproductive destiny with safety and with dignity.

* * *

The WOMEN'S INTERNATIONAL RESOURCE EXCHANGE (WIRE) in New York City distributes articles and information on women in the Third World. Right now WIRE is producing an article comparing sterilization in El Salvador and Cuba. This article is a case study that shows the connection between a woman's reproductive rights and her political

and economic status within her society. One of WIRE's objectives is to bridge the gap between women in this country and women in developing countries. Regardless of the many differences between us, all women have the right to control their reproductive process and to have access to adequate health care and child care.

* * *

The WOMEN'S LAW CENTER, INC. of Baltimore, Maryland is an advocacy organization in the State of Maryland whose goal is to promote the legal rights of women through litigation, legislation and education. Our organization sees the privacy and reproductive rights issues raised in the Webster case as critical to the advancement of women's rights, and, indeed, as critical to preventing the loss of legal rights gained over the last sixteen years since the Roe v.

Wade decision.

* * *

The WOMEN'S PROJECT in Little Rock, Arkansas is a community-based nonprofit organization committed to the elimination of sexism and racism. Since 1981, the Women's Project has provided community education and assisted women in organizing around: violence against women and children; women's economic issues, especially those affecting low income women; and social justice issues such as sexism, racism, homophobia, ageism, ableism, classism and anti-Semitism.

* * *

The WOMEN'S STUDIES PROGRAM OF HUNTER COLLEGE in New York City is a cross-disciplinary program of academic courses, research and public education that involves some sixty faculty members, 2,000 students, and ongoing relations with many community

organizations. Many of our courses, the scholarly research of our faculty, and our overall philosophy are concerned with expanding women's reproductive freedom. Maintaining full access to safe, legal abortion for all women is critical to this purpose.

* * *

The WORKERS WORLD PARTY is a national multi-chapter organization based in New York City whose members include working and poor women, youth, lesbians, seniors, disabled, unemployed and women on fixed incomes. It believes that every woman must be guaranteed choice and privacy regarding the critical and very personal issue of whether or when to have children and the right to control their own reproduction. To deny women this fundamental right to make the most personal decisions about their lives reinforces their

subordinate status in society. Additionally, it further burdens young, poor, Black, Latina, Asian and Native women, who would have even fewer choices if legal abortion is overturned, and who, furthermore, would face a disproportionately higher number of complications by having to resort to unsafe abortionists or self-induced procedures.

* * *

The YWCA OF GREATER PITTSBURGH, as the YWCA nationally and locally, has been a strong voice for abortion rights dating back to 1967 when delegates to a YWCA National Convention voted to work to repeal all laws restricting or prohibiting abortions performed by a duly licensed physician. In 1973 delegates voted to support efforts to provide safe, low-cost abortions to all women who desire them. The YWCA also has as its number one imperative the elimination of

racism wherever it exists and by any means necessary. Women of color are disproportionately impacted by the banning or restricting of abortions because they tend to have low incomes as a result of racism in America. This provides the basis for our interest in the CCR amicus brief.

* * *

The YWCA OF THE HARTFORD REGION, INC., in affiliation with the YWCA of the USA, believes "that there are times when respect for potential personhood should not override respect for the needs and lives of those already living...Legal restrictions and prohibition of abortions effect only poor women, depriving them of safe, medically approved abortions, while women of means can travel to locations where abortion is legal and safe. Thus the problem of unwanted pregnancies cannot be solved by outlawing

abortions, and the denial of public funding for abortions prevents some women from exercising a constitutional right guaranteed to all." (From "The YWCA Position on Abortion Rights," June 1985, The National Board of the YWCA.)

* * *

The YWCA OF THE NATIONAL CAPITOL AREA, located in the D.C. Metropolitan area, has long been a leader in the struggle for racial justice and a strong advocate of reproductive freedom for women. As an organization whose mission is to serve women and girls and whose one imperative is the elimination of racism wherever it exists and by any means necessary, we are well aware of the twin burdens of racism and sexism. Thus, we are naturally concerned about the detrimental impact on women of color of any threats to reproductive freedom, including limitations

on the right to choose abortion and on reproductive information and services that can be provided by publicly funded facilities. Such limitations will serve only to damage further the economic status of many women of color. Reproductive freedom must be preserved if women of color are to achieve economic equity.

* * *

The YWCA OF THE U.S.A. is a national membership movement with headquarters in Washington, D.C. that serves 2 million women and their families. The YWCA draws together women and girls of diverse experiences so that their lives may be open to new understanding and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people. The YWCA Mission states that the YWCA will work toward the elimination of

racism wherever it exists and by any means necessary.

* * *

INDIVIDUAL SIGNATORIES

SYLVIA CHAVKIN, homemaker, teacher, New York City: Working with individuals in parenting courses I have observed how, if one can in some way control one's life and make choices, how much better lives can be helped psychologically and socially.

PHYLLIS CHESLER, author, professor, New York City.

ANA MARIA GARCIA, producer, filmmaker, Caparra Heights, Puerto Rico.

VICTORIA A. GORSKI, M.D., Bronx, New York: I teach family medicine, a discipline which places emphasis on prevention and advocacy for families. I care for patients in a community health center which serves a large minority and medicaid-eligible

population. From both of these perspectives I see it as essential that all women, regardless of age, race, or financial status be allowed the right to have abortion as one safe, legal means of achieving effective family planning.

GWENYTH JACKAWAY, Mt. Vernon, New York.

CLARA Y. JONES, M.D., Bronx, New York.

SHEILA KEENAN, New York City: As an American citizen I wish to have the civil rights to make my own decisions in regard to reproductive rights including birth control and abortion choices. This is a private, hard-to-reach, overwhelming personal choice. The choice should be mine.

DINAH LEVENTHAL, Chair, Democratic Socialists of America Youth Section: We are an activist organization with over 1000 members on more than 40 campuses nationally. We work to fight poverty and racism; to

empower students, particularly women and minorities. In the past few years, we have made a priority of work to defend reproductive freedom, including access to affordable abortions, as well as other health services, child care, and pay equity.

CYNTHIA F. MORENO, Chicago, Illinois: As a single parent, self-supporting head of household, woman of color, on a daily basis I come into contact with women who are in similar situations and are struggling to survive and raise our children to be contributing adults. I have been fortunate to have been afforded the opportunity to educate myself before I had children. I find it intolerable for the government of this or any country to dictate to me a decision that is MY RIGHT to make. Most of the women with whom I work are abused or homeless and have the right to be allowed to make their own

choice. Economics should not figure into the decision process of a woman's right to choose.

JANE D. SAUNDERS, Boston, Massachusetts: For five years, previous to my current position as a Training Director, I worked at a federally funded family planning program in Western Massachusetts as a counselor. In that capacity, I saw many poor women (particularly Latina women because there is a large population of them in that area) who had birth control failures and saw no other reasonable alternative but an abortion since they did not have the economic base to have another child. Forcing these women to have another child in poverty serves no humane purpose on earth. The pain and agony of making this decision is more than enough for any person to have to deal with, making them break the law to have an abortion will not

benefit our society in any way, shape or form. Until there is utopia in this country there will be a need to exercise freedom of choice regarding an abortion.

SAUNDRA D. SHEPHERD, M.D., New York City: The current attempt by those of the conservative persuasion to overturn abortion laws is another strategy to further disenfranchise those who already live at the mercy of American society. Before they ban abortion, let them enact legislation to protect all of the children who are already here -- hungry, without shelter, without access to education or medical care. The wealthy will continue to have abortion on demand if we allow Roe to be overturned, the poor will die in their crowded shelters and substandard housing, unable to afford good medical care before their pregnancies or for their abortions.

PAT SHONUBI, New York City: I strongly oppose an inequitable medical treatment system. Changes in Roe which would put the decision in the states' hands would restrict all women's rights but would impact on poor women without the means to circumvent the law. As before I believe abortions would go underground and poor women would be in more danger of getting botched-up abortions.

ANN SNITOW, author, professor, New York City.

TWENTY SPELMAN COLLEGE STUDENTS, Atlanta, Georgia: Spelman sisters are against the following: (1) women of color being denied by law to have an abortion because of an unwanted pregnancy that may arise due to rape, incest, or a birth defect; (2) limitations on the types of reproductive services made available to women of color; and (3) a continuing cycle of infant

mortality, maternal morbidity, and despair amongst women of color.

LAURA UNGER, President, CWA Local 1150, New York City: My local represents AT&T workers in New York and New Jersey. Many are minorities, many are single parents, and approximately half of my members are women. Those with clerical titles are often in a position of living from week to week. The company has already declared its intention to cut our medical benefits. My members want and need safe, inexpensive and private access to abortions.

VIVIENNE VERDON-ROE and MICHAEL PORTER, independent filmmakers: We feel very strongly that a woman has the right to make decisions about her body.

CLAIRE JUN JIN YOO, New York City: I work for the Hotel Tenants' Rights Project (HTRP), a community organizing project of

homeless women, building an organization to affirm, defend and advance the rights and interests of homeless women. HTRP is dedicated to the ideal of social justice and supports the rights of people in welfare hotels to have a decent standard of living, to be safe in their neighborhood and to have control over policies which affect their lives.

* * *

In addition to the above-named individuals, 221 women and men primarily from Hartford, Connecticut --but also from Washington, D.C.; Jersey City, New Jersey; Union City, New Jersey; West New York, New Jersey; New York City; Los Angeles; Chicago; Atlanta, Georgia, and Norwich, Connecticut -- signed a petition supporting this brief.[1]

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[1](Copies of this petition are available from Sabrae Y. Jenkins, Women of Color Partnership Program, RCAR Educational Fund, Inc., 100 Maryland Avenue, N.E., #307, Washington, DC.)

AMICUS CURIAE

BRIEF

FILED
MAR 30
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,
v.
REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF SEVENTY-SEVEN ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

(List of *Amici Curiae* on inside cover)

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Amici Curiae

National Abortion Rights Action League
Women's Legal Defense Fund
League of Women Voters of the United States
National Federation of Business
and Professional Women's Clubs, Inc.
National Women's Law Center
NOW Legal Defense and Education Fund
Women's Law Project
American Association of University Women
National Association of Social Workers, Inc.
Women's International League for Peace and Freedom
Ms. Foundation for Women
Women's Equity Action League
Northwest Women's Law Center
Equal Rights Advocates, Inc.
Connecticut Women's Educational and Legal Fund, Inc.
National Woman Abuse Prevention Project
Wider Opportunities for Women
American Veterans Committee, Inc.
Voters for Choice/Friends of Family Planning
Lambda Legal Defense and Education Fund, Inc.
Boston Women's Health Book Collective, Inc.
Human Rights Campaign Fund
American Federation of State, County,
and Municipal Employees
Women Lawyers' Association of Los Angeles
Queen's Bench of the San Francisco Bay Area
Yale Journal of Law and Feminism
Abortion Rights Council
Center for Women Policy Studies
Women's Equal Rights Legal Defense and Education Fund
Committee to Defend Reproductive Rights—CMRW
New York State Coalition on Women's Legal Issues
Abortion Rights Mobilization
Women's Bar Association of Massachusetts
California Women Lawyers
National Gay & Lesbian Task Force
New York Women in Criminal Justice
Harvard Women's Law Association

Buffalo Lawyers for Choice
80% Majority Campaign
CHOICE
Women in Film
National Women's Conference Committee
Women's Law Association of the Washington College of Law of the American University
Choice Network of Tarrant County, Texas
Lawyers for Reproductive Rights
Gay and Lesbian Democrats of America
Women's Medical Fund, Inc.
Columbia-Greene Rape Crisis Center
Radical Women
D.C. Feminists Against Pornography
New Hampshire Women's Lobby
Institute for Women's Policy Research
Women's Equity Affiliates, Ltd.
Feminist Health Center of Portsmouth
Toledo Women's Bar Association
Washington Women United
Fund for New Leadership
Women's Agenda
Missouri Women's Network
Hawaii Women Lawyers
National Women's Studies Association
Hawaii Women Lawyers Foundation
North Carolina Association of Women Attorneys, Inc.
Women's City Club of New York, Inc.
Illinois Women's Agenda
Feminist Institute
National Council for Research on Women
Tucson Women's Commission
League of Women Voters of Missouri
National Committee to Free Sharon Kowalski
Santa Barbara Women's Political Committee
Women Employed
National Gay Rights Advocates
Women's Center of the University of Connecticut
North Carolina Equity
Women's Rights Coalition
International Center for Research on Women

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Eisenstadt v. Baird, 405 U.S. 438 (1972)	4, 21
Eu v. San Francisco County Democratic Central Committee, 57 U.S.L.W. 4251 (U.S. Feb. 21, 1989)	18
Frontiero v. Richardson, 411 U.S. 677 (1973)	1, 25, 26
Griswold v. Connecticut, 381 U.S. 479 (1965)	4, 21
Grodin v. Grodin, 102 Mich. App. 396, 301 N.W. 2d 869 (1981)	23
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	14
Hoyt v. Florida, 368 U.S. 57 (1961), *overruled, Taylor v. Louisiana*, 419 U.S. 522 (1975)	24-25
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	18
In re A.C., 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988)	22
In re Guardianship of Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975)	28
In re Klein, No. 1736-89 (N.Y. App. Div. Feb. 8, 1989)	20

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In re Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981)	23
Korematsu v. United States, 323 U.S. 214 (1944)	18
Loving v. Virginia, 388 U.S. 1 (1967)	4
Meyer v. Nebraska, 262 U.S. 390 (1923)	4
McFall v. Shimp, 10 Pa. D. & C. 3d 90 (Allegheny Cty. 1978) (*per curiam*)	27-28
Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981)	12
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	18, 25
Muller v. Oregon, 208 U.S. 412 (1908)	24, 25, 26
Olmstead v. United States, 277 U.S. 438 (1928)	3-4
Palko v. Connecticut, 302 U.S. 319 (1937)	4
People v. Stewart, No. M508197 (San Diego Mun. Ct. Feb. 27, 1987)	23
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	4
Rochin v. California, 342 U.S. 165 (1952)	11
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	6
Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914), *overruled on other grounds, Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957)	28
Skinner v. Oklahoma, 316 U.S. 535 (1942)	4
Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988)	23
Stanton v. Stanton, 421 U.S. 7 (1975)	25
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United States v. Kozminski, 108 S. Ct. 2751 (1988)	12
United States v. Vaughn, 117 Daily Wash. L. Rep. 441 (D.C. Super. Ct. Mar. 7, 1989)	22-23
United States Department of Justice v. Reporters Committee for Freedom of the Press, 57 U.S. L.W. 4373 (U.S. Mar. 22, 1989)	13
Whalen v. Roe, 429 U.S. 589 (1977)	13

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Winston v. Lee, 470 U.S. 753 (1985)	10, 11
Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982)	14
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	18
Constitution, Statutes and Legislative Materials	
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Amend. VI	18
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Amend. XIV	*passim*
Minn. Stat. § 604.05(1) (1988)	27
Mo. Rev. Stat. § 1.205 (1986)	21, 23
House Committee on Education and Labor, *Family and Medical Leave Act of 1988*, H.R. Rep. No. 511, 100th Cong., 2d Sess. (1988)	14
Surgeon General's Report on Abortion, *reprinted in* 135 Cong. Rec. E906-E909 (daily ed. Mar. 21, 1989)	29
Title VII, 1964 Civil Rights Act, 42 U.S.C. § 2000e (1982)	14
Uniform Anatomical Gift Act § 2(b), (c) (1987)	27
Other Authorities	
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981)	8
Amici Curiae Brief of Distinguished Scientists and Physicians, Including Nobel Laureates, in Support of Appellees, *Webster v. Reproductive Health Services*, 88-605	17
Blau & Ferber, *Women in the Labor Market: The Last Twenty Years*, in 1 *Women and Work: An Annual Review* 19 (L. Larwood, A. Stromberg & B. Gutek eds. 1985)	15
Brief *Amici Curiae* of Focus on the Family, and Family Research Council of America, in Support of Appellants, *Webster v. Reproductive Health Services*, 88-605	27

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Brief for the United States as *Amicus Curiae* Supporting Appellants, *Webster v. Reproductive Health Services*, 88-605	5
Brief of the United States Catholic Conference as *Amicus Curiae* in Support of Appellants, *Webster v. Reproductive Health Services*, 88-605	27
Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982)	10
Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth, Are the Statistics Biased?*, 248 J. A.M.A. 192 (1982)	9
Center for Population Options, *The Facts: Teenage Childbearing, Education, and Employment* (1987)	13, 14
D. Danforth, M. Hughey & A. Wagner, *The Complete Guide to Pregnancy* (1983)	7
Defendant's Memorandum of Points and Authorities in Support of Demurrer to Complaint Without Leave to Amend and in Support of Motion to Dismiss, *People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 27, 1987)	23
Fielding, *Adolescent Pregnancy Revisited*, 299 Mass. Department of Public Health 893 (1978)	13
C. Fried, *Right and Wrong* (1978)	13
Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288 (1977)	13
Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persps. 25 (1989)	12, 15, 16
I. Garfinkel & S. McLanahan, *Single Mothers and Their Children: A New American Dilemma* (1986)	15
Karst, Book Review, 89 Harv. L. Rev. 1028 (1976)	1
W. Keeton, D. Dobbs, R. Keeton & D. Owen, *The Law of Torts* (5th ed. 1984)	27

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Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987)	22
O'Neill, *Role Differentiation and the Gender Gap In Wage Rates* in 1 *Women and Work: An Annual Review* 50 (L. Larwood, A. Stromberg & B. Gutek eds. 1985)	15
J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* (17th ed. 1985)	6, 7, 8, 9, 10
Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979)	28
Restatement (Second) of the Law of Torts § 314 (1965)	27
Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing (Vol. 1) (C. Hayes ed. 1987)	14
S. Romney, M.J. Gray, A.B. Little, J. Merrill, E.J. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* (2 ed. 1981)	8
R. Schwarz, *Septic Abortion* (1968)	9-10
L. Silver & S. Wolfe, *Unnecessary Cesarean Sections: How to Cure a National Epidemic* (1989)	8
R. Spalter-Roth & H. Hartmann, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave* (1988)	14
C. Tietze & S. Henshaw, *Induced Abortion: A World Review* (1986)	9
L. Tribe, *American Constitutional Law* (2d ed. 1988)	27-28
Wilcox, Weinberg, O'Connor, Baird, Schlatterer, Canfield, Armstrong & Nisula, *Incidence of Early Loss of Pregnancy*, 319 New Eng. J. Med. 189 (July 28, 1988)	20
Winkler & Van Keppel, *Relinquishing Mothers in Adoption: Their Long-Term Adjustment*, Monograph No. 3, Institute of Family Studies (1984)	12

TABLE OF AUTHORITIES—Continued

	Page
Winton, *Skin Diseases Aggravated by Pregnancy*, 20 J. Am. Acad. Dermatology 1 (1989)	8
Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Leaflet No. 88-2, *20 Facts on Women Workers* (1988)	15
Women's Work, Men's Work: Sex Segregation on the Job (B. Reskin & H. Hartmann eds. 1986)	14, 15, 16

BRIEF OF SEVENTY-SEVEN ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

Amici curiae share a common concern for the judicial protection of women's rights, including the constitutional right to reproductive autonomy. Because we believe that no ruling of this Court has had a more positive effect on the lives of American women than *Roe v. Wade*, 410 U.S. 113 (1973), we submit this brief to explain why this Court should maintain its protection of the right to choose abortion as defined in *Roe v. Wade* through *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

The more specific interests of each of the seventy-seven *amici curiae* are set forth in Appendix A.[1]

SUMMARY OF ARGUMENT

Although the constitutional protection afforded reproductive autonomy is cast in the doctrinal terms of the liberty-based right of privacy, the scope of such protection must be informed by an awareness of its implications for women's equality as well.[2] If this Court were to uphold abortion restrictions that force pregnant women to bear children, it would render empty the constitutional promise of liberty for women by profoundly structuring

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[1] *Amici curiae* file this brief with the consent of all parties and letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

[2] Significantly, the Court decided *Roe v. Wade* in the same Term in which it condemned "our Nation['s] . . . long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality), and began protecting women from state legislation that would limit women's opportunities to the role of homemaker and mother. *See* Karst, Book Review, 89 Harv. L. Rev. 1028, 1036 (1976) ("Not merely the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in our society.").

their lives. Moreover, it would do so for women alone; men are not required to endure comparable burdens in the service of the state's abstract interest in promoting life. To ensure that the constitutional guarantee of liberty "extends to women as well as to men," this Court must secure women's right to choose abortion lest it "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Thornburgh*, 476 U.S. at 772.

Freely chosen and planned childbearing is often a joyous experience. But because "few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision . . . whether to end her pregnancy," *id.*, forced motherhood threatens the core of a woman's constitutionally valued autonomy in two distinct ways.

First, state interference with abortion violates the principle of bodily integrity that underlies much of the Fourteenth Amendment's promise of liberty. The process of bearing a child involves the most intimate and strenuous exercises of the female body and psyche; compelling a woman to devote her body, mind and soul to continue an unwanted pregnancy constitutes an invasion of our deepest sense of privacy and the primacy of self-determination. Forced continued pregnancy also entails a more tangible violation of physical liberty by subjecting women to a host of physical burdens and risks that range from prolonged discomfort and pain during pregnancy and delivery, to a substantial risk of specific medical complications, and even to death. State abortion restrictions thus require women—and women only—to endure physical intrusions and risks that are greater than those previously found by this Court to violate the constitutional principle of bodily integrity.

Second, state interference with abortion denies women the capacity to control their own lives in the most basic of ways. The bearing and raising of children often places severe constraints on women's employment opportunities and therefore threatens their ability to support themselves and their families. Moreover, teenagers' inability to postpone motherhood until they have completed a basic education and are psychologically and financially equipped properly to care for children largely predetermines the paths their lives will take before they have even developed their own identities and aspirations. Hence, the imposition of abortion restrictions both belies the constitutional promise of personal autonomy and curtails women's ability to participate equally with men in the public world.

Bald assertions of an unabridged state interest in protecting the potentiality of human life, proclaimed to be sufficiently "compelling" to justify these major invasions of all aspects of women's personal autonomy, must be viewed by this Court with great skepticism. There is no logical stopping point at which such an asserted interest could be cabined. Thus, this Court's cognizance of this interest as "compelling" would not only result in the unprecedented evisceration of a fundamental right; it would also provide states with an open-ended invitation to impose a wide range of other liberty-curtailing policies on pregnant women, dictating their employment, health care, diet, exercise, and even leisure activities.

Moreover, that a state chooses to advance its interest in potential life by restricting women's reproductive autonomy, thereby resurrecting archaic stereotypes about women's proper role in society, counsels further against recognition of that interest as "compelling." States never impose comparable physical burdens or risks on men in requiring them to protect other persons; by singling out only women to sacrifice their bodies and autonomy to protect the mere potentiality of life, abortion restrictions both reflect and reinforce the stereotype that breeding children is women's "natural role." This Court cannot safely cede control over the availability of abortion to a political process that can be expected to undervalue both the importance to women of this aspect of their fundamental liberty and the burdens and risks of forced motherhood. "The greatest dangers to liberty lurk in insidious

encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

ARGUMENT

I. RESTRICTIVE ABORTION LAWS INTERFERE WITH WOMEN'S CONSTITUTIONAL RIGHT TO LIBERTY BY RESTRICTING THEIR ABILITY TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR BODIES AND LIVES.

The liberty-based right to privacy includes the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Indeed, control of one's own reproductive capacities is a prerequisite to the exercise of many of the other fundamental choices that are protected from government interference by the Fourteenth Amendment's liberty guarantee, choices by which people determine their participation in the public world, define their personal lives and structure their families.[3] Thus, the decisions whether and when to bear a child lie, for women, "at the very heart" of the fundamental right to liberty. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).[4]

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[3] This Court has held that the Fourteenth Amendment guards not only those rights enumerated by the Constitution but also "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The Court has long protected the liberty to decide when or whether to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), how to raise and educate children, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and when or whether to conceive or bear children, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[4] The Court's recognition of the right to choose abortion followed directly from its holding that states may not prohibit the use of contraceptives. A woman's liberty interest in making her own decision concerning whether she will bear a child does not diminish after conception occurs. Indeed, as Justice Stevens points out, "if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious." *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring).

At some time in their lives, most women willingly choose to bear and raise children. For many of them, having a wanted child is a joyful and enriching experience. Yet bearing and raising children also entails significant risks and burdens which not all women can assume at all times and in all circumstances. The constitutional guarantee of liberty protects the right of women to assess those risks and burdens, and to decide if and when they are prepared to assume them.

State restrictions on abortion therefore violate women's fundamental right to liberty in at least two different ways.[5] First, they infringe on a woman's right to bodily integrity by imposing on her tremendous physical intru-

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[5] The Solicitor General argues that the proper constitutional inquiry is whether a woman has been afforded a "meaningful opportunity" to avoid an unwanted pregnancy, taking into account such options as abstinence and contraception. Brief for the United States as *Amicus Curiae* Supporting Appellants, at 22 n.16. Not only is this proposed inquiry inconsistent with Supreme Court precedent, but its factual premise that women who become pregnant have in some sense consented to the pregnancy belies reality. Abstinence during the forty years a woman is fertile is not a viable way of life for most women, and sterilization, while effective, requires women permanently to sacrifice rather than exercise their "interest in procreative choice." *Id.* Moreover, no other method of contraception is 100% effective, and many present significant health risks that make them inappropriate for many women. Finally, the large number of women, especially teenagers, who never receive proper information about contraception cannot be said to have a meaningful opportunity to avoid pregnancy. These women and others who are the inevitable losers in the contraceptive lottery no more "consent" to pregnancy than pedestrians "consent" to being struck by drunk drivers.

Indeed, underlying the Solicitor General's position appears to be the outmoded view that women ought not engage in sexual intercourse for reasons other than procreation and that those who do—unlike their male partners—deserve to be punished with an unplanned pregnancy.

sions and significant physical risks and pain. This Court has held that less invasive and dangerous government-imposed bodily intrusions violate the constitutional guarantee of liberty. Second, because the birth of a child significantly circumscribes a woman's life choices, state restrictions on abortion infringe on the fundamental "freedom of choice in the basic decisions of . . . life" protected by the Fourteenth Amendment. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted).[6]

A. Restrictive Abortion Laws Subject Women to Substantial Physical Intrusions and Risks In Violation of Their Fundamental Right To Bodily Integrity.

A woman's body must adjust dramatically to provide nourishment and space for a developing fetus.[7] During pregnancy, her uterus changes from pear-shaped to nearly spherical and, by the end of pregnancy, has increased to 500 to 1000 times its original capacity. As her uterus enlarges, it displaces and compresses other bodily organs including her heart, appendix and gastrointestinal tract. A woman's resting pulse rate increases by ten to fifteen beats per minute, and her heart may

[6] This Court has held that laws that interfere with women's right to choose abortion or any other fundamental right must be strictly scrutinized and cannot stand absent a compelling state interest. *See, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983). *See generally San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (strict scrutiny required if law has "'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty").

Justice O'Connor has proposed that strict scrutiny be applied in the abortion context only to laws that "unduly burden" women's abortion decisions. *Akron*, 462 U.S. at 461-65 (O'Connor, J., dissenting). But unless the undue burden standard is intended to apply to *all* fundamental rights (which would drastically rewrite this Court's fundamental rights jurisprudence), its application would impermissibly single out for weaker protection the one fundamental right unique to women.

[7] J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 181-205, 218, 260-63 (17th ed. 1985) [hereinafter *Williams Obstetrics*].

increase slightly in size. Her average total weight gain during pregnancy is about 25 pounds.[8]

Although the extent of the physical burdens associated with pregnancy and childbirth varies from woman to woman and the joy of having a wanted child can positively influence the way a woman experiences those physical changes, most women experience pain and significant discomfort. Even the healthiest of women may experience nausea, intermittent vomiting, increased frequency of urination, fatigue, back pain, difficulty sleeping, labored breathing and water retention.[9]

Women also risk many serious, albeit less common, medical complications, including toxemia of pregnancy or preeclampsia (combination of high blood pressure, water retention and protein in urine), eclampsia (preeclampsia plus convulsions potentially leading to coma), gestational diabetes (glucose intolerance during pregnancy), thromboembolic disease (vascular inflammation and blood clots potentially leading to fatal pulmonary embolism), and cardiomyopathy (enlargement of the heart resulting in congestive heart failure).[10]

Labor and delivery, during which a woman's body must meet extraordinary physical demands, pose additional risks. Women usually experience extreme pain during the process of labor and vaginal delivery, which in most cases lasts for six to twelve hours and in some cases longer.[11] Vaginal delivery also entails substantial

[8] *Id.* at 182, 188, 194, 197.

[9] *Id.* at 181-210, 218, 260-63.

[10] *Id.* at 526-30, 600, 731. The recommended treatment for some of the serious complications is complete bed rest until delivery. *Id.* at 750-51. Some pregnancy-related medical problems such as hemorrhoids and varicose veins (which can cause severe discomfort and swelling, requiring surgery) can persist beyond delivery. *Id.* at 261-62.

[11] D. Danforth, M. Hughey & A. Wagner, *The Complete Guide to Pregnancy* 228-31 (1983).

risk of infection and laceration.[12] The dangers are magnified in the approximately one in four deliveries that are accomplished by cesarean section, including risks from general anesthesia, infection and blood clots.[13] Pregnancy-related death also remains a distinct possibility, even for healthy women. Death can result from hemorrhage, hypertension, infection or other complications from cesarean deliveries.[14]

The dangers normally faced are compounded for women in "high risk" groups. Medical conditions such as systemic lupus erythematosus, multiple sclerosis, asthma, diabetes and acquired immunodeficiency syndrome (AIDS) can be exacerbated by the physical changes attending pregnancy.[15] These risks are even greater for older or very young women.[16] The stress of carrying an unwanted pregnancy can aggravate other medical ailments, including high blood pressure and asthma, thereby increasing the woman's risks of serious physical consequences beyond that normally faced.[17]

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[12] S. Romney, M.J. Gray, A.B. Little, J. Merrill, E.J. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* 626-27, 632, 637 (2d ed. 1981) [hereinafter *Gynecology and Obstetrics*].

[13] L. Silver & S. Wolfe, *Unnecessary Cesarean Sections: How to Cure a National Epidemic* 9, 13 (1989).

[14] *See Williams Obstetrics, supra* note 7, at 3. In 1986, 270 women died during childbirth in the United States. Delivery by cesarean section increases approximately four-fold the risk of death in childbirth. L. Silver & S. Wolfe, *supra* note 13, at 12.

[15] *See Williams Obstetrics, supra* note 7, at 597, 600, 609, 619-20; Winton, *Skin Diseases Aggravated by Pregnancy*, 20 J. Am. Acad. Dermatology 1, 7 (1989). Medications that normally control preexisting conditions often pose risks to fetal development, requiring women either to accept those risks or to sacrifice their own health. *See Williams Obstetrics, supra*, at 260.

[16] *See, e.g., Williams Obstetrics, supra* note 7, at 3, 539; Alan Guttmacher Inst., *Teenage Pregnancy: The Problem That Hasn't Gone Away* 29 (1981).

[17] *See Gynecology and Obstetrics, supra* note 12, at 726. Knowledge of fetal anomaly or of a disease, such as AIDS, that may be passed on to the fetus, also greatly increases stress during pregnancy.

This Court's protection of the right to choose abortion is based in part on its recognition of the serious physical risks attending pregnancy: "[t]he detriment that the State would impose upon the pregnant woman by denying this choice [whether to have an abortion] altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved." *Roe*, 410 U.S. at 153. Indeed, the trimester approach developed in *Roe* reflected the fact that a first trimester abortion was safer than continued pregnancy. *See id.* at 163.[18]

Legal abortion remains far safer than childbirth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth, Are the Statistics Biased?*, 248 J. A.M.A. 192, 196 (1982). "Moreover, the risk of death from legal induced abortion is no higher at any point in gestation than is the risk of childbearing." C. Tietze & S. Henshaw, *Induced Abortion: A World Review* 110 (1986). Similarly, the non-fatal health risks associated with legal abortion are very limited and substantially lower than those risks, described above, created by continued pregnancy and delivery.[19]

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[18] *Roe* also relied on the fact that most women faced with an unwanted pregnancy experience a significant improvement in mental health and outlook after an abortion. *Roe v. Wade*, 410 U.S. at 153; *see* Brief of *Amicus Curiae* American Psychological Association in Support of Appellees (noting that studies of mental health of pregnant women before and after abortion reveal significant reductions in symptoms of stress after abortion and discussing methodological problems in research relied on by *amici curiae* supporting Appellants).

[19] *Williams Obstetrics, supra* note 7, at 483-88. By contrast, prior to *Roe*, illegal abortions performed by back-alley abortionists led to the deaths of at least hundreds and perhaps thousands of women each year, and countless other women suffered serious, often permanent, injuries, including sterility. *See* R. Schwarz, *Septic Abor-*

Because after conception has occurred, continued pregnancy entails both a protracted bodily invasion and significantly greater burdens and risks than abortion, a state's decision to prevent women from choosing abortion is an unprecedented affront to the constitutional principle of bodily integrity. Indeed, because this principle is so deeply and historically embedded in our common law [20] as well as our constitutional traditions, it is not surprising that government has rarely attempted to impose analogous intrusions in other contexts.[21] But the principles underlying this Court's infrequent treatment of state-mandated intrusions in such contexts demonstrate that forced childbearing visits unacceptable violations upon women's bodily integrity.

For example, in *Winston v. Lee*, 470 U.S. 753 (1985), the Court held that, in part because of "the extent of [its] intrusion upon the individual's dignitary interest in personal privacy and bodily integrity," *id.* at 761, a state could not, consistent with the Fourth Amendment, compel a criminal defendant to submit to an invasive surgical operation in order to retrieve a bullet necessary for the state's prosecution. By comparison, a state-mandated continued pregnancy more profoundly violates a woman's "dignitary interest in personal privacy." She is constantly aware for nine months that her body is not wholly her own; the state has conscripted her body for its own ends.[22]

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tion 7 (1968); Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982); *see also Williams Obstetrics*, *supra* at 484 ("Serious complications of abortion have been most often . . . associated with criminal abortion.").

[20] *See* discussion *infra* at pp. 27-29.

[21] Indeed, the few contexts in which states have attempted such intrusions on bodily integrity have generally involved criminal defendants, over whom states traditionally exercise a great deal of authority, and courts have declared even these intrusions to be unconstitutional. Pregnant women's bodily integrity and liberty are entitled to at least as much constitutional protection.

[22] By contrast, a woman *desiring* to carry her pregnancy to term perceives the growing fetus as a welcome presence within her body

Moreover, the Court in *Winston* also found that the criminal defendant's right to bodily integrity would be violated by the state's imposition of the risks inherent in a surgical procedure consisting of a small incision in his skin and retrieval of the bullet. By comparison, one in four pregnant women delivers by cesarean section, which requires a much larger incision in the woman's abdomen, and is accompanied by all the risks, pain and permanent disfigurement associated with invasive surgery. In *Rochin v. California*, 342 U.S. 165 (1952), this Court overturned a conviction based on evidence obtained from a "shocking" bodily invasion consisting of the forced stomach pumping of a criminal suspect. The pain and discomfort associated with having one's stomach pumped is comparable to the physical effects of pregnancy, including morning sickness, which is experienced by many pregnant women on a recurring basis, and the compression of bodily organs that results from the enlargement of the uterus. Given that these isolated aspects of pregnancy involve risks and burdens comparable to those found unacceptable when imposed upon criminal defendants, the entire pregnancy and childbirth experience certainly constitutes an intolerable bodily intrusion when imposed by the state on unwilling pregnant women.

In sum, the physical burdens imposed by the compelled continuation of pregnancy amount to a significant invasion of women's bodily integrity.[23] As Chief Justice

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rather than an invasion of her privacy. *Cf. Winston*, 470 U.S. at 765 ("When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. . . . [But where the state] proposes to take control of respondent's body * * * [t]his kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.").

[23] While a woman might choose to bear children gladly and voluntarily, statutes that curtail her abortion choice are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment, in that forced pregnancy requires a woman to provide

Rehnquist has recognized, women "suffer disproportionately the profound physical, emotional, and psychological consequences" of pregnancy. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). For women to maintain bodily integrity, as men do, they must not be subject to state coercion forcing them to carry their every pregnancy to term.

B. Restrictive Abortion Laws Deprive Women Of The Freedom To Control The Course Of Their Lives And Restrict Their Ability To Participate In Society Equally With Men.

Few events can more dramatically constrain a woman's opportunities in life than an unplanned child. Because under present social conditions most women assume primary responsibility for raising their children,[24] having an unwanted child would limit their ability fully to participate in public life. Moreover, for many women who would find it difficult to shoulder the numerous burdens accompanying childrearing, forced motherhood would relegate them (certainly for long periods and perhaps permanently) to a daily struggle to make ends meet; any hopes of fulfilling their own plans and dreams would be shattered. Denying women's ability to control when and whether to bear children, thereby denying women the capacity to define their paths through life in the most

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continuous physical service to the fetus in order to further the state's asserted interest. Indeed, the actual process of delivery demands work of the most intense and physical kind: labor of 12 or more grueling hours of contractions is not uncommon. *Cf. United States v. Kozminski*, 108 S. Ct. 2751 (1988) (criminal involuntary servitude is present where compulsion of services is achieved by use of physical or legal coercion).

[24] Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persps. 25, 25 (1989). Although women could relinquish their infants for adoption, the vast majority do not, generally because doing so is exceedingly traumatic. *See, e.g.*, Winkler & Van Keppel, *Relinquishing Mothers in Adoption: Their Long-Term Adjustment*, Monograph No. 3, Institute of Family Studies (1984).

basic of ways, would contravene the principle of personal autonomy underlying the Fourteenth Amendment's liberty guarantee.[25]

Forced motherhood would particularly limit life's options for teenagers who become pregnant, even before they have the opportunity to define their own identities and aspirations or prepare for the weighty responsibilities of motherhood. Childbearing presently curtails most teenagers' ability to obtain even the most basic education: eight out of ten who currently become mothers at age seventeen or younger do not complete high school, and four of ten who have a child by the age of fifteen do not finish even eighth grade.[26] Early motherhood also constrains teenagers' ability to earn a decent income. In part because of their limited educational experience, teenage mothers receive lower hourly wages and earn less annually for the rest of their lives than women who post-

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[25] Among the fundamental rights protected by the Fourteenth Amendment is the "interest in independence in making certain kinds of important decisions." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 57 U.S.L.W. 4373, 4377 (U.S. Mar. 22, 1989) (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977). As Charles Fried has recognized:

> "What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty." C. Fried, Right and Wrong 146-47 (1978). *See also* Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288-89 (1977) (the concept of privacy embodies the "moral fact that a person belongs to himself and not others or to society as a whole").

Thornburgh, 476 U.S. at 777 n.5 (Stevens, J., concurring).

[26] Fielding, *Adolescent Pregnancy Revisited*, 299 Mass. Dep't Pub. Health 893, 894 (1978). Moreover, less than two percent of teenage mothers complete college, compared to more than one-fifth of those women who do not bear children until age 24. Center for Population Options, *The Facts: Teenage Childbearing, Education, and Employment* 1 (1987).

pone childbearing.[27] These teenage mothers earn about half as much income as those who first give birth in their twenties, and sixty-seven percent of families headed by teenage mothers live below the poverty level.[28]

Even for many women who become pregnant after their teens, opportunities in the public world are severely constrained. Many women lose their employment during pregnancy because employers unlawfully discriminate against them or do not adapt their jobs either to perceived fetal hazards[29] or to the perceived physical constraints of pregnancy;[30] many other women lose their jobs or suffer significant financial hardships because employers do not provide or do not pay for job-protected leave for childbearing or infant care.[31] Over the long term, because today's workplace generally does not accommodate the responsibilities of those caring for young children, and because day care often is inadequate, unavailable or unaffordable, many mothers (especially those who are young, unmarried, minority, or lower income) must leave their jobs in order to care for their children.[32]

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[27] This comparison holds true even when factors such as socioeconomic status are taken into account. *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (Vol. I) 130 (C. Hayes ed. 1987).

[28] Center for Population Options, *supra* note 26, at 1 (figures for families with children aged five or younger).

[29] Courts have upheld exclusionary fetal hazard policies in the workplace, even though they appear to violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1982). *See, e.g., Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

[30] *See, e.g., Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980).

[31] *See* House Comm. on Educ. & Labor, *Family and Medical Leave Act of 1988*, H.R. Rep. No. 511, 100th Cong., 2d Sess. 18-25 (1988); R. Spalter-Roth & H. Hartmann, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave* 5 (1988).

[32] *See Women's Work, Men's Work: Sex Segregation on the Job* 73-74 (B. Reskin & H. Hartmann eds. 1986) [hereinafter *Women's Work*]. Working outside the home for pay is not inherently incompatible with childrearing. However, societal allocation of resources, in concert with established employment practices, operate to disadvantage individuals raising children.

Others must either accept part-time work with significantly less pay and few if any job benefits[33] or move to less skilled positions so that they can work a regular schedule.[34] Even those remaining in their original jobs often cannot advance because their child care responsibilities conflict with job requirements as presently defined.[35]

As a result, childbearing imposes severe financial constraints on women,[36] many of whom depend on their income to support themselves. Indeed, 60% of women in the labor force are either single (25%), divorced (12%), widowed (4%), separated (4%), or have husbands whose annual earnings are less than $15,000 (15%).[37] Many of these women even now do not make ends meet; already, women maintain 51% of families below the poverty level, including 75% of poor black families, 49% of poor Hispanic families, and 42% of poor white families.[38]

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[33] *See* Blau & Ferber, *Women in the Labor Market: The Last Twenty Years*, in 1 *Women and Work: An Annual Review* 19, 28 (L. Larwood, A. Stromberg & B. Gutek eds. 1985); O'Neill, *Role Differentiation and the Gender Gap in Wage Rates*, in 1 *Women and Work: An Annual Review*, *supra*, at 50, 57.

[34] *Women's Work*, *supra* note 32, at 74.

[35] *Id.*

[36] Compared to childless women, mothers earn considerably less per hour and their wages drop sharply with each additional child. Fuchs, *supra* note 24, at 35. For example, of white women between the ages of 30 and 39 who worked more than 1,000 paid hours in 1986, those with 3 children earned 70 cents to every dollar earned by women with no children. *Id.* No similar relations between children and hourly earnings exists for men who become fathers. *Id.*

[37] Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Leaflet No. 88-2, *20 Facts on Women Workers* 2 (1988) (based on March 1987 statistics).

[38] *Id.* at 4; *see also* I. Garfinkel & S. McLanahan, *Single Mothers and Their Children: A New American Dilemma* 12-15 (1986).

If this Court were to overrule *Roe*, thereby depriving women of the right to control the frequency and timing of their pregnancies, it would deny women the ability to plan and shape their futures and assume their place in the public world.[39] Some of those who suffer will be teenagers for whom many of life's options will be foreclosed even before they have finished growing up. Some will be single mothers, whether widowed, divorced, or never married, who are struggling to feed and care for the children they already have. Some will be older women, married or single, who have already raised a family. If women were denied the ability to control their reproductive capacities, the Fourteenth Amendment's promise of liberty would be rendered hollow for them.[40]

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[39] Because *Roe v. Wade* has afforded women greater control over the timing of their childbearing, women have been able to plan for and minimize somewhat the accompanying burdens. In part as a result, women as a class have experienced significant economic gains over the past 16 years, gains that would be jeopardized were the Court to deprive women of the right to choose abortion. In fact, since *Roe*, women's labor force representation has increased significantly, and the occupations in which they work have become significantly less sex segregated. *Women's Work*, *supra* note 32 at 23-24. Moreover, the wage gap between women and men has diminished. Economist Victor Fuchs demonstrates that the group most responsible for the decrease in the wage gap between women and men that occurred between 1980-1986 was composed of women born between 1946 and 1950 who were in their late thirties in 1986. A key difference between these women and those born half a decade before is that they had substantially fewer children, Fuchs, *supra* note 24, at 36-37, and more control over the timing of the children they did bear.

[40] Overruling *Roe* would severely constrain the lives, not only of women who become pregnant, but of all women. If women no longer had the right to choose abortion, all women capable of bearing children would have to attempt to plan their lives knowing that, as long as contraceptive devices fail, their lives might be interrupted at any time by an unwanted pregnancy.

II. THE STATE'S BALD ASSERTION OF A "COMPELLING" INTEREST IN PROTECTING POTENTIAL LIFE DOES NOT JUSTIFY A RETREAT FROM *ROE v. WADE*.

A. A Critique Of Viability Does Not Absolve This Court Of Its Responsibility To Accommodate Women's Fundamental Right To Reproductive Autonomy.

According to this Court, the state has an "important and legitimate interest in protecting the potentiality of human life."[41] For any given pregnancy, however, promoting this interest by prohibiting abortion necessarily deprives a pregnant woman of her fundamental right to decide whether and when to bear a child. The Court in *Roe* concluded that the state's interest becomes sufficiently compelling to override a woman's right only after the point of fetal viability, and even then only in cases in which the woman's health is not endangered by continued pregnancy.

Both Missouri and the Solicitor General now ask this Court to relabel the state's interest in protecting potential life as compelling prior to viability so as to override a woman's right at all times. This extraordinary request is based solely on the assertion that viability provides an unworkable dividing line. Current medical evidence reveals that this critique is unfounded.[42] But even were the critique acceptable, the conclusion that the state's interest is always compelling would not logically follow; the unworkability of viability as a dividing line would equally support the opposite conclusion: that the state's interest in protecting potential life is *never* sufficiently compelling to outweigh a woman's fundamental right to choose abortion. Hence, the critique of viability merely begs the central question of how to evaluate the state's asserted interest in the context of abortion restrictions.

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[41] *Roe*, 410 U.S. at 162.

[42] *See, e.g., Amici Curiae* Brief of Distinguished Scientists and Physicians, Including Nobel Laureates, in Support of Appellees.

Where giving effect to a state interest—even one asserted to be "compelling" in the abstract—entails interference with the exercise of a fundamental right, such as the right to choose abortion, this Court struggles to protect the right and closely scrutinizes the context and manner in which the interest is asserted. The Court has carefully evaluated, for example, whether the state's proposed infringement on the right is narrowly tailored to promoting the asserted interest,[43] whether the manner in which the state pursues the interest may reflect or perpetuate stereotypes,[44] and whether the interest outweighs in importance the protection of a particular right in a particular context.[45] These inquiries reflect a consistent judgment that even extremely weighty interests do not easily justify interference with fundamental rights;[46] therefore, this Court must examine closely Missouri's asser-

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[43] *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 57 U.S.L.W. 4251, 4253 (U.S. Feb. 21, 1989); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (states must "adopt the least drastic means to achieve their ends").

[44] *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

[45] *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' *at least in the context of higher education*, to support the use of racial considerations in furthering that interest.") (emphasis added).

[46] Thus, for example, the Court has recognized that, although "as a general proposition" the government "has a vital national interest" in protecting foreign diplomats in accordance with international law, that interest is not "automatically . . . compelling" when its assertion infringes upon First Amendment rights. *Boos v. Barry*, 108 S. Ct. 1157, 1165 (1988); *see also Coy v. Iowa*, 108 S. Ct. 2798, 2802 (1988) (defendant's Sixth Amendment rights "outweighed" state's interest in "protecting victims of sexual abuse"); *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) (Court cannot "distort Constitution to approve all that the [state] may deem expedient" and in the national interest when fundamental rights are at stake).

tion of an interest in potential life sufficiently compelling to prohibit abortion from the moment of conception.

While Missouri relies on its flawed critique of the viability distinction, several of Missouri's *amici curiae* suggest that support for the existence of a broad compelling interest in potential life lies in various states' recognition of the fetus as a legal person under property, tort and criminal law. This argument is unpersuasive. Without question, states possess sufficiently important interests to justify such recognition of the fetus in certain limited contexts. For example, granting a cause of action for prenatal injuries resulting from the tortious conduct of others compensates the subsequently born child and his or her parents for the injuries, and also deters such tortious acts.[47] These and similar measures properly promote the interests and well-being of the child, while at the same time promoting the interests of the pregnant woman. But acceptance of such measures provides no guidance for the treatment of the very different clash of asserted state interest and fundamental right involved in the abortion context.

B. Recognition Of A Compelling State Interest In Protecting Potential Life Throughout Pregnancy Would Both Completely Eviscerate Women's Right To Choose Abortion And Portend Even Broader Invasions Of Women's Fundamental Rights.

This Court has never accepted as compelling an asserted interest so broad that it would eliminate virtually all constitutional protection afforded a fundamental right. Were this Court to accept Missouri's blanket contention that its interest in potential life outweighs women's fundamental right to procreative autonomy at all stages of pregnancy, states would be free to criminalize abortion in virtually all

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[47] Similarly, penalizing third parties for causing a woman's pregnancy to terminate without her consent, either through civil wrongful death actions or criminal "feticide" laws, protects pregnant women from serious physical harm, severe bodily intrusion and the termination of wanted pregnancies.

circumstances,[48] to investigate all abortions to determine whether they were spontaneous or intentionally induced,[49] and then to prosecute for murder women who intentionally ended their pregnancies.[50] In analogous circumstances where a state proffered an interest which, if deemed compelling, would have had "no logical stopping point" and would have completely overridden a particular constitutional right, this Court has refused to recognize the interest as compelling. *See, e.g., City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (interest in redressing generalized societal discrimination deemed not to be sufficiently compelling to justify race-conscious remedies because it "has no logical stopping point") (citation omitted); *id.* at 723 (interest in providing role models deemed not to be sufficiently compelling to justify race-conscious remedies because it "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration").[51]

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[48] Accepting Missouri's recharacterization would allow states to criminalize abortions even when a woman's pregnancy is the result of rape or incest, and when childbearing poses a serious risk to the woman's health or life. *Cf. Roe v. Wade*, 410 U.S. 113, 118 (Texas criminal statute proscribed all abortions except those necessary to protect life of pregnant woman).

[49] Approximately 31% of all pregnancies terminate by spontaneous abortion prior to the third trimester. Wilcox, Weinberg, O'Connor, Baird, Schlatterer, Canfield, Armstrong & Nisula, *Incidence of Early Loss of Pregnancy*, 319 New Eng. J. Med. 189 (1988).

[50] Moreover, complete strangers could have free reign to intervene in the lives of women and their families. This troubling scenario was actually played out in the recent case of *In re Klein*, No. 1736-89 (N.Y. App. Div. Feb. 8, 1989). There, a man requested guardianship of his comatose, pregnant wife for the purpose of authorizing an abortion he believed could improve her chances of recovery. Two anti-abortion activists who had never even met the Klein family sought to intervene and prevent the abortion. Relying in part on *Roe*, a New York appellate court ruled that "these absolute strangers to the Klein family, whatever their motivation, have no place in the midst of this family tragedy." *Slip op.* at 4.

[51] *See also Cohen v. California*, 413 U.S. 15, 25 (1971) (interest in preserving public order deemed not to be sufficiently weighty to justify restrictions on free expression because it is "inherently boundless").

Indeed, recognition of a broad "compelling" interest in protecting potential life necessarily would legitimize many other state intrusions on procreative autonomy that would be "essentially limitless in scope and duration."[52] Missouri's reasoning would allow states to criminalize the use of any contraceptive devices, such as intrauterine devices and some oral contraceptives, that prevent implantation of a fertilized ovum after conception. More fundamentally, since the "potentiality" of life exists equally before sperm-ovum fusion as after, states could invoke the same "compelling" interest proffered here to justify laws prohibiting the use or sale of *all* contraceptives. At bottom, embracing the position advocated by Missouri would not only require the reversal of *Roe*, but would call into question *Griswold* and *Eisenstadt* as well.[53]

Moreover, embracing Missouri's position would provide states with an open-ended invitation to force pregnant women to act in whatever ways the state determined were optimal for the fetus, thereby reducing pregnant women to no more than fetal containers. A frightening perview of the potential intrusions is found in Mo. Rev. Stat. § 1.205 itself (part of which is at issue here), which states that "[t]he life of each human being begins at conception" and "[u]nborn children have protectable interests in life, health and well-being." A Missouri court relied on section 1.205 in ordering a pregnant woman to submit to a cesarean section against her

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[52] *Croson*, 109 S. Ct. at 723.

[53] To be sure, the probability that any given act of sexual intercourse will lead to the birth of a child is less than 100%. But the probability that any given embryo will lead to a live birth is itself only approximately 69%, given the rate of spontaneous abortion. *See supra* note 49. In any case, some potential for life still exists even prior to conception, and if a state attempted to protect that life by proscribing the use of contraceptives, this Court would be hard-pressed to justify a constitutional ruling that the state's interest in postconception potential life is compelling but its interest in preconception potential life is not.

wishes, finding that "the life, health and well-being" of her fetus "may be jeopardized" by her decision. *Deaconess Hosp. v. McRoberts*, No. 874-00172 (St. Louis Cir. Ct. May 21, 1987).

Within a month of this Missouri case, a District of Columbia court granted a hospital's similar request for an order compelling a woman who was critically ill with cancer to undergo a cesarean section, despite the unanimous objections of the woman, her family and her physicians and despite the uncontroverted fact that it might hasten the woman's death. *See In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988). The fetus was not viable and did not survive; the woman herself died two days later. The District of Columbia Court of Appeals, which had refused to stay the order, issued an opinion subsequent to the woman's death in which it stated "we well know that we may have shortened [her] life span" but concluded that the value of her remaining life was outweighed by the "slim" chance that the fetus might survive. 533 A.2d at 613-14, 617.[54]

Although cases citing protection of fetal interests to justify other types of infringements upon pregnant women's autonomy have been relatively rare—largely because of *Roe*—a handful of such cases have arisen in the last decade. Courts have jailed pregnant women based on a belief that the women might act contrary to the interests of the fetuses they carried.[55] A woman was prosecuted

[54] Courts in at least 11 states have ordered women to submit to cesarean sections. *See* Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987) (also citing six cases in which courts refused to order such surgery).

[55] A District of Columbia court recently ordered the incarceration of a woman solely to prevent her from using cocaine during the remainder of her pregnancy. *See United States v. Vaughn*, 117 Daily Wash. L. Rep. 441 (D.C. Super. Ct. Mar. 7, 1989). The woman had pled guilty to the misdemeanor of second degree theft (for check forgery); the prosecutor recommended that the woman not be jailed and the judge stated that he would have accepted the recommendation but for the fact that the woman was pregnant and tested positive for cocaine use. In fact, the judge indicated that he might even jail a pregnant woman to prevent her from ingesting alcohol or smoking cigarettes. *Id.* at 442; *see also In re Stevens S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (reversing juvenile court's order that woman with alleged mental illness be institutionalized during last two months of pregnancy; appellate decision came only after woman had given birth and had been released).

and faced imprisonment for allegedly waiting "many hours" before seeking medical help after she noticed some vaginal bleeding and experienced some uterine contractions.[56] In another case, a child was allowed to sue his mother to recover for prenatal injuries allegedly caused by the woman's failure to act as a "reasonable" pregnant woman.[57]

If this Court accepts a compelling state interest in the fetus from conception, laws like section 1.205 could be used to force women to submit not only to cesarean sections, but also to other types of surgery and medical treatment deemed to be in the interest of the fetuses they carry, including *in utero* fetal surgery. Pregnant women could be denied medical care needed to protect their own health, such as radiation or chemotherapy to treat cancer or the use of prescription or nonprescription drugs. A wide range of common conditions and conduct

[56] The woman's pregnancy was complicated by a dangerous condition, placenta previa, which caused her to hemorrhage and lose a great deal of blood. Her son was born with severe brain damage and died within six weeks. The woman was prosecuted for causing her son's death through her own loss of blood. *See People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 27, 1987) (transcript of decision); Defendant's Memorandum of Points and Authorities in Support of Demurrer to Complaint Without Leave to Amend and in Support of Motion to Dismiss, *People v. Stewart*.

[57] *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1981). *But see Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988) (court refused to recognize cause of action for prenatal injuries in suit filed by girl against her mother, noting that otherwise "[m]other and child would be legal adversaries from the moment of conception until birth").

arguably posing some threat to fetal health could provoke state intervention, criminal prosecution or civil liability, including: being overweight, being underweight, exercising, not exercising, failing to eat "well," failing to "stay off of her feet," smoking, drinking alcohol, ingesting caffeine, and suffering physical harm.

In short, acceptance of Missouri's assertion of a broad compelling interest in protecting potential life would do far more than eviscerate the fundamental right to abortion, already an unprecedented step at odds with the Court's consistent effort to balance state interests with individual rights. It would also provide the constitutional foundation for a frontal assault on other fundamental liberties.

C. The Imposition Of Unparalleled Burdens Only On Women To Service The State's Asserted Interest In Potential Life Impermissibly Reflects And Reinforces Outmoded Stereotypes Of Women As Childbearers.

Missouri's decision to advance its interest through previability abortion restrictions must also be rejected because it entails the resurrection of "archaic and overbroad generalizations" about women's proper role in society. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam). States have long sought to restrict women's autonomy and opportunities for participation in public life, citing women's ability to bear children as the principal justification for this unequal and disadvantageous treatment. For example, states excluded women from certain professions,[58] limited the hours women could work outside the home,[59] and discouraged women's involvement in political and civic affairs.[60]

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[58] *See, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (women excluded from practice of law).

[59] *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908).

[60] *See, e.g., Hoyt v. Florida*, 368 U.S. 57 (1961) (women exempted from jury duty), *overruled, Taylor v. Louisiana*, 419 U.S. 522 (1975); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (women exempted from paying poll tax if they "chose" not to vote).

For many years this Court accepted such detrimental treatment as the "natural" consequence of women's reproductive capacities and as furthering important state interests, such as "preserv[ing] the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). This Court has now soundly rejected the outmoded view that "the female [is] destined solely for the home and the rearing of the family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and it has invalidated legislation that perpetuates women's image as the "'weaker sex' or . . . child rearers." *Califano*, 430 U.S. at 317. Despite the likely absence of malicious intentions and the widespread acceptance (even among women) of unequal treatment, the Court has recognized that the Constitution prohibits the state from disadvantaging any individual woman on the basis of stereotypes.[61]

The Court has therefore refused to accept asserted state interests that reflect "traditional . . . assumptions about the proper roles of men and women." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). In *Hogan* itself, the Court precluded Mississippi from operating a women-only nursing school, rejecting the state's asserted interest in increasing educational opportunities for women because the state's action gave "credibility to the old view that women, not men, should become nurses . . . ." *Id.* at 730.

Abortion restrictions reflect and reinforce the same stereotypes of women that this Court has found illegitimate. By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, state laws manifest the stereotype that it is women's

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[61] *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality) ("[O]ur Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

"natural role" to bear children. The fact that the state's interest in depriving women of control over their own reproductive capacities can be cloaked in noble terms does not diminish the actual harm and invasion of liberty suffered by individual women denied abortion. And the fact that many people (including women) presently are not troubled by this stereotype is no more constitutionally relevant today than was the popularity of "romantic paternalism" many years ago. Just as previous state limitations on women's ability to participate in public life presumed that the "paramount destiny and mission of women are to fulfil[l] the noble and benign offices of wife and mother," *Bradwell*, 83 U.S. at 141, laws that deprive women of their ability to choose whether to end a pregnancy force women to fulfill that same destiny.

Moreover, reinforcing this stereotype by upholding restrictive abortion laws would lead states once again to restrict women's autonomy in the name of enforcing their "motherly duties" in the non-abortion contexts discussed above.[62] The Court held in 1908 that states could limit the hours women worked outside the home because work was thought harmful to reproductive capacity: "[working long hours has] injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller*, 208 U.S. at 421. We risk repeating and even worsening this "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality), by allowing states, in the name of fetal protection, to control women's decisions and actions regarding employment, medical treatment, exercise, diet and overall lifestyle.[63]

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[62] *See* discussion *supra* at pp. 21-24.

[63] Many of the *amici curiae* supporting Appellants reveal that their willingness to impose unprecedented burdens on women through forced childbearing stems from their own stereotyped views of women. Some *amici curiae* portray women as incapable of moral decisionmaking. *See, e.g.*, Brief of Covenant House and Good Counsel, Inc., *Amici Curiae* 9-10, 17 (discussing wide variety of behavior of pregnant women that could harm fetus, from smoking to obtaining inadequate prenatal care, and concluding that state must protect potential life from conception "[i]f *any* children are to have reasonable assurances of healthy birth and productive life" (emphasis in original)). Others describe women as the victims of their own abortion decisions. *See, e.g.*, Brief *Amici Curiae* of Focus on the Family, and Family Research Council of America, in Support of Appellants 13-24 (purporting to describe adverse medical and psychological risks of abortion, as well as "serious sexual problems experienced by women who had abortions"). Virtually all trivialize or deny entirely the tremendous harms to women's liberty, equality and health inflicted by state restrictions on abortion. *See, e.g.*, Brief of the United States Catholic Conference as *Amicus Curiae* in Support of Appellants 15-19 (downplaying medical risks of pregnancy and denying existence of pre-*Roe* maternal mortality and morbidity due to illegal abortion).

Although Missouri asserts an interest in compelling unwilling women to sacrifice their bodies, health and well-being for nine months to protect *potential* life, Missouri and other states never impose comparable duties on men to protect *actual* life. The value that our law attaches to the individual right to liberty is so great that people are generally not required to reach out to aid another person, even when it is possible to save another from grave injury or certain death at little or no risk to one's self.[64] Particularly instructive is *McFall v.*

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[64] W. Keeton, D. Dobbs, R. Keeton & D. Owen, *The Law of Torts* § 56, at 375-76 (5th ed. 1984); *Restatement (Second) of the Law of Torts* § 314 (1965); *see also* Uniform Anatomical Gift Act § 2(b), (c) (1987) (organ donations unlawful if made against wishes of decedent).

A small number of states require people to stop at the scene of or report an accident. These requirements do not, however, present passersby with any risk of physical harm. For example, the Minnesota Good Samaritan statute specifies that assistance is never required if providing it poses a "danger or peril to self or others." Minn. Stat. § 604.05 (1) (1988). Nor does the law ever require a father to put himself at appreciable physical risk to help his child. Professor Tribe notes that "the law nowhere forces *men* to devote their bodies and restructure their lives even in those tragic situations (such as organ transplants) where nothing less will permit their children to survive." L. Tribe, *American Consti-*

Shimp, in which the court refused to order a man to donate bone marrow, a procedure far less risky and painful than many aspects of pregnancy and childbirth, even though the donation was necessary to save the life of his cousin. According to the court:

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue . . . . For our law to *compel* the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, . . . and one could not imagine where the line would be drawn.

10 Pa. D. & C. 3d 90 (Allegheny Cty. 1978) (per curiam) (emphasis in original).[65]

To permit the state's interest in potential life to prevail over women's fundamental rights would have the

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tutional Law 1354 (2d ed. 1988) (emphasis in original); *see also* Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1588 (1979) ("[C]onsider a simple burning building, with a child trapped inside. Would a court impose criminal liability on anyone, even the child's parent, who did not attempt to save the child at the risk of second-degree burns over one or two percent of his or her body? . . . [E]ven if the potential rescuer is specified to be the child's parent, liability is unlikely. In all other cases, the suggested imposition is unthinkable in the context of our legal system.").

[65] *See also In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180, 182 (1975) (rejecting family's attempt to force incompetent schizophrenic man to donate kidney to sister because of "the absence of real consent on his part," even where dire need of transfer was established).

In addition, the medical risks to which Missouri would subject unconsenting pregnant women starkly contrast with the right of consent afforded all others. Ordinarily when a person faces serious medical risks that might result from recommended surgery, the choice lies with that individual whether to accept those risks and consent to the procedure. At common law it was recognized that "a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), *overruled on other grounds*, *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

perverse effect of elevating fetuses to "superhuman" status by giving fetuses protections that states do not give to persons. This provides further evidence that this legislative "trade-off" rests upon an illegitimate stereotype that women are essentially, and "naturally," childbearers, and that women are therefore appropriate targets for a subordination of bodily freedom and autonomy that never has been and never would be placed in comparable fashion upon others in society. Just as the right of a potential donor or rescuer to refuse to help is fully protected by the common law's respect for bodily freedom, so too must the law respect the right of a woman to choose whether to undergo the great burdens of pregnancy and childbirth.

* * * * *

This Court is asked to view the state's interest in protecting potential life as so compelling that it eviscerates women's fundamental right to reproductive choice throughout pregnancy. The Court has never before found a purported state interest to be compelling in a context where that interest would justify intrusions with "no logical stopping point" on a fundamental right.[66] The Court in *Roe* understood and discharged its responsibility to protect fundamental rights from undue government interference by allowing women's right and the state's interest to supersede each other at different temporal stages of pregnancy. Retreating today from this commitment to the safeguarding of fundamental rights would cede complete control over women's (and only women's) reproductive autonomy (and hence a core aspect of their

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[66] *Croson*, 109 S. Ct. at 723. Even if the Court found the asserted interest in protecting potential life "compelling," abortion restrictions would still fail heightened scrutiny because they are not the least restrictive means of promoting this interest. For example, the Surgeon General of the United States' recent report on abortion concludes that governments could curtail the incidence of abortion through various non-coercive means, such as implementing sex education programs and subsidizing the costs of childbearing and rearing for women bearing unplanned children. *See* Surgeon General's Report on Abortion, *reprinted in* 135 Cong. Rec. E906-E909 (daily ed. March 21, 1989).

social, economic and political freedom) to a political process that frequently has failed to treat women fairly; particularly given the highly charged emotional environment in which legislative "balances" necessarily would be struck, legislatures can be expected again to undervalue both the importance of protecting women's autonomy and the burdens of state-imposed continued pregnancy and childbirth. Allowing state legislatures to dictate women's most intimate and fundamental decisions in life would fail utterly to respect the Constitution as an operative restraint on unwarranted legislative intrusions on fundamental liberties and would fail to discharge this Court's duty to be the "ultimate guardian" of those liberties.

CONCLUSION

To ensure that the constitutional guarantee of liberty "extends to women as well as to men," *Thornburgh*, 476 U.S. at 772, this Court must reaffirm *Roe v. Wade* and prohibit states from forcing women to continue pregnancies through laws such as the Missouri provisions at issue in this case.

Respectfully submitted,

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March 30, 1989

APPENDIX

APPENDIX

STATEMENTS OF INTEREST

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL), has 250,000 members in 34 state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

THE WOMEN'S LEGAL DEFENSE FUND (WLDF) is a non-profit national advocacy organization of over 2500 members dedicated to challenging sex discrimination and to advancing women's concerns through the legal system. WLDF believes that reproductive freedom is fundamental to women's achievement of equality in society. Therefore WLDF makes this issue one of its highest priorities and has a long history of activism and legislative and judicial advocacy in this area.

THE ABORTION RIGHTS COUNCIL (ARC) was founded in 1968 and currently has 5,000 members and 12,000 supporters in the State of Minnesota. It has as its sole purpose keeping abortions safe and legal for all women. ARC opposes any further restrictions on women's access to abortions and supports the principles established in *Roe v. Wade*.

ABORTION RIGHTS MOBILIZATION (ARM) is a Section 501 (c) (3) organization, using lawsuits, education and other techniques to maintain separation of church and state and "to implement and guarantee a woman's right to legal abortion as decreed by the U.S. Supreme Court," following ARM's by-laws.

THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW

supports basic constitutional rights for all persons, including first amendment rights of free speech and separation of church and state, the right to privacy, and equal protection under the law. The right to reproductive choice continues to be a priority issue for AAUW.

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, is a union of over 1 million public employees, including over 300,000 health care workers. AFSCME also represents thousands of workers in social service agencies caring for abused, neglected and abandoned children. Over half of AFSCME's members are women.

THE AMERICAN VETERANS COMMITTEE, INC. (AVC), founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World War II, Korean War, or Vietnam War. AVC has filed *amicus* briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, sex, or national origin is detrimental to our Nation. AVC believes that the U.S. Constitution entitles a pregnant woman, in light of her unique burden of pregnancy, to determine whether to terminate her pregnancy, and that the Missouri statute involved in this case violates both that constitutional right and the right of medical personnel under the First Amendment to provide information about such termination to their patients.

BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, INC. (BWHBC), is a non-profit women's health education and advocacy organization which seeks to empower individuals and groups to make informed personal and political decisions affecting health and medical care, especially as they relate to women. Founded in 1970, BWHBC operates a Women's Health Information Center near Boston and serves approximately 10,000 people each year. We have had a longstanding interest in reproductive rights, including access to safe, legal, affordable abortion services. Our 20 years of contact with thousands

of women and their families has only reinforced our belief in the importance of contraception and abortion services for those who need and want them.

BUFFALO LAWYERS FOR CHOICE is an organization currently of approximately 50 attorneys—men and women—formed in 1989 in Buffalo. All the attorneys in the organization practice in Buffalo. Although they are from diverse backgrounds and practices, the group's members all have supported the right of women to choose abortion and have supported equality between men and women. Buffalo Lawyers for Choice intends to continue as an active organization supporting local groups that protect individuals' ability to control their bodies and their lives. Many of the members have been active in the past in Planned Parenthood of Buffalo and Erie County and in national Planned Parenthood organizations, as well as civil liberties organizations. Because of an intense interest in the rights of women and men to make their own decisions about reproductive issues, Buffalo Lawyers for Choice wishes to be recognized as an *amicus Curiae* in the *Webster* case.

CALIFORNIA WOMEN LAWYERS is an organization founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is the largest women lawyers organization in the world, with several thousand individual members, and speaking for 30 women's bar organizations in California. From its inception, CWL's agenda has included increasing the numbers of women appointed to the bench, admitted to law schools, offered jobs and partnerships in law firms, and eliminating gender bias in the courts. It has also been committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

THE CENTER FOR WOMEN POLICY STUDIES (CWPS), founded in 1971, was the first national policy

research and advocacy institute focused exclusively on issues of women's social and economic rights. The Center's current programs include the National Resource Center on Women and AIDS, the first national effort focused exclusively on women, particularly low income women and women of color; a key concern is the potential abrogation of women's reproductive rights in the name of protecting public health. CWPS also is conducting the second stage—policy implementation and public education—of the Reproductive Laws for the 1990s Project. Finally, our Young Women's Project seeks to bring women in their twenties into the policy process and will address issues of reproductive choice from their perspectives.

For almost 20 years, CHOICE (Concern For Health Options: Information, Care & Education) has been an educator, consumer advocate, counselor, and information resource in the areas of reproductive health, sexuality, and maternity care. Because of its background and experience in public education and counseling, CHOICE was selected by the City of Philadelphia to operate its city-wide hotline for information on AIDS. CHOICE, through its information hotlines, teen improvisational theatre company, training center, and publications, has pursued an organizational philosophy that decisions regarding sexuality and reproduction are highly personal, and that those very private choices should not be constrained by private or public intimidation, economic or social status, lack of relevant information, or unwarranted governmental interference.

CHOICE NETWORK OF TARRANT COUNTY, TEXAS, is a coalition formed in 1983 and dedicated to keeping abortion safe and legal and to assuring reproductive freedom for all women, regardless of age or economic status.

THE COLUMBIA-GREENE RAPE CRISIS CENTER, based in New York, was founded in 1981. It assists approximately 400 women per year who have been

the victims of sexual assault, and their families and friends, to overcome the trauma of sexual assault. It also serves 7,000 community residents per year through its sexual abuse prevention project. Pregnancy can result from any number of situations, many of which do *not* include "irresponsibility" on the part of the woman. The Rape Crisis Center sees many unwanted pregnancies resulting from sexual crimes and supports a woman's freedom of choice over her personal medical and emotional concerns, including the right to terminate an unwanted pregnancy.

Founded in 1977, THE COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS—CMRW is a San Francisco-based grass roots organization with a nationwide membership of almost 2,000 people. CDRR-CMRW and its membership advocate the right to legal, affordable, and safe abortion services for all women, regardless of their age, race, income level, or sexual preference. CDRR-CMRW recognizes that the right to choose if and when to bear children is a fundamental and private right that every woman should be able to exercise free from coercion, governmental regulation, or intervention. CDRR-CMRW considers abortion a vitally important and needed health service and a constitutionally-protected right for all women.

THE CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., was incorporated in 1973 as a nonprofit public interest law firm advocating for women's legal rights. We have over 400 members, and serve thousands of people in New England each year through our litigation, community education, research, and information and referral programs. We choose to join this brief as *amicus curiae* because we believe it is essential to protect the rights of women to choose safe and legal abortion. As an organization working for equality, we believe that every woman, without regard to religious belief, income, race, age or disability, must have an equal opportunity to control her own health and reproduction.

D.C. FEMINISTS AGAINST PORNOGRAPHY, founded in 1980, is a feminist community organization dedicated to community education on issues of sexism, racism, and sexual violence in the media. D.C. FAP provides slide shows, public discussions, and other community education activities in the Washington Metropolitan area, testified before the Meese Commission on Pornography, has debated both right wing puritans and pornographers on issues of women's rights, sexuality and other media issues.

THE 80% MAJORITY CAMPAIGN is a pro-choice research and information service which is very involved with activist organizations and abortion providers all over the country. The organization publishes an eight-page newsletter twice a month which provides information and analysis of the abortion issue to our subscribers. This commitment was undertaken out of the belief that the constitutional right to make reproductive decisions is fundamental to women's personal freedom and dignity. It would be a national tragedy to retreat from the acknowledgment of that right into the political arena where those who can shout the loudest often prevail.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation founded in 1974 that is dedicated to securing economic, social, and political equality for women. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through our participation as counsel and as *amicus* in numerous cases involving women's reproductive rights, including *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252 (1981) and related cases.

The collective membership of the FEMINIST HEALTH CENTER OF PORTSMOUTH regard the decision to terminate or complete a pregnancy to be essential to the individual freedom of women everywhere. We believe the Constitution protects our right to make this most private decision and we urge the Justices of the Supreme Court to uphold the Constitution of the United States of America and protect our right to privacy.

THE FEMINIST INSTITUTE promotes social change that ensures women's autonomy and independence. Our women's health policy and pro-choice projects promote public policies that ensure women's control over their own bodies. We are concerned that, as women become free from subjugation to patriarchal control within the family, they in turn not become subject to state control of their reproduction. Control over one's own body is fundamental to the exercise of personal autonomy, without intervention or restriction by the government.

FUND FOR NEW LEADERSHIP, a political action committee founded in 1987, represents more than 250 young (ages 20-40) Democrats. The purpose of the Fund is to raise money for Democratic Party candidates and organizations, and to increase the political participation, knowledge, and campaign skills of young Democrats. The Fund also seeks to provide a forum for the discussion of contemporary social, economic, and political problems in America. The Fund for New Leadership is interested in the case of *Webster v. Reproductive Health Services* because we believe that women's right to choose abortion is closely related to women's equality in society. If women were to lose their reproductive rights, we feel that women's lives and women's opportunities to participate equally in society would be greatly diminished.

GAY AND LESBIAN DEMOCRATS OF AMERICA is a national organization of individuals and local organizations founded in 1982 to encourage the involvement of lesbians and gay men in electoral politics and public policy. Among the issues that GLDA has worked on are the protection of the right to privacy and of all civil rights. GLDA has supported efforts to protect the re-

productive rights of women and thus is interested in the case of *Webster v. Reproductive Health Services.*

THE HARVARD WOMEN'S LAW ASSOCIATION was founded in 1969. It is currently celebrating its twentieth year at Harvard Law School, where women have been students for 38 years. Most of the almost 700 women currently attending Harvard Law School attend some Women's Law Association events; many participate in the Battered Women's Project which the Women's Law Association cosponsors. Over 200 women, almost one-third of the women at Harvard Law School, are paying, voting members of the Women's Law Association. Among the Women's Law Association's objectives are informing the law school and the broader community about issues of concern to all women at Harvard Law School and promoting women's rights, such as the right to choose an abortion.

HAWAII WOMEN LAWYERS is dedicated to the improvement of the status of women attorneys and the support of issues of concern to all women, so as to promote the advancement of all women.

THE HAWAII WOMEN LAWYERS FOUNDATION is a professional organization of women and men attorneys and others. One of its main purposes is to advance the status of women in the community. Members have been involved in many projects which aid women lawyers and women in the community in general. Foundation members are aware that women's right to choose abortion is constitutionally protected. Women must have the right to reproductive freedom if they are to have physical control over their own bodies. Without reproductive autonomy, women can neither control the course of their lives nor participate equally in society. The Hawaii Women Lawyers Foundation supports reproductive freedom for women and opposes any and all efforts to limit women's right to choose abortion.

THE HUMAN RIGHTS CAMPAIGN FUND is a lobbying organization representing the national gay and

lesbian community. Since its founding nearly 10 years ago, the Campaign Fund has been committed to working toward full civil rights for lesbians and gay men and ultimately for all Americans. In pursuit of this goal, we are interested in any governmental actions—legislative, judicial, or administrative—that could affect civil rights.

Founded in 1975, the ILLINOIS WOMEN'S AGENDA is a statewide coalition of organizations and individuals committed to full equality and justice for women. Current IWA membership consists of several hundred individual members and over 50 affiliated organizations, representing 80,000 women throughout Illinois in the fields of law, academia, labor, and business, among others. The IWA develops and participates in a wide range of programs for women through research, public education, and advocacy.

THE INSTITUTE FOR WOMEN'S POLICY RESEARCH (IWPR) is an independent, nonprofit, scientific research institution established to respond to the need for women-centered, policy-oriented research. IWPR conducts research that addresses the full spectrum of issues that impact women's lives—with sensitivity to and consideration for diversity based on race, ethnicity, and class. The focus of the Institute's research is both national and international in scope. Organized in 1987 by Dr. Heidi Hartmann and Dr. Teresa Odendahl, and a Washington-based steering committee, the work of the organization is accomplished by four full-time and three part-time staff members with occasional assistance from consultants, interns, and volunteers. IWPR is supported with funds provided by foundations, women's groups, labor unions, and more than 400 individuals. In all aspects of its endeavors, IWPR is committed to expanding access, strengthening relationships, and fostering partnerships which strengthen the economic, social, and political well-being of all women. IWPR gives its full support to the *amicus curiae* brief in the case of *Webster*

v. Reproductive Health Services. IWPR urges the Court to uphold women's right to reproductive choice and to strike down the Missouri law, because, among other reasons, women's right to reproductive choice is a key element in their ability to achieve economic equity.

THE INTERNATIONAL CENTER FOR RESEARCH ON WOMEN (ICRW) is a nonprofit organization located in Washington, D.C., and founded in 1976, that works to improve the productivity and economic status of poor women in developing countries and to influence development policy on their behalf. ICRW's programs address the dual economic and family responsibilities of women through policy-oriented research, technical assistance, and public education. While primarily focusing on women's economic situation, ICRW programs also consider the important relationship between women's economic participation, their health, and their families' health. Whether in developing or developed nations, women's ability to control their reproduction must be considered a fundamental right and one that is crucial to women's health and their ability to participate fully in social and economic development.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. (LLDEF), founded in 1973 as a not-for-profit corporation in New York, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. Lambda's work has included challenging the constitutionality of statutes that criminalize private adult, consensual sexual contact, ending discrimination against gay people and people with AIDS, seeking recognition of lesbian and gay relationships, and seeking equal access to medical treatment for people with AIDS. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

LAWYERS FOR REPRODUCTIVE RIGHTS has recently been founded by approximately 15 lawyers in Philadelphia, Pennsylvania, to educate fellow lawyers and the public on legal issues of reproductive rights and to work to ensure that all reproductive options are available. Our organization is a revival of a group formed approximately eight years ago which at that time represented more than 800 lawyers in the Philadelphia metropolitan area.

THE LEAGUE OF WOMEN VOTERS OF MISSOURI (Missouri League) is a nonpartisan, nonprofit membership organization with 1,509 members and 16 local Leagues throughout the state of Missouri. The Missouri League has worked to promote public policies that affirm the constitutional right of privacy of the individual to make reproductive choices. For example, the Missouri League has distributed publications to legislators, the media, and the general public, and has cosponsored an annual educational forum on public policy on reproductive choices.

THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES (LWVUS) is a nonpartisan, nonprofit membership organization with members in state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS further believes that the *Roe v. Wade* decision is an important protection of this constitutional right.

THE MISSOURI WOMEN'S NETWORK is a banding together of Missouri organizations and individual women and men to facilitate communication, promote education, and to strengthen advocacy for women's issues based on the 1977 National Plan of Action for Women (adopted in Houston).

THE MS. FOUNDATION FOR WOMEN is the nation's only public, multi-issue, women's fund. The Foun-

dation has long recognized that the extent to which women can control their reproductive capacities is a principal factor in determining the quality and character of their lives; this is especially true for poor women and women of color, who are often the first victims of anti-choice legislation. The Ms. Foundation for Women has been responding to attacks on reproductive freedom with a combination of grantmaking, technical assistance, and advocacy since its founding almost 15 years ago.

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW), a nonprofit professional association with over 120,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico, and Europe. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skill. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy. The Association has been in the forefront of the struggle for women's equality, and is particularly concerned in the present instance that the state not override a pregnant woman's autonomy nor restrict her right to choose abortion.

The purpose of the NATIONAL COMMITTEE TO FREE SHARON KOWALSKI, founded in October 1987, is to ensure that, in particular, Sharon Kowalski, an adult disabled lesbian, receive rehabilitation and access to her partner currently denied by her father and guardian and, in general, the right to self-determination for lesbian and heterosexual women, gay men, and people with disabilities not be abridged. The National Committee, headquartered in Washington, D.C. has 17 local chapters and a membership of 4,000. We have pointed the *amicus* brief because without the ability to make decisions about one's body unencumbered by state prohibi-

tions—for example, for a lesbian, whether to make love with a woman or, for any woman, whether to remain pregnant—the concept of individual freedom and autonomy becomes an empty reality.

THE NATIONAL COUNCIL FOR RESEARCH ON WOMEN is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls. The Council also works to strengthen ties with other national and international organizations and coalitions. Through its member centers and affiliates, the Council links over 2,000 women and men scholars and practitioners in this country and abroad and serves constituencies that include government, the media, business and industry, and the nonprofit sector, as well as the academic community and the general public.

THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. (BPW/USA) is the world's oldest and largest organization of working women. Founded in 1919, and with 125,000 members in 3,400 local organizations across the country, BPW/USA promotes full participation, equity, and economic self-sufficiency for working women. BPW/USA includes among its members men and women of every age, religion, race, political party, and socioeconomic background. BPW's platform commits us to "support reproductive freedom as a right for all women." We believe that if the Supreme Court reverses the decision of the lower courts in *Webster v. Reproductive Health Services*, this will seriously infringe on the reproductive freedom of all women and seriously limit our ability to achieve equity, economic self-sufficiency, and full participation in American society.

THE NATIONAL GAY & LESBIAN TASK FORCE (NGLTF) is a national membership advocacy and political organization to protect and advance the civil and social rights of lesbians and gay men. Founded in 1973,

NGLTF has 15,000 members and offices in Washington, D.C. NGLTF strongly supports the reproductive freedom of all women and the expansion of a fundamental right to privacy for all people in the area of reproductive and sexual decision-making. Bodily integrity is an essential aspect of reproductive decisions and sexual privacy.

NATIONAL GAY RIGHTS ADVOCATES is a nonprofit public-interest law firm founded in 1978. NGRA engages in impact litigation throughout the country on behalf of lesbians and gay men. Today, NGRA has over 20,000 members from every state and the District of Columbia. Preserving the constitutional rights to liberty and privacy, rights that are principal components of a woman's right to choose abortion, are of fundamental concern to NGRA's work and its membership. If these essential rights are eroded, lesbians and gay men also will be denied equal participation in American society.

THE NATIONAL WOMAN ABUSE PREVENTION PROJECT is a national domestic violence information and policy resource center. Founded in 1986, the Project provides information, training, and technical assistance to battered women in their work, and develops policy guidelines for professionals on issues affecting battered women. We are joining the Women's Legal Defense Fund and NARAL as an *amicus curiae* in the *Webster* case because any decision weakening *Roe v. Wade* would greatly reduce the ability of many battered women, who often become pregnant as a result of forced sexual conduct, to protect themselves or to have the economic ability to leave their abuser.

THE NATIONAL WOMEN'S CONFERENCE COMMITTEE, formerly the IWY Continuing Committee of the 1977 First National Women's Conference (Houston, TX), is the nonprofit, all-volunteer Committee working to implement the National Plan of Action adopted by 2,000 delegates representing every state and territory, mandated by Congress to adopt recommendations to advance the status of women of the United States and to monitor progress on this National Plan of Action. Guaranteeing reproductive freedom to all women is one of the 25 priority planks in the National Plan of Action. Four hundred seventy members were appointed to the IWY Continuing Committee. Currently we are joined in our advocacy for women's rights by 14 statewide networks and many individual grassroots supporters.

THE NATIONAL WOMEN'S LAW CENTER is a Washington-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

THE NATIONAL WOMEN'S STUDIES ASSOCIATION, with a membership of nearly 4,000 feminist educators and scholars promotes the development of Women's Studies Programs, feminist scholarship, and education in a broad sense about women's lives. By studying, researching, and discussing women and gender relationships, NWSA believes we can understand systems that deny equality and envision alternative ways to structure society to guarantee that women and others who are denied privileges will have the opportunity to make choices about their lives and shape the world they live in. NWSA believes women cannot achieve equality without control over their reproductive lives. Historically women's oppression was cemented by state or religious control over whether, when, and how they bore children.

THE NEW HAMPSHIRE WOMEN'S LOBBY was formed in 1980. Its purpose is to bring about changes in laws, regulations, public attitudes, and perceptions re-

lating to a woman's role in society by addressing the laws of the state of New Hampshire. We are a 1,000-member organization with a statewide board of 30, and believe that supporting this brief is in the best interests of greatest choice for New Hampshire women.

NEW YORK STATE COALITION ON WOMEN'S LEGAL ISSUES (COWLI) is a statewide organization established to identify and eradicate gender bias which is pervasive in our society. Among its other purposes, COWLI offers practical and substantive expertise and commentary on the effects on women of existing laws and of proposed legislation. COWLI also provides special assistance to the courts by drawing attention to the deleterious effects on women of biased implementation of laws. COWLI is particularly concerned with this appeal because it focuses on the critical issue of reproductive freedom. COWLI is committed to ensuring reproductive freedom for all, as well as gender equality in the Courts.

NEW YORK WOMEN IN CRIMINAL JUSTICE is an organization of women whose members include police, probation, and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. Our main concerns are that offenders who go through the system not come out worse than when they went in, and that as many offenders as possible be diverted from the system. We also strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the dysfunctional children in school and often the criminals of the future. The right to choose should not be restricted to only those women who can afford abortions (whether or not they remain legal); the right to choose should be available to all women, most especially those who understand the heavy burden that would be imposed upon both the children and the women in and just out of prison.

THE NORTH CAROLINA ASSOCIATION OF WOMEN ATTORNEYS, INC. (NCAWA), is a non-

profit corporation founded in 1978 whose objects are the promotion of the participation of women in the legal profession and the promotion of the rights of women under the law. The NCAWA has been instrumental in the passage of laws affecting women on issues such as domestic violence, equitable distribution of marital property, and child support enforcement. There are approximately 1,700 women attorneys in North Carolina and almost one-third of all new lawyer applicants are women. We believe it is the obligation of all women attorneys, as well as the stated objective of our organization, to act as advocates for women's rights. In 1979 the NCAWA adopted a resolution endorsing the right of all women to exercise their reproductive freedom to carry their pregnancies to term with adequate prenatal care or to have an abortion. Based on this resolution and our objectives, the North Carolina Association of Women Attorneys joins in this *amicus* brief.

NORTH CAROLINA EQUITY, a nonprofit organization, is dedicated to the economic advancement of women. NC Equity serves as a catalyst on women's issues and advances networking of women. We support women's full realization and exercise of their most basic legal rights, including a woman's right to control her own body. This right must include her right to choose an abortion.

THE NORTHWEST WOMEN'S LAW CENTER is a private, nonprofit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court and other courts.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and edu-

cational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1971 by the leaders of the National Organization for Women.

QUEEN'S BENCH OF THE SAN FRANCISCO BAY AREA is a bar association in the San Francisco area designed to promote the interests of women attorneys. Founded in 1921, it has almost 700 members. Queen's Bench is joining in this *amicus curiae* brief because of its concern in maintaining the fundamental legal principles affecting women that were established in *Roe v. Wade.*

RADICAL WOMEN is the oldest socialist feminist organization in the U.S. Formed in 1968, it has eight U.S. branches and one in Australia. The community-based organization includes working women, young and elderly women, women of color, and lesbians. The battle for women's rights, including the right to safe and accessible abortions, is crucial to women's equality, socially, politically, and economically. The right to abortion is a fundamental right to privacy and for the court to interfere is a gross injustice. The abolition of *Roe v. Wade,* or any changes whatsoever, will especially affect low-income women, namely women of color, who will not be able to obtain private services found by other women who can afford to pay.

THE SANTA BARBARA WOMEN'S POLITICAL COMMITTEE, a political action committee with over 300 members, was formed in 1987 with a commitment to increasing the role of women in the political and governmental processes of Santa Barbara and of the State of California. The Committee is also committed to furthering the interests of women as a group through the political process. Issues such as reproductive choice, pay equity, and child care are central to our concerns. Because the protection of the constitutional right of reproductive choice is our top priority for 1989, we are especially interested in the resolution of *Webster v. Reproductive Health Services* by the U.S. Supreme Court.

THE TOLEDO WOMEN'S BAR ASSOCIATION's purpose is to foster communication among women attorneys; promote and advance the position of and opportunities available to women attorneys in order to more accurately reflect the role of women in a democratic society; ensure women attorneys' participation in bar associations; and encourage participation in social and political areas affecting the community. It monitors legislation, policies, and practices which affect the status of and opportunities available to women and seeks changes where necessary. It promotes and provides continuing legal education in areas of current interest to the community and, in particular, to the legal profession; and gathers and disseminates information of interest to women.

THE TUCSON WOMEN'S COMMISSION was founded in late 1975 by the Mayor and Council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission has long held that good public policy respects the principle of bodily integrity and trusts women's ability to make their own decisions about their reproductive lives. The Tucson Women's Commission also maintains that public policy in the best interest of women will support a full range of options, information, and services so that every woman has the ability to make real choices about when, whether, and under what conditions to bear a child.

VOTERS FOR CHOICE/FRIENDS OF FAMILY PLANNING is a national, independent, pro-choice political action committee. The mission of Voters for Choice is to preserve safe and legal abortion for all women by helping elect pro-choice candidates to U.S. Congress.

WASHINGTON WOMEN UNITED (WWU), founded in 1978, is a private nonprofit organization whose pur-

pose is to lobby the Washington State Legislature on issues of concern to women. Reproductive choice is WWU's first legislative priority. The organization has opposed state legislation that would limit a woman's reproductive choice. WWU is also active in a state coalition that has worked to maintain Medicaid funds for abortion.

WIDER OPPORTUNITIES FOR WOMEN supports the *amicus* brief of the Women's Legal Defense Fund and NARAL regarding *Webster v. Reproductive Health Services*. Because of our 25-year history working for equality of opportunity and economic self-sufficiency for women and girls, we urge the Court to uphold women's right to choose abortion and to strike down the Missouri law.

WOMEN EMPLOYED is a national organization of working women, based in Chicago, with a membership of 1,500. Over the past 16 years, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service, and public education. Women Employed strongly believes that any limitation on women's reproductive rights will have a profoundly negative impact on women's opportunities to achieve economic equity.

WOMEN IN FILM, founded in 1974, is a nonprofit professional organization of approximately 1,500 members. Our goals are to improve the employment, depiction, and position of women in the film and television industries. We are particularly committed to expanding equal employment opportunities for women in film and television, and we believe that a commitment to equal opportunity must include a commitment to the principle of freedom of choice on issues relating to childbearing and abortion. We are based in Los Angeles, California.

THE WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES (WLALA), founded in 1919, is the largest

local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1,200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy. WLALA last appeared as *amicus curiae* before this Court on this issue in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

WOMEN'S AGENDA is a statewide, non-partisan, women's economic justice organization composed of 2,100 individual members and 150 endorsing organizations committed to equity and justice for women, opportunities for children, and security for families. Women's Agenda believes that every woman must have the fundamental right to choose whether or when to have children. If a woman does not have the right to control her fertility, she has no rights. Women's Agenda believes that reproductive freedom is a women's economic justice issue.

THE WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS is a statewide bar association of over 1,000 members. The WBA is committed to the advancement of women attorneys and to the protection of all women in the legal system. Since its founding in 1978, the WBA has been particularly concerned with the protection of a woman's right to choice. It has filed *amicus* briefs in cases concerning public funding of abortion, restrictions on family planning agencies, and the rights of minors to abortion. The WBA also sponsors a panel of attorneys who represent minors seeking judicial consent for abortion and is a member of the Massachusetts Coalition for Choice.

THE WOMEN'S CENTER OF THE UNIVERSITY OF CONNECTICUT is committed to creating a social, economic, and political world that supports the full equity of women. Without unrestricted access to the full range of health care procedures, including abortion for women of all ages, equity cannot be achieved. Continued at-

tacks aimed at limiting women's access to reproductive freedoms are directly contrary to establishing a system whereby women are afforded equal protection under the law.

THE WOMEN'S CITY CLUB OF NEW YORK, INC., founded in 1916, is a membership organization concerned with contemporary societal programs—with the welfare of men, women, and children, in promoting such welfare by advocacy of an efficient government and a just legal system. We are concerned with this case for the following reasons: we feel that the principle established in *Roe v. Wade* was a step forward in establishing the freedom of women for domain over their own bodies and that any step backward is a challenge to that freedom and the equality of women in our society.

THE WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND (WERLDEF) is a non-profit California corporation. Established in 1978, WERLDEF was organized to ensure that women will be treated equally under the law. We achieve our goals by educating women about their legal rights, and assisting them in vindicating those rights by providing access to the courts. WERLDEF often receives calls from women who are pregnant and in crisis because they are neither financially nor emotionally able to raise a child and who are psychologically unable to carry their pregnancy to term and then put their baby up for adoption.

THE WOMEN'S EQUITY ACTION LEAGUE (WEAL) was founded in 1968 as a national, nonprofit membership organization sponsoring research, education, litigation, and advocacy in order to advance the economic status of women. WEAL supports and recognizes a woman's constitutional right to reproductive choice. Basic to a woman's economic empowerment is the right to make a fully-informed decision regarding the planning of her family.

WOMEN'S EQUITY AFFILIATES, LTD., is a 501 (c)(4) Ohio corporation consisting of state affiliates,

first established here in 1968, whose purpose is achieving and maintaining equal economic status for women. We are just now in the process of reestablishing our state groups. We are interested in the instant case because we know that an unplanned childbirth is an economic crisis, particularly for working women. The majority of American women are now working because our economy and their husbands cannot otherwise support them. We therefore object to our Justice Department's engaging in what amounts to legislation by entering into pending cases and enlarging the issues, to the economic disadvantage of women. The expense of rearing a child, including the workplace disadvantages to the caregiver, is a heavy legal sanction for the law to impose on an act which is not illegal.

Since the WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM was founded in 1915, it has stood for freedom and equality. Choice and control over one's own life and decisions are integral aspects of freedom and equality. To overturn *Roe v. Wade* or to limit in any way women's—and especially poor women's—access to abortion would be the gravest infringement upon the rights and opportunities for women to be truly free, equal, and self-defined. In 110 chapters across the U.S. and in 28 countries, WILPF works for a world free of racism and sexism; the building of a constructive peace through world disarmament; and the changing of government policies to meet human needs.

THE WOMEN'S LAW ASSOCIATION OF THE WASHINGTON COLLEGE OF LAW OF THE AMERICAN UNIVERSITY was founded in 1982. The association has 50 active members and sponsors events for the benefit of the entire law school community. The organization's purpose is to serve as a forum for the discussion of issues and the promotion of interests affecting women in the law school community and in society. As an organization committed to legal and social equality for women, we believe that the legal attempt of *Webster v.*

Reproductive Health Services to erode women's constitutional right to decide if and when to bear children seriously jeopardizes women's ability to be equal citizens in society.

THE WOMEN'S LAW PROJECT is a nonprofit law firm dedicated to advancing the status and opportunities of women. The Women's Law Project believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion. Since its founding in 1974, the Women's Law Project has challenged in the courts a wide variety of state statutes designed to restrict abortion rights, including the Pennsylvania statute invalidated by this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

THE WOMEN'S MEDICAL FUND, INC., is a volunteer charity, recognized by the Internal Revenue Service as a 501(c)(3), which has helped more than 3,000 women pay for abortion care. Founded in the 1970s, the Fund has helped victims of rape who were pregnant from that crime, victims of incest, women in jail and in prison, the mentally ill, battered wives impregnated by their batterers, destitute women living in shelters with their children, handicapped women, pregnant women with histories of repeated C-sections and other surgeries, and children as young as age 11. The Women's Medical Fund, Inc., hears daily from destitute women unwillingly pregnant. Our administrators are aware of the tragedies that are avoided because abortion is safe and legal.

WOMEN'S RIGHTS COALITION is an active legislative effort composed of more than 60 local and statewide organizations across the State of Oregon. Founded in 1973, the Coalition brings together a wide range of service, professional, and advocacy groups who have the common belief that Oregon women should have equal rights and reproductive freedom.

THE YALE JOURNAL OF LAW AND FEMINISM is a nationally circulated journal dedicated to addressing feminist issues in law and legal scholarship. Preservation of the legal right to abortion is central to our concerns because a woman's control over her body is a necessary starting point for our broader concerns about the status of women in society.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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OCTOBER TERM, 1988

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Appellants,

V.

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Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Agudath Israel of America is a national grassroots Orthodox Jewish movement with tens of thousands of members across the United States. It was founded in 1922 as the American arm of the world-wide Agudath Israel movement, for the purpose of uniting the American Orthodox Jewish community under its organizational

banner. The movement is led, and its policies determined, by a group of prominent senior Orthodox rabbinical figures respected broadly as outstanding scholars of Jewish law and decisors of Jewish policy.

Informed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws which undermine the sanctity of human life send a message that is profoundly dangerous for all of society, Agudath Israel of America speaks out frequently on a broad panoply of public policy issues that arise at the outset and conclusion of human life. At the same time, as a representative of a religious minority community whose constituents rely heavily on the religious freedoms guaranteed under the First Amendment, Agudath Israel of America is a staunch advocate of religious liberty for all Americans. Missouri's legislative finding that human life begins at conception implicates both of these concerns in a manner that, to some extent, creates a dilemma for Agudath Israel of America.

On the one hand, Agudath Israel of America heartily welcomes the Court's request that the parties address the question of whether the analytical framework of *Roe v. Wade,* 410 U.S. 113 (1973), should be "reconsidered and discarded in favor of [a] rational basis test," *Webster v. Reproductive Health Services,* 57 U.S.L.W. 3441, 3442 (Jan. 10, 1989). Reconsideration of a decision that has effectively legalized abortion on demand is, in our view, highly appropriate and long overdue. Jewish tradition accords fetal life significant protection; it rejects the notion that termination of pregnancy, even prior to fetal viability, is a

matter of free choice within the province of the mother. *Roe v. Wade* has exacted such a heavy toll that we feel the time has come to break our silence at the Supreme Court level and urge reconsideration of the underlying decision.

On the other hand, though, any reconsideration of *Roe v. Wade,* particularly in the context of a state "finding" that human life begins at conception, carries with it the danger that abortions might be legislatively proscribed even where they are mandated by religious belief -- under sinaitic Jewish law, for example, where the mother's life is endangered. What is called for, in Agudath Israel of America's view, is a jurisprudential framework that is at once protective of human fetal life yet solicitous of religious freedom. It is the objective of this *amicus* brief to attempt to outline such a framework.

Through their respective counsel, the parties have consented to the appearance of this *amicus curiae*.

SUMMARY OF ARGUMENT

Like the court below, Agudath Israel of America believes that the Missouri legislature exceeded its constitutional authority in finding that human life begins at conception. We arrive at this conclusion, however, by a totally different route.

I. In our view, *Roe v. Wade* was decided incorrectly and should be overruled. In most cases, where the pregnancy poses no danger to maternal life and there is no religious mandate for abortion, and where the sole constitutional source of the claimed right to abortion is the personal

liberty/due process right developed in *Roe*, 410 U.S. at 152-53, the right to abortion should not be accorded the status of a "fundamental" right. Accordingly, a legislative measure designed to restrict or prohibit abortion should generally be upheld even in the absence of any "compelling" state interest for the measure, so long as there is a rational basis for the legislation.

There are times, though, when abortion is necessary to preserve the mother's life, or when it is mandated under the mother's religious beliefs. In those exceptional circumstances, a woman's claimed right to an abortion may be grounded not only in her personal liberty/due process right, but also in her Fourteenth Amendment right to life or her First Amendment right freely to exercise her religion. In such cases, access to abortion is indeed a right that is "fundamental."

II. In developing public policy to regulate abortions, it was not necessary for Missouri's legislature to "find" that human life begins from the moment of conception. Whether human life is present in actuality or only in potential, a state's interest in protecting the fetus is sufficient to justify the types of abortion regulation Missouri has imposed on its citizenry.

Nor was it constitutionally permissible for Missouri to make such a finding. Defining human life as beginning from the moment of conception places the state's imprimatur upon a particular religious belief, in an area that has been the subject of considerable theological and doctrinal dispute. There is a fundamental distinction between

defining human life, an inherently theological matter beyond the competence or authority of secular legislative bodies; and *regulating human conduct,* a secular governmental prerogative regardless of theological perspectives on human life.

The distinction is far from academic. For if a state legislature has the authority to define human life as beginning from the moment of conception, then it is at least arguable that from that moment the fetus is a "person" for purposes of the Fourteenth Amendment, entitled to due process of law before being deprived of life or liberty -- presumably even in cases where the fetus' continued development would endanger the mother's life. [I]f the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the [preservation of maternal life] exception appear to be out of line with the [fourteenth] amendment's command?" *Roe v. Wade,* 410 U.S. at 157 n.54.

This conundrum can best be avoided by prohibiting legislative bodies from conferring human status -- "personhood" -- upon fetuses. The establishment clause provides ample basis for such a prohibition.

ARGUMENT

I. THE RIGHT TO ABORTION SHOULD NOT UNIVERSALLY BE DEEMED "FUNDAMENTAL"; ITS CHARACTERIZATION AS SUCH SHOULD DEPEND ON THE CIRCUMSTANCES SURROUNDING THE CLAIMED RIGHT

One of the pillars upon which *Roe v. Wade* rested was the Court's determination that the right of abortion protected under the Fourteenth Amendment's personal liberty/due process clause was "fundamental," and thereby protected against governmental abridgment absent a compelling state interest. 410 U.S. at 155. Under prevailing jurisprudence, the right to abortion is no less "fundamental" when it is being done to avoid the birth of a child of the "wrong" sex (*see* G. Kolata, *Fetal Sex Text Used as Step to Abortion,* N.Y. Times Dec. 25, 1988) or for any other "convenience, whim, or caprice of the putative mother" (*Doe v. Bolton,* 410 U.S. 179, 221 (1973) (White, J., dissenting)), than when it is being done to preserve the life of the mother or allow her to follow her religious beliefs. This need not be so -- and ought not.

In Typical Cases, Where the Constitutional Source of the Abortion Right is the Personal Liberty/Due Process Clause, Its Exercise is Not "Fundamental"

Recently, in *Bowers v. Hardwick,* 478 U.S. 186 (1986), the Court had occasion to consider the factors that go into the making of a right or liberty that is "fundamental":

> "Striving to assure itself and the public that announcing rights not readily identifiable in the

> Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut,* 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.' *Id.*, at 503 (POWELL, J.). See also *Griswold v. Connecticut,* 381 U.S., at 506."

Id. at 191-92. Applying these formulations to the asserted right of homosexuals to engage in acts of consensual sodomy, the Court noted that proscriptions against such acts had strong historical roots, both from ancient times and in the laws of the various states throughout most of American history. "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

The same can be said with respect to most cases of abortion: It is facetious, at best, to claim that the concept of unfettered access to abortion prior to fetal viability is deeply rooted in our history and tradition, or that it is a necessary

component of ordered liberty. We need not dwell on the point, since the Court has heard it made many times over in the years since *Roe,* both from within and from without. Suffice it for us to reiterate the persuasive analysis offered by Justice White, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 793-94 (1986):

> "If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) commands or justifies that result; it can only be because protection for this unique choice is itself 'implicit in the concept of ordered liberty' or, perhaps, 'deeply rooted in this Nation's history and tradition.' It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the

> Constitution do not compel recognition of the abortion liberty as fundamental."

Indeed, there is a factor present in the abortion context that in a sense makes abortion on demand even less deserving of "fundamental rights" protection than consensual sodomy: the irrevocable harm done to the fetus. Whereas consensual acts of homosexual sodomy, in theory at least, are performed with the full knowledge and acquiescence of the parties involved, abortion is not. "The pregnant woman cannot be isolated in her privacy," observed the Court in *Roe,* 410 U.S. at 159, a factor that led Justice White to argue -- correctly, in our view -- that the abortion decision "must be recognized as *sui generis,* different in kind from the others that the Court has protected under the rubric of personal or family privacy or autonomy." *Thornburgh, supra,* 476 U.S. at 792 (White, J., dissenting; footnote omitted).

In typical cases, therefore, where a woman seeks an abortion neither because her life is in danger nor because her religion demands it, and where her claimed constitutional right to an abortion is grounded solely in her Fourteenth Amendment personal liberty/due process rights, the analysis in *Bowers* leads *a fortiori* to the conclusion that the right ought not be deemed "fundamental." Accordingly, states that seek to restrict or prohibit abortions in those cases should be permitted to do so on any rational basis, even in the absence of a compelling state interest.

Abortion Does Become A "Fundamental" Right When Its Performance is Necessary to Preserve the Mother's Life Or is Mandated Under Her Religious Beliefs

The conclusion that *most* abortions are not grounded in any "fundamental" right does not mean that access to abortion is *never* a "fundamental" right. In exceptional cases, it is. Specifically, where an abortion is sought to preserve maternal life, or as an expression of free religious exercise, the right to obtain one is indeed "fundamental."

Roe v. Wade itself makes clear that abortions in situations involving danger to the mother's life are entitled to enhanced constitutional protection. In those cases, as well as in cases where maternal health is at stake, states must permit abortions even *subsequent* to fetal viability. 410 U.S. at 163-64. *See Thornburgh, supra,* 476 U.S. at 768-69; *Colautti v. Franklin,* 439 U.S. 379, 397-401 (1979). Reconsideration of the central holding of *Roe* -- that *all* abortions are expressions of a "fundamental" right -- by no means requires the Court to vitiate the enhanced constitutional status of at least those abortions performed to preserve the mother's life. Such abortions have long been permitted by civilized societies (*see, e.g., Mishnah,* Tractate *Oholoth* 7:6) and under the laws of the various states (see *Roe, supra,* 410 U.S. at 138-40). Employing the *Bowers* analysis cited above, access to abortion in such cases is "deeply rooted in this Nation's history and tradition" and, we submit, "implicit in the concept of ordered liberty." It is therefore entitled to be characterized as a "fundamental" right.

Moreover, for a state to deprive a woman the right to abortion even where her life is in danger is not merely to deprive her, without due process, of some vague sense of personal liberty protected under the Fourteenth Amendment; it is literally to deprive her, without due process, of the "*life*" the Fourteenth Amendment expressly guarantees. "Fundamental liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance." *Thornburgh, supra,* 476 U.S. at 790 (White, J., dissenting). The Constitution comes a great deal closer to providing specific textual recognition of the right to abortion where the mother's life is in danger than where the pregnancy simply interferes with her conveniences.

In addition, even if preservation of maternal life by itself would not elevate abortion to the status of a "fundamental" right, there are times when the right to abortion should be deemed "fundamental" on the basis of the woman's religious beliefs. Under sinaitic Jewish law, for example, danger to a mother's life at any stage prior to parturition requires an abortion. *See generally, e.g.,* J.D. Bleich, *Abortion in Halakhic Literature,* reprinted in the author's *Contemporary Halakhic Problems* 325, 354-56 (Ktav/Yeshiva University Press 1977). There may exist other situations as well in which a state's decision to outlaw abortion will burden a woman's First Amendment free exercise rights. In those relatively few cases, a rational basis should not be a sufficient basis for proscribing abortion.

Free exercise rights are indisputably "fundamental." *E.g., Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972). Accordingly,

government may not burden free religious exercise unless it can show that "an inroad on religious liberty . . . is the least restrictive means of achieving some compelling state interest," *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 718 (1981); or, as the *Yoder* Court put it, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. Although the Court has not had occasion to consider the applicability of its free exercise jurisprudence to the abortion context -- *Harris v. McRae,* 448 U.S. 297, 320-21 (1980), the one case where the issue was raised, was dismissed on this point because the plaintiffs lacked free exercise standing -- there is every reason to emphasize both its relevance and importance in any post-*Roe* regulatory framework.

If the Court will indeed use this case as a vehicle to "reconsider[ ] and discard[ ]" the fundamental right/compelling state interest framework of *Roe v. Wade* "in favor of [a] rational basis test" -- as it suggested it might when it accepted the case for review, 57 U.S.L.W. at 3442 (Jan. 10, 1989), and as we have urged it to do with respect to most abortions -- we would respectfully suggest that the Court at the same time emphasize that abortions necessary to preserve maternal life or mandated by religious belief continue to enjoy special status under the constitution.

II. MISSOURI'S "FINDING" THAT HUMAN LIFE BEGINS AT CONCEPTION VIOLATES THE ESTABLISHMENT CLAUSE

It is by now well known to even the most secular scholars of the law that there are serious divisions among (and to some extent even within) the various religions regarding the onset of human existence. *See, e.g., Roe v. Wade, supra,* 410 U.S. at 160-61; *McRae v. Califano,* 491 F. Supp. 630, 690-702 (E.D.N.Y.), *rev'd on other grounds sub. nom. Harris v. McRae,* 448 U.S. 297 (1980). Missouri has "found" that "the life of each human being begins at conception" (R.S. Mo. sec. 1.205 (1.1)) -- thereby coming down four-square on the side of certain religious teachings and in opposition to others. Just last month, however, the Court reminded us that "[i]n proscribing all laws 'respecting an establishment of religion,' the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs . . ." *Texas Monthly v. Bullock,* ____ U.S. ____, 109 S.Ct. 889 (1989).

To understand what it is about Missouri's "finding" that contravenes the First Amendment's establishment clause, it is instructive to contrast this case with another in which the Court specifically found *no* establishment clause violation. In *Harris v. McRae, supra,* 448 U.S. at 319-20, the Court considered and rejected the argument that the Hyde Amendment's restrictions on abortion funding were predicated on the Roman Catholic viewpoint "concerning the sinfulness of abortion and the time at which life commences," and that they therefore unconstitutionally established religion. Citing *McGowan v. Maryland's*

teaching that a statute does not necessarily violate the establishment clause simply because "it happens to coincide or harmonize with the tenets of some or all religions," 366 U.S. 420, 442 (1961), and noting that the Hyde Amendment reflects "traditionalist" values toward abortion no less than religious values, the Court concluded that "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, *without more,* contravene the Establishment Clause." 448 U.S. at 319-20 (emphasis added).

Here, we submit, there *is* more. For the Missouri legislature has not merely created legislation requiring its citizens to act in a way that happens to coincide with a religious viewpoint; it has purported to make a "finding" of fact in an area that lends itself to theological debate but not to objective observation or legislative fact-finding.

Justice White, in his *Thornburgh* dissent, characterized the "question of when human life begins" as "unanswerable." 476 U.S. at 800. Upon reflection, it becomes apparent why this is so, at least in any scientifically rational sense. There are, of course, certain objectively verifiable physical stages of fetal development, commencing from the moment of conception, proceeding through the various levels of pregnancy, and culminating in the actual birth. Advances in biology and medical technology enable observers better to gauge these various stages of fetal development, so that we might know at exactly what point certain fetal organs are present, at what point the fetus achieves viability, and so on. Undeniably, science and technology enable us to gain greater insight into the wonder of human development. But

that is as far as they, and rational human thought, can ever take us. The ultimate question -- Is human life present? -- requires a pre-existent supra-rational value system that is capable of defining the very essence of human existence. The great faiths provide those value systems, each according to its own traditions and teachings.

Legislatures are in the business of regulating human conduct, not opining on metaphysical theology. Had Missouri refrained from issuing its "finding" that human life begins at conception, and merely enacted the rest of the law at issue in this case -- restricting the use of public employees, public facilities and public funds for abortions (R.S. Mo. Secs. 188.205, 188.210, 188.215); requiring performance of abortions after the sixteenth week of gestation in a hospital (R.S. Mo. Sec. 188.025); requiring doctors to determine fetal viability prior to performing certain abortions (R.S. Mo. Sec. 188.029); even declaring that unborn children have certain protectable interests (R.S. Mo. Sec. 1.205 (1.2,1.3)) -- there would be no establishment clause problem. Regulation of human conduct toward fetal life need not be premised on a particular religious conception concerning the precise moment human life is present. Whatever one's views on that inherently religious question, the state has a substantial interest in the protection of fetal life -- which all agree is at least *potential* human life -- sufficient to justify the types of regulations Missouri has imposed upon the performance of abortions.

Indeed, had Missouri enacted legislation that defined human life as beginning from the moment of conception *solely for the purpose of a specific law,* there would also likely

be no establishment clause problem. It would be clear that the state was merely adopting a shorthand version of defining the interests it was seeking to protect; no governmental imprimatur of religious endorsement would be discernible.

By taking the extra step, though, of issuing an unrestricted legislative finding, tied to no specific law, in an area that is inherently beyond legislative competence and susceptible only of religious dogma, Missouri has enacted legislation that has a "principal or primary effect" of advancing a particular religious viewpoint. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As Professor Tribe has observed, "when government needlessly uses means that are inherently religious, a message of endorsement is virtually unavoidable. By adopting the language and precepts of a religion as its own, government implies that non-adherents are outsiders." L. Tribe, *American Constitutional Law*, at 1285 (2d Ed. 1988). That is what Missouri has done here.

Much in the mortal world may hinge upon a state's right to jump into the theological fray. As the Court recognized in *Roe v. Wade*, defining a fetus as a person from the moment of conception could lead to great legal mischief:

> "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion

> procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> "There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out ... that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?"

410 U.S. at 157-58 n. 54. The point is obvious: Once a state has the right to define for all purposes the onset of human life, and chooses to define it as of conception, the constitutional protections of the Fourteenth Amendment (among others) should logically extend no less to a fetus than to any other person -- including his or her mother.

One way to avoid this conundrum, obviously, would be to reaffirm the Court's approach in *Roe v. Wade*, by finding that abortion is a "fundamental" constitutional right, and that a state therefore "may not adopt one theory of when

life begins to justify its regulation of abortions." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444 (1983). That is what the courts did below. *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1075-77 (8th Cir. 1988). As we have argued in Point I above, however, we do not believe that is the correct approach; we think the Court should strip the right to abortion of its "fundamental" status in typical cases. But that should not give states free reign to define the onset of human life -- for in so doing, they impermissibly establish religion.

CONCLUSION

For the reasons stated above, *amicus curiae* Agudath Israel of America respectfully submits that *Roe v. Wade's* holding that all abortions are expressions of a "fundamental" constitutional right should be overruled; that abortion should be deemed a "fundamental" right only where necessary to preserve the life of the mother or where mandated by the mother's religious beliefs; and that Missouri's legislative "finding" that human life begins at conception should be struck down as a violation of the First Amendment establishment clause.

Respectfully submitted,

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March 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE SUPPORTING APPELLEES

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Cates, *Putting the Risk* in *Perspective*, Contraceptive Technology Update (November, 1989) 16
Forrest and Henshaw, *The Harassment of U.S. Abortion Providers* in *Abortion Services in the United States, Each State & Metropolitan Area, 1984-1985* (Guttmacher Institute 1988) 17, 18
Fox, *Abortion Deaths in California*, 98 Am. J. of Obst. and Gynec. 645 (1967) 14, 15
Frejka, *Induced Abortion and Fertility* in *Abortion Services in the United States Each State & Metropolitan Area, 1984-1985* (Guttmacher Institute 1988) 16, 17
Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women L.J. 9 (1987) 19
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Goldberg, *Equal Justice: The Warren Era and the Supreme Court* (1972) 20, 22
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Levin, Rizzi, and Veprovsky, *Management of Incomplete Abortion*, 83 Am. J. of Obst. and Gynec. 9 (1962) 15
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Monoghan, *Stare Decisis and Constitutional Adjudication*, 88 Columbia L. Rev. 723 (1988) 21
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Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. of Am. Med. Ass'n 141 (1967) 15
Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L.J. 639 (1986) 7
Sherman, *Fetal Rights*, 11 Nat'l L.J. 25 (1988) 19
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Tietze, *Induced Abortion, A World Review 1986* (Guttmacher Institute 1986) 14, 15, 17, 18
Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) 13
Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 Am. J. of L. & Med. 97 (1982) 19
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BRIEF FOR THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) submits this *amicus curiae* brief in support of the appellees in this case.[1] NOW urges the Court to affirm the well-reasoned decision below by the Court of Appeals for the Eighth Circuit, *Reproductive Health Services v. Webster*, 851 F.2d 1071 (1988). NOW further asks this Court to decline to overrule or in any way limit this Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases that the constitutional right to privacy "necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." 410 U.S. at 170 (Stewart, J., concurring).

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[1] NOW has the written consent of both parties, filed with the Court, to file this brief.

NOW is the largest feminist organization in the United States. NOW's purpose is to bring full equality to women. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety. NOW has a strong interest in any case, such as this one, that involves women's basic rights and liberties.

As a defender of women's rights, NOW believes that it has an absolute need and right to address what the Solicitor General and the State of Missouri have interjected as the central issue in this case: whether women will continue to make fundamental decisions regarding reproduction or whether that role will be usurped by the state.

SUMMARY OF ARGUMENT

Roe v. Wade was properly decided and should not be reconsidered. The right to choose an abortion is necessarily encompassed by the constitutional right to privacy. Attacks on *Roe v. Wade* stem from an unacceptable narrow view of the right to privacy, a distorted view of history and case law, and a mistaken belief that the scope of individual rights should be determined by state legislatures, rather than protected by the courts. Moreover, these attacks fail to recognize the crucial significance to women of the right to choose between an abortion and childbirth.

A reversal or limiting of *Roe v. Wade* would have far-reaching impacts. Statistics show that women will obtain abortions at the same rate, regardless of whether or not abortion is legal. Thus, the choice is not between abortion and childbirth, but between safe, legal abortions and the dangers of illegal abortions.

Undercutting *Roe v. Wade* would create legal confusion. In addition to the right to abortion, the right to contraception would be open to question. Without the protection

of *Roe v. Wade*, women could be subjected to further encroachment on their privacy rights by states purporting to protect the fetus. Subordinating women's right's to those of the fetus could result in restrictions on individual liberty found nowhere else in our legal system.

The doctrine of *stare decisis* also weighs heavily against reversal of *Roe v. Wade*. *Stare decisis* precludes the arbitrary rejection of settled doctrine, particularly where, as here, the doctrine is consistent with precedent and has been upheld numerous times in the recent past. Even if there were some reason to question the rationale of *Roe v. Wade*, *stare decisis* would prevent the courts from erasing the sixteen years of fundamental societal change that were wrought in that decision.

The Missouri statute at issue here is unconstitutional, imposing severe restrictions on abortions similar to other restrictions struck down by this Court. Even judged under the less strict "undue burden" standard, the statute cannot stand.

I. *ROE v. WADE* SHOULD BE UPHELD

Roe v. Wade was correctly decided and should not be reconsidered by this Court. The attacks upon *Roe v. Wade* by, among others, the Solicitor General, are unconvincing. Moreover, a retreat from *Roe v. Wade* would have disastrous effects on women's health and lead to wide-spread disregard of any subsequently passed abortion restrictions. Finally, reversing or limiting *Roe v. Wade* would be bad law, opening to question the entire right-to-privacy line of cases and setting the dubious precedent that a woman's rights can be subordinated to those of a fetus at the whim of the state.

A. *Roe v. Wade* Was Correctly Decided

The Court's decision in *Roe v. Wade* was correct and should neither be reconsidered nor reversed. In *Roe v. Wade*, the Court carefully weighed the interests at stake and determined that the constitutional right to privacy

"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This conclusion was amply supported by precedent and fully in line with the principle that the Constitution provides "as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The Solicitor General attacks *Roe v. Wade* for four reasons. He begins by asserting that the right to abortion is some lesser species of privacy right that has no grounding in American history and is not truly related to earlier right-to-privacy cases.[2] The Solicitor General then claims that if the state has an interest in potential life, that interest is equally compelling at all times during pregnancy.[3] Next, he argues that the *Roe v. Wade* court's division of pregnancy into trimesters and its premise that the state's interest in fetal life becomes compelling only at viability are untenable.[4] Finally, the Solicitor General suggests that the woman's right to abortion can best be governed by state legislatures.[5] The Solicitor General is wrong on all counts.

The Solicitor General argues that the Court should give a crabbed reading to the right to privacy, suggesting that the right is not "comprehensive" at all, and that the right to abortion is not constitutionally mandated. The Solicitor General appears to contend that unless it can be shown that the framers of the Constitution specifically considered and approved the right to abortion, that right is not cognizable. These conclusions are directly at odds with prior decisions by this Court. *See, e.g., Thornburgh*

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[2] Brief of the United States as *Amicus Curiae* ("Solicitor General") at 11-15.

[3] *Id.* at 15-17.

[4] *Id.* at 17-20.

[5] *Id.* at 20-24.

v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986) ("constitutional principles . . . provide the compelling reasons for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy"); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419 (1983) ("the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy"); *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices"); *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system.")[6]

The Solicitor General cites anti-abortion laws enacted from the mid-Nineteenth Century up to the time that *Roe v. Wade* was decided as proof that the right to abortion has not historically been recognized.[7] This simple statement ignores the body of evidence, carefully presented in *Roe v. Wade*, that criminal laws restricting abortion "are of a relatively recent vintage."[8] As the Court noted:

> at the time of the adoption of the Constitution . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States [at the time that *Roe v. Wade* was decided]. At least with respect to that early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.[9]

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[6] *See generally* Garfield, *Privacy, Abortion, and Judicial Review*, 61 Wash. L. Rev. 293 (1986).

[7] Solicitor General at 16.

[8] 410 U.S. at 129; *see generally id.* at 129-147.

[9] *Id.* at 140-41.

It thus appears that the right to abortion remained unquestioned during most of this nation's first century. It is laws restraining the exercise of that right that are new and require justification.[10]

Even if the specific right to abortion were not envisioned by the framers, this Court has previously rejected claims that the Constitution protects only those rights specifically spelled out therein. In *United States v. Classic*, 313 U.S. 299, 316 (1941), Justice Stone explained that:

> in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

See Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution").

As detailed below, *Roe v. Wade* was solidly grounded in a series of cases, stretching back to the early part of this century, recognizing that individuals have a right to protection from government interference in decisions regarding their private lives. *Roe v. Wade* is clearly in line with the "great purposes" of the Constitution.

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[10] For a similar view, *see generally* Luker, *Abortion and the Politics of Motherhood* 11-39 (1984) and authorities cited therein.

The Solicitor General's claim that the state has an equal interest in life at all stages of pregnancy is also incorrect. The Court has repeatedly rejected attempts by states to assert their interests throughout pregnancy. *See Roe v. Wade*, 410 U.S. at 163; *Akron*, 462 U.S. at 428. While a "powerful theological argument can be made for that position . . . [the Court's] jurisdiction is limited to the evaluation of secular state interests . . . the development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality." *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).[11] *See Colautti v. Franklin*, 439 U.S. 379, 386-89 (1979) (reviewing and affirming earlier holdings that state interest becomes compelling only at viability, and that viability must be determined in each case by the physician).[12] If the Solicitor General were correct, the state could impose detailed and burdensome restrictions upon women from the moment they became pregnant.[13] The Solicitor General proposes no standard under which state regulation could be limited were his argument accepted. His theory could result in overbroad, conflicting state regulation.

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[11] *See also* Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 1997 (1985) ("the relevant legal question ought not to be whether a fetus is "alive" or a "person" from the moment of conception, or the moment of viability, etc., as if the question were one of natural rather than social decision. A *legal* decision will still have to be made to whom the law ought to give protection and at what cost, paid by who[m]. . . .").

[12] The viability standard itself can be overly restrictive. For example, it is difficult to justify state control over late-term abortions in cases where the fetus is diagnosed as having an incurable defect that would condemn it to a short, pain-filled life. *See* Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L.J. 639, 684-691 (1986). The decision whether to have an abortion in such a case is best left to the woman, who will in any event bear the consequences.

[13] *See* note 44, *infra*.

The assertion that *Roe v. Wade*'s division of pregnancy into trimesters is untenable must similarly fall. In *Akron*, 462 U.S. at 429 note 11, this Court reaffirmed that the *Roe v. Wade* trimester system "continues to provide a reasonable legal framework for limiting a state's authority to regulate abortions." As the Court recognized in *Roe v. Wade*, an early abortion is safer than a later one; indeed, it is considerably safer for the woman than childbirth. *See* 410 U.S. at 163. The Solicitor General offers no reasonable alternative standard and no justification whatsoever for allowing the states to force unwilling women to carry early pregnancies to term.

Finally, the Solicitor General would turn over control of the reproductive aspect of women's lives to the various state legislatures, which he apparently considers appropriate arbiters of such purely personal choices, and would deny any role to the judiciary. The Solicitor General ignores the fact that important constitutional rights are at issue here. It is a fundamental tenet of constitutional jurisprudence that the judiciary is empowered to protect against "the occasional tyrannies of governing majorities," *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis and Holmes, J.J., concurring), and that "liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction . . . are at the mercy of legislative action . . . ." *Taylor and Marshall v. Beckham*, 178 U.S. 548, 609 (1900) (Harlan, J., dissenting); *see McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("The Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life").[14]

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[14] *See also Hurtado v. California*, 110 U.S. 516, 536 (1884) ("The limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well as against the power of numbers. . . ."); *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting).

There is no guarantee that state legislatures, however well-intentioned, will adequately protect individual rights. Indeed, "[e]xperience teaches us to be most on our guard to protect liberty when Government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting). *See* Garfield, *supra* note 6, at 359:

> Abortion laws attempt to solve, not so much a social problem, as an individual problem of great complexity and great import to the individual involved. In this context, the intractable nature of the problem leads to the conclusion, not that it should be left to the legislatures, but that it should be left to the individual. Whatever the decision may be, it is the individual who is going to have to deal with its consequences, not the state. When the consequences are so grave and far reaching, only the person who must bear them should be entitled to make the choice.

The Solicitor General suggests that the majority, in the person of State legislatures, should decide what for all women is a deeply personal, ethical and spiritual question and that the will of the majority should be absolute. Yet no decision can be more personal, more private, or more important to a woman than her choice whether or not to accept the risks and obligations of bearing a child. This decision is one which individual women are uniquely

qualified to make. No legislature can possibly weigh the considerations that face individual women and craft regulations that adequately cover all cases. The choice whether to obtain an abortion can only be meaningfully exercised by individual women.

Throughout his argument, the Solicitor General ignores the impact of forced pregnancy on women, apparently not realizing the consequences of a reconsideration of *Roe v. Wade*. This Court, however, has recognized that the denial of the right to abortion would have a wide range of negative effects upon women forced to bear unwanted children. In *Roe v. Wade*, the Court explained:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. These impacts can be even harsher on disadvantaged women, such as those who are poor, young or disabled, who are least able to cope with the burdens of compulsory pregnancy or unwanted motherhood.[15]

There is no authority for the proposition that the state can compel an individual to give up the right to control

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[15] *See Beal v. Doe*, 432 U.S. 438, 458-59 (1977) (Marshall, J., dissenting):

> An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost.

See also Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 473 (1981), where then-Justice Rehnquist concluded for the Court that "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female."

his or her body to benefit another.[16] The idea, for example, that the state could determine that a supposedly less worthy member of society must donate an organ to save the life of a pillar of the community is unthinkable.

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[16] *See, e.g., Union Pacific Rwy. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or influence of others, unless by clear and unquestionable authority of law."); *see also McFall v. Shrimp*, 10 Pa. D. & C.3d 90, 91 (C.P. Ct. 1978), where the court refused a request from a man suffering anemia to force his cousin to donate bone marrow to him, stating:

> For a society, which respects the right of *one* individual, to sink its teeth into the jugular vein or the neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horror this portends.

So too, is it far beyond the pale to suggest that a parent be ordered to undergo surgery and months of life-threatening activity in order to benefit a child. Yet that is precisely what women may be forced to do if *Roe v. Wade* is reconsidered. And the sacrifice would be required, not for a living human being, but for a fetus, which has never been accorded personhood in our jurisprudence.[17] Forcing a woman to undergo an unwanted pregnancy and delivery clearly is not risk-free. In no other case does society dictate to a patient acceptance of a procedure that is considerably more dangerous, lengthy, and expensive than the procedure of the patient's choice.

Indeed, forcing a woman to sacrifice her body and put her life at risk by carrying an unwanted pregnancy to term is akin to the involuntary servitude that is barred by the Thirteenth Amendment. This Court has held that the Thirteenth Amendment was enacted:

> to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free by prohibiting that control by which the personal service of one . . . is disposed or coerced for other's benefit which is the essence of involuntary servitude.

Bailey v. Alabama, 219 U.S. 219 (1911).[18] The Thirteenth Amendment "is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the

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[17] *See Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring); *Roe v. Wade*, 410 U.S. at 156-59.

[18] *See also Plessy v. Ferguson*, 163 U.S. 538, 555 (1896) ("The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.") (Harlan, J., dissenting); *see Slaughter-House Cases*, 83 U.S. 36, 72 (1873).

term, but involuntary servitude in every form." *Slaughter-House Cases*, 83 U.S. at 90 (Field, J., dissenting). Requiring women to surrender control of their bodies to the state during pregnancy is in a very real sense a form of involuntary servitude and thus is inconsistent with the letter and spirit of the Thirteenth Amendment.[19]

B. Reversing or Limiting *Roe v. Wade* Would Have Negative Results

Reversing or limiting *Roe v. Wade* would create a fundamental upheaval in American society. Women accustomed to the free exercise of their constitutional rights would be faced with a bewildering, inconsistent patchwork of state regulation. The consequences on women's health, society's respect for the law, and on the law itself would be devastating.

1. *Anti-Abortion Laws Do Not Prevent Abortions.*

Before *Roe v. Wade*, as many as 1.2 million American women obtained illegal abortions every year.[20] There is no reason to believe that the situation would be different if *Roe v. Wade* were overturned. Reversing or limiting *Roe v. Wade*, then, would restore massive disrespect for and disobedience of laws that cannot be enforced.

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[19] *See* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv L. Rev. 1, 40 (1973):

> A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, to the pains and anxieties of carrying, delivering, and nurturing a child she did not wish to conceive or does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude.

[20] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st

Global abortion statistics show that making abortion illegal does not reduce the abortion rate. The abortion rate in the United States now is little different from what it was when abortion was generally unlawful.[21] Abortion rates in countries where abortion is severely restricted, including Brazil, Argentina, and Mexico, are equal to the rate in the United States.[22] In Latin America, where abortions generally are illegal, some 10 to 12 million women nonetheless procure abortions each year.[23] In Ireland, where abortion is illegal, the overall abortion rate (including abortions obtained in foreign countries) is the same as in the Netherlands, where abortions are freely available.[24]

It thus appears clear that the legal status of abortion does not serve as a deterrent. Women will seek and obtain abortions whether or not they are legal. To reconsider *Roe v. Wade* would be to ignore this reality and condemn women to the danger of illegal and often unsafe abortions.

Cong., 1st Sess. 26 (1989) (Final Draft Report of the Honorable C. Everett Koop, M.D., Surgeon General of the United States, at 12) [hereinafter *Surgeon General's Report*]; *see* Fox, *Abortion Deaths in California*, 98 Am. J. of Obst. and Gynec. 645 (1967).

[21] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st Cong., 1st Sess. 26 (1989) (Statement of Dr. Jaroslav Fabian Hulka, Professor of Obst. and Gynec., School of Medicine, University of North Carolina) [hereinafter *Hulka Testimony*] at 3 ("One out of four pregnancies ended in induced abortion before legalization, the same rate as now. Regardless of what Congress or the Supreme Court decide this year, it will be true next year").

[22] *World Abortion Trends*, 9 Population 1 (Sept. 1982) (Population Crisis Comm.).

[23] N.Y. Times, November 26, 1988, at 1, col. 4.

[24] Tietze, *Induced Abortion, A World Review 1986* (Guttmacher Institute 1986) at 3.

2. *Banning Abortion Threatens Women's Lives.*

As noted, before *Roe v. Wade*, some 1.2 million illegal abortions were performed each year. And women were dying from illegal abortions. Between 1958 and 1972, an annual average of over 260 women died as a result of abortions, a rate of approximately one in every 4,600 abortions.[25] In addition, thousands of women were severly injured as a result of botched, illegal abortions.[26] Often, death resulted when women attempted their own abortions, utilizing such crude techniques as inserting foreign objects into their vaginas and uteruses, including metal rods, curtain rods, copper wire, telephone wire, chopsticks, coat hangers and knitting needles; drinking caustic solutions such as pine oil, Lysol, soap, alcohol, and hydrogen peroxide; and inserting air by syringe, football pump, and bicycle pump.[27]

The World Health Organization has established that as many as 200,000 women die every year in developing countries as a result of unsafe abortions.[28] Illegal abortion now is Latin America's leading cause of pregnancy-related mortality.[29] Romania has twice imposed restrictions on abortion in the last three decades. Despite these

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[25] Derived from Tietze, *supra* note 24 at 131 (Table 22). If the number of abortions was less than 1.2 million, the mortality rate becomes even greater.

[26] Treatment of women suffering from the complications of illegal abortions was a common subject of discussion in medical literature during the 1960s. *See e.g.*, Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. of Am. Med. Ass'n 141 (1967); Fox, *supra* note 20; Stevenson and Yang, *Septic Abortion with Shock*, 83 Am. J. of Obst. and Gynec. 1229 (1962); Levin, Rizzi, and Veprovsky, *Management of Incomplete Abortion*, 83 Am. J. Obst. and Gynec. 9 (1962).

[27] Fox, *supra* note 20, at 648-49.

[28] N.Y. Times, November 26, 1988, at 1, col. 4.

[29] *Id.*

barriers, the abortion rate has risen constantly, while abortion-related deaths have increased by 500 percent.[30]

After abortion was legalized in the United States as a result of *Roe v. Wade*, illegal abortions and resultant deaths dropped dramatically. Abortion is now considered an extremely safe procedure, since it is now performed under sanitary conditions by trained medical personnel.[31] The United States Center for Disease Control reported that in 1985 there were only six deaths from legal abortion in the United States, or one for every 200,000 abortions.[32] For abortions performed during the first trimester of pregnancy the rate is even lower, one in 400,000.[33] Full-term pregnancy and childbirth pose a seven to ten times greater risk of death to a woman than an early abortion.[34] Moreover, medical studies have shown that legal abortion does not lead to any difficulty in subsequent conception or pregnancy.[35]

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[30] *See* Huber, *Restricting or Prohibiting Abortion by Constitutional Amendment: Some Health Implications*, 27 J. of Repro. Med. 729 (1982).

[31] *Surgeon General's Report, supra* note 20, at 12-13. ("Major medical and public health associations thus consider abortion a safe surgical procedure when performed by a licensed physician in a good clinical setting").

[32] *Hearing on the Medical and Psychological Impact of Abortion Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Governmental Operations*, 101st Cong., 1st Sess. 26 (1989) (Statement of Ralph R. Reed, M.D., Acting Assistant Secretary for Health, United States Public Health Service, Department of Health and Human Services, at 4).

[33] Cates, *Putting the Risk in Perspective*, Contraceptive Technology Update (November, 1980). Ninety percent of all abortions are performed in the first trimester, forty-seven percent in the first eight weeks. *Surgeon General's Report* at 11.

[34] *Hulka Testimony, supra* note 21, at 2.

[35] *Surgeon General's Report, supra* note 20, at 12-13; *Hulka Testimony, supra* note 21, at 2; Frejka, *Induced Abortion and*

The choice presented here is stark. Legal abortions are safe and simple; illegal abortions are life-threatening. Yet, if this Court were to reverse or limit *Roe v. Wade*, state bans on abortion and contraception could resurrect the health care crisis posed by illegal abortions.

3. *Allowing the States to Regulate Abortions Will Reduce the Availability of Abortions in All States.*

An indirect impact of a decision to permit the states to ban abortion will be increased difficulty in obtaining abortion even in those states that continue to permit them. Even now, abortion is not readily available to all women. Ninety-one percent of all counties in the United States have no abortion providers at all.[36] If abortion can be made illegal on a state-by-state basis, this situation will be exacerbated. Many states and regions will have no abortion providers. This will result in women having to travel, perhaps long distances, to find an abortion provider.[37] Those who cannot afford to do so will be forced to turn to illegal abortion.

In addition, a signal from this Court that the right to abortion is not subject to judicial protection will give increased impetus to those seeking to chill the exercise of that right where it remains legal. In 1985, almost half of all abortion providers experienced at least one form of harassment by anti-abortion activists.[38] Eighty-

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Fertility in *Abortion Services In The United States, Each State & Metropolitan Area, 1984-1985* at 63-67 (Guttmacher Institute 1988).

[36] *Id.*

[37] *See* Tietze, *supra* note 24, at 131 ("restrictions appear to have little effect on the abortion rate, although they may result in delay, inconvenience, increased travel distance, increased cost and international migration of women seeking abortions") (citation omitted); *see also Akron*, 462 U.S. at 434-35.

[38] Forrest and Henshaw, *The Harassment of U.S. Abortion Providers* in *Abortion Services in the United States, Each State & Metropolitan Area, 1984-1985* at 32 (Guttmacher Institute 1988).

three percent of large, non-hospital abortion facilities were subjected to harassment, including picketing, bomb threats, physical contact with patients, invasion of the facility, vandalism, death threats and tracing of patient's license plate numbers.[39] If the number of states permitting abortion shrinks, the pressure on remaining abortion providers will grow, making it even harder for women to obtain abortions.

4. *Reconsidering* Roe v. Wade *Would Create Legal* Confusion.

If the Court were to reverse or limit *Roe v. Wade*, the states might conclude that the entire right-to-privacy line of cases is open to question. For example, some widely used contraceptives, including certain oral contraceptives and the intrauterine device, are abortifacients that do not prevent ovulation or fertilization, but rather interfere with the implantation of the ferilized egg in the uterine wall.[40] This Court has held repeatedly that the Constitution protects the right to obtain contraceptives. *Carey*, 431 U.S. 678; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. 479. Yet, if the states are allowed to restrict access to abortion, they may well assert the right to ban all contraceptives that operate as abortifacients. Ironically, such actions could well result in an increased abortion rate. Since abortifacients are the most effective contraceptives, a ban on their use would lead directly to a radically increased number of unwanted pregnancies and a correspondingly higher abortion rate, whether legal or illegal.[41] In addition, a ban on abortion could deprive women of access to the

[39] *Id.*

[40] *See* Huber, *supra* note 30, at 730-732.

[41] *See* Tietze, *supra* note 24, at 132 ("Part of the decline in the number of illegal abortions in the United States was undoubtedly due to more widespread use of more effective contraceptives, notably the Pill and the IUD. . . .").

most modern, safe technology, such as the new abortion-inducing drug RU 486.[42] Women will be precluded from safe alternatives and forced to take unnecessary risks to obtain what should be safe, simple medical care.

Reversing or limiting *Roe v. Wade* also would encourage rulings restricting or punishing pregnant women on the basis of conduct allegedly harmful to the fetus. Cases already before the courts include: a doctor seeking a court order requiring a woman to abstain from non-prescription drugs; a father suing a mother on behalf of a child because a drug the woman took during pregnancy allegedly discolored the child's teeth; criminal charges being brought against a woman who allegedly failed to follow her doctor's advice to avoid sexual intercourse and drugs; and a pregnant women charged with forging $700 worth of checks being jailed to protect her fetus from her alleged cocaine use.[43] This assault on women's civil liberties must not be encouraged.[44]

Reversing or limiting *Roe v. Wade* would pose far more questions than it would answer. There is no reason

[42] *See* N.Y. Times, October 30, 1988, at 1, col. 1.

[43] Sherman, *Fetal Rights*, 11 Nat'l L.J. 25, at col. 1 (1988).

[44] *See* Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women L.J. 9 (1987); *see also* Westfall, *Beyond Abortion: the Potential Reach of a Human Life Amendment*, 8 Am. J. of L. & Med. 97, 111 (1982) ("[Women] might be required to lead less active life-styles in order to preserve the life of a conceptus (or possible conceptus). The interests of the conceptus will often diverge from those of the woman in such matters. From the standpoint of the conceptus, a passive carrier who exposes it to the minimum risk of miscarriage or prenatal injury is preferred. She should not smoke, drink, or use any drugs with possible adverse effects on the conceptus. Skiing, working in hazardous environments, flying, and riding in automobiles might be prohibited for such women in order to minimize possible adverse effects on the conceptus. Indeed, the Victorian regime for upper-class pregnant women that minimizes activities either inside or outside the home might be ideal").

for this Court to plunge the country into the fear, confusion and uncertainty that would follow such an action. Accordingly, *Roe v. Wade* should be reaffirmed.

II. *STARE DECISIS* PRECLUDES OVERRULING *ROE v. WADE*

A. *Stare Decisis* Should Be Given Strict Adherence Where Individual Rights Are at Stake

Stare decisis, the rule of following existing precedent, is a crucial underpinning of our legal system because it "promotes the even-handed, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system." [45] The principle of *stare decisis* requires "that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). Former Justice Goldberg has articulated a sensible formulation for the application of the rule, explaining that:

> stare decisis applies with an uneven force—that when the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to extend personal liberties, the doctrine imposes a markedly less restrictive caution.[46]

There have been no changes in society or in the law that justify reconsidering *Roe v. Wade*. Indeed, the Court

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[45] Solicitor General at 9.

[46] Goldberg, *Equal Justice: The Warren Era and the Supreme Court* at 74 (1972).

should be exceptionally wary of overturning precedent where, as here, it is being asked to restrict a hitherto accepted right, in this case, that of a woman to determine whether to continue a pregnancy. In addition, where, as here, the matters in question are the subject of public debate, adherence to precedent can reassure society that constitutional questions are answered with reference to settled principles, rather than in response to political considerations.[47]

The Solicitor General cites several cases for the proposition that *stare decisis* has less force in constitutional litigation and that the Court should reexamine precedent where its reasoning is called into question.[48] None of these cases is on point here. In most of the cases cited, the Court found the overruled decision to have been inconsistent with earlier precedents.[49] No party has shown that *Roe v. Wade* is in any way inconsistent with this Court's prior rulings. In fact, as will be discussed below, *Roe v. Wade* rests securely on a long line of cases recognizing the right of the individual to privacy and to be protected from undue interference by the state. Also,

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[47] *See* Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Columbia L. Rev. 723, 751 (1988) ("even when expectations or practices are not deeply entrenched, if serious public debate still surrounds an issue, departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided: *Roe* provides a ready example") (footnote omitted).

[48] Solicitor General at 9.

[49] *E.g., Solorio v. United States*, 55 U.S.L.W. 5038, 5039-42 (1987); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 273-75 (1980); *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 695-96 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47 (1977); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 628 (1974) (Powell, J., concurring); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

many of the cited cases represent expansions of individual rights;[50] none involves a dilution of these rights.[51]

Were the Court to reverse or limit *Roe v. Wade*, it would undermine the very purpose of *stare decisis*, "the public belief that . . . rights labelled fundamental in the past still retain their status."[52] As explained by Justice Edward White:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting), *vacated on rehearing*, 158 U.S. 601 (1895). A retreat from *Roe v. Wade* would lead the public to believe that political considerations, rather than adherence to constitutional principles, moti-

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[50] *E.g., Vasquez*, 474 U.S. 254 (vindicating protection against discrimination in jury selection); *Thomas*, 448 U.S. 261 (expanding the ability to receive worker's compensation); *Monell*, 436 U.S. 658 (expanding right of individual to sue municipalities); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (expanding protection of foreign individuals against discrimination in state courts).

[51] A number of the cited cases do not directly implicate individual rights. *E.g., Continental T.V.*, 433 U.S. 36 (whether per se rule or rule of reason applied in antitrust action); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (question involved whether certain courts were Article III courts); *Helvering*, 309 U.S. 106 (question regarding tax treatment of an estate).

[52] Goldberg, *supra* note 46, at 94.

vated the Court's rulings. Such an unfortunate perception must be avoided.

B. *Roe v. Wade* Is Consistent with Prior Precedent

It is impossible to look at *Roe v. Wade* in isolation. *Roe v. Wade* is part of an unbroken chain of cases in which this Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152. The diversity of these decisions demonstrates that the right to privacy is not to be construed narrowly.[53] This Court has recognized "the right to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy." *Stanley v. Georgia*, 394 U.S. 557 (1969). Thus, those who seek to undermine *Roe v. Wade* attack not only the holding of that case, but also the basic principle that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh*, 476 U.S. at 772.

Moreover, *Roe v. Wade* hardly stands alone. Since 1973, the Court has had repeated occasion to revisit the issue of the right to abortion and consistently has confirmed that right.[54] Even when upholding laws that argu-

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[53] *See, e.g., Eisenstadt*, 405 U.S. 438 (right of both married and unmarried couples to have access to contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marriage); *Griswold*, 381 U.S. 479 (right of married couples to obtain contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to ability to procreate); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to attend private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to learn a foreign language).

[54] *See Thornburgh*, 476 U.S. 747; *Akron*, 462 U.S. 416; *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulous v. Virginia*, 462 U.S. 506 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Harris v. McCrae*, 448 U.S. 297 (1980); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Colautti*, 439 U.S. 379; *Poelker v. Doe*, 432 U.S. 519 (1977); *Carey*, 431 U.S. 678 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parent-*

ably restrict women's access to abortion—such as statutes barring the provision of state funds for poor women seeking abortions—the Court has emphasized that its holding "signals no retreat from *Roe* or the cases applying it." *Maher v. Roe*, 432 U.S. 464 (1977).[55] Indeed, in one of the most recent abortion cases, this Court explained in detail why *stare decisis*, as well as reasoned decision-making, bound the Court to uphold *Roe v. Wade*. *See Akron*, 462 U.S. at 420-21 and n.1.[56]

This review of case law demonstrates not only that is *Roe v. Wade* in accord with prior precedent, but also that its holding has been affirmed by this Court more than a dozen times over the last sixteen years. As a result, overturning or limiting *Roe v. Wade* would be a revolutionary act. Unlike other cases cited to this Court as examples of cases that have been reversed, *Roe v. Wade* is not inconsistent with earlier cases, is not stale, and has not been overtaken by subsequent developments. There is nothing in the record to demonstrate that either society or law has changed in such a way as to require reversal.[57]

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hood of Central Missouri v. Danforth, 428 U.S. 52 (1976); *Sendak v. Arnold*, 429 U.S. 968 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Doe v. Bolton*, 410 U.S. 179 (1973).

[55] *See also Harris*, 448 U.S. at 312 ("The constitutional underpinning of *Roe v. Wade* was a recognition that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life") (footnote omitted).

[56] Those asking this Court to reverse *Roe v. Wade*, then, are asking the Court not only to reverse that case, but also to reverse its own holding that *stare decisis* precludes such a reversal.

[57] As demonstrated above, the abortion rate remains essentially unchanged, showing that women have a consistent need to exercise their right to abortion. The fact that anti-abortion forces have increased their attempts to chill the exercise of this right hardly constitutes a change cognizable by this Court as a basis for reversal.

In fact, as demonstrated above, the impact of *Roe v. Wade* has been entirely positive, essentially eliminating illegal abortion and its devastating impact upon women. *Stare decisis*, then, counsels strongly against reversing or limiting *Roe v. Wade*.

III. THE MISSOURI STATUTE AT ISSUE HERE IS UNCONSTITUTIONAL

The Missouri statute at issue here represents the state's third attempt to pass a law "designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice." *Thornburgh*, 476 U.S. at 759; *Planned Parenthood v. Ashcroft*, 462 U.S. at 476, *see Planned Parenthood v. Danforth*, 428 U.S. 52. Like the earlier attempts, the current statute is unconstitutional.[58]

The statute begins with a preamble that asserts, *inter alia*, that life begins at conception. *See* Mo. Rev. Stat. § 1.205.1(1) (1986). This legislative finding is barred by the Court's rejection of a similar statute, based upon its holding in *Roe v. Wade* that "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444 (citing *Roe v. Wade*, 410 U.S. at 159-162).

The statute goes on to require a psysician, before performing an abortion, to perform various tests apparently designed to determine the viability of the fetus. *See* Mo. Rev. Stat. § 188.029 (1986). In *Colautti*, the Court affirmed its prior holdings that viability may vary from case-to-case and can be determined only in the judgment of the attending physician, stating that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it

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[58] *Amici* believe that the opinion below, *Reproductive Health Services*, 851 F.2d 1071, convincingly demonstrates the manifest infirmities of the Missouri law, and therefore will only briefly discuss this issue.

weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus." 439 U.S. at 388-89. Here, Missouri is attempting to set twenty weeks as the beginning of viability and to force the physician to satisfy the state by conducting a battery of tests on a possibly unwilling woman, regardless of the physician's judgment as to whether those procedures are necessary or advisable. These requirements clearly invade the woman's fundamental right to have her physician be given "the room he needs to make his best medical judgment." *Doe*, 410 U.S. at 192; *see Akron*, 462 U.S. at 427, 429-30. Consequently, the statute impermissibly invades the woman's right to privacy.

Finally, the Missouri statute contains a number of provisions designed to prevent public employees from in any way counseling, encouraging, assisting in, or performing abortions not necessary to save the life of the mother. *See* Mo. Rev. Stat. §§ 188.205, 188.210, 188.215 (1986). These restrictions also are unconstitutional.

The Missouri statute "places the State between physicians and their patients by forbidding the physicians from relaying certain information, opinions, and advice." *Reproductive Health Services*, 851 F.2d at 1079.[59] As the Court of Appeals noted, this prohibition could forbid a doctor from advising a patient to have an abortion that the doctor believed was medically advisable although not necessary to save the patient's life. *Id.*

There is little doubt that both the intent and the effect of the statute is to "place obstacles in the path of a woman's exercise of her freedom of choice." *Harris*, 448 U.S. at 316. The statute raises the possibility of a woman being unable to obtain advice from the same doctor who helped her obtain contraception and conducted her preg-

[59] The prohibitions also would apply to nurses, counselors, and others upon whom many women rely.

nancy test. To then require the woman to seek an entirely new physician to advise her about abortion is a complete breach of the doctor-patient relationship and would subject women to great hardship in obtaining basic medical care.

The ban on state employees assisting or performing abortions and on the use of state facilities also represents an improper obstacle to abortion. As the lower court explained, the cost of the facilities and the employee's services used during an abortion are recouped when the patient pays. Thus, the state is blocking the use of public facilities not to save money, but only to discourage abortions. *See Reproductive Health Services*, 851 F.2d at 1083. These restrictions are not justified by any compelling state interest, but instead are unconstitutional regulations "designed to influence the woman's informed choice between abortion or child birth." *Akron*, 462 U.S. at 444 (footnote omitted). The Missouri statute would place significant new barriers in the path of a woman seeking abortion counseling and serivces, contrary to the Court's holding that state abortion statutes are proper only if they do not add any "restriction on access to abortions that was not already there." *Maher*, 432 U.S. at 474; *see Whalen v. Roe*, 429 U.S. 589, 605, n.33 (1977).

The statute's sweeping prohibition on the use of state facilities even for the *discussion* of abortion is so broad as to make it almost impossible for many women to determine freely whether to have an abortion. Even if judged under the less restrictive standard advocated by some members of this Court for review of abortion regulations, the statute is unconstitutional. *See Akron*, 462 U.S. at 453 (O'Connor, J., dissenting).

CONCLUSION

Women's lives and fundamental rights are at stake in this case. Were this Court to retreat from *Roe v. Wade*, women would face a return to the days of back-

alley abortions, as well as a threat to their freedom from control by the state. This Court over the past sixteen years has consistently affirmed *Roe v. Wade*'s holding that the right to privacy grants to women the right to decide whether or not to continue a pregnancy. The weight of precedent, social policy, and medical science is on the side of freedom of choice. This Court should once again protect that freedom.

Respectfully submitted,

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March 30, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

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Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
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On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN LIBRARY ASSOCIATION AND FREEDOM TO READ FOUNDATION SUPPORTING APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR *AMICI CURIAE* AMERICAN LIBRARY ASSOCIATION AND FREEDOM TO READ FOUNDATION SUPPORTING APPELLEES

INTEREST OF AMICI

The American Library Association ("ALA"), founded in 1876, is a nonprofit, educational organization committed to preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation. ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 libraries and more than 44,000 individuals, primarily librarians. Many of ALA's member libraries are, and many of its member libraries serve, state or federally subsidized institutions. Still other ALA members are themselves state institutions or state or federal employees. As such, they are potentially

subject to viewpoint-based restrictions on the use of public funds such as the one imposed by Missouri in the present case.

The Freedom to Read Foundation ("Foundation") was established in 1969 by ALA to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work that they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The second principle of the Library Bill of Rights, adopted by the ALA Council and subscribed to by both *amici*, is pertinent to the statute at issue:

> "Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval."

This principle is directly transgressed by Missouri's ban on encouraging or counseling a woman to have an abortion, insofar as it applies to libraries receiving or expending public funds. The ban will remove from circulation many materials concerning abortion solely because a majority of the state legislature wishes to deny access to ideas based upon viewpoint. Application of the statutory ban beyond the library to other state employees or recipients of state funds—such as doctors or psychologists—is of substantial concern to *amici* as well; such restrictions pose a similar threat to the marketplace of ideas guaranteed by the First Amendment.

The parties have consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of this Court.

INTRODUCTION

The Court of Appeals has struck down the provision of the Missouri code prohibiting the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." Mo. Stat. Ann. § 188.205 (Vernon 1983 & 1988 Supp.) ("the statute"). *Amici* contend that the Court of Appeals was correct in ruling that this statute violates the First Amendment.[1]

Libraries are essential to the intellectual, cultural, and educational welfare of the Nation precisely because they make available to the public the full spectrum of information and opinion without censorship based upon authors' views. Libraries *per se* do not express opinions, but they do, without favoritism, make available books, magazines, and other materials that express opinions, often in very strong terms. Thus, even absent a statute such as section 188.205, a library would not "counsel" a woman to have an abortion or to take any other course of action. But if asked by a pregnant woman wanting information about abortion, the options available to her, or

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[1] The Court of Appeals also struck down provisions barring the use of public facilities for the purpose of encouraging or counseling a woman to have an abortion, and barring certain state employees within the scope of their employment from encouraging or counseling a woman to have an abortion not necessary to save her life. Mo. Stat. Ann. §§ 188.210, 188.215 (Vernon 1983 & 1988 Supp.). The State has not appealed these rulings.

As appellees and *Amici* American Civil Liberties Union *et al.*, contend in their briefs filed today, serious questions as to the justiciability of the challenge to § 188.205 are raised by the State's failure to appeal these rulings and its belated attempt to redefine the scope of the funding limitation. *Amici* ALA and Foundation agree that the issues addressed herein might more profitably be addressed on review of the Title X funding cases. *See, e.g., New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988); *Planned Parenthood Federation v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988).

places where she might obtain an abortion, a library would provide her the materials she seeks. Such materials might well "counsel" or even "encourage" a woman to have an abortion in particular circumstances (or counsel against or discourage abortion). In this respect, the role of the library is directly comparable to that of a physician or other health care provider, among whose responsibilities is providing information about all medical choices.

Fulfillment of this function by libraries is crucial to the flourishing "marketplace of ideas" celebrated in this Court's fundamental First Amendment jurisprudence. But despite the tradition of "freewheeling inquiry" in America's libraries, *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), libraries occupy a perilous niche in our society: most of our libraries are publicly funded institutions subject to state control not only through the police power but also through the power of the purse. If not insulated by the First Amendment from viewpoint-biased manipulation of public funds, as well as from viewpoint-censorship administered in the more traditional form of regulations and criminal laws, the precious tradition of free inquiry and discovery safeguarded and promoted by America's libraries will become a thing of the past.

To be sure, the State seeks to assure this Court that the statute at issue "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Appellant's Brief at 42. But this is cold comfort indeed. *First*, as discussed *infra*, if, as Appellant contends, the State can prohibit doctors and mental health counselors in public health programs from expressing a point of view favoring abortion—despite the tradition in these professions and such programs of unfettered expression of professional judgment in the patient's best interest—there is no reason

to believe the State could not prohibit libraries dependent on public funding from making those same views available in literature maintained on library shelves.

Second, even if no viewpoint-restrictive statute *directly* applies to the role of information-provider fulfilled by libraries, the very presence of a state policy actively hostile to one set of views on this controversial subject will silently deter libraries from making such views available. Libraries have no stake in the abortion controversy and have no position as to how it should be resolved. But in the presence of a high-profile state policy barring public employees from expressing pro-abortion views, libraries may well err on the side of caution and be forced to act as self-censors of their acquisitions and collections.

Third, as the Court of Appeals correctly observed, the statute, even as read by attorneys and judges, is vague in the extreme. As construed by libraries (and no doubt by other publicly funded institutions) its proscription will inevitably be applied to prohibit the use of public funds to provide information *about* abortion as well as information advocating abortion. Indeed, such a construction would not be unreasonable. Given the vague language of the statute and the variety of interpretations to which it may be subjected (as well as the difficulty of distinguishing information from advocacy in many cases), it is safe to predict that if left unchecked, the statute will engender widespread censorship of information and opinion. It is also certain that this censorship would compromise the traditional functions of libraries as well as other public institutions, and significantly diminish the quality of information available on the subject of abortion, not only to a pregnant woman struggling to decide whether to terminate her pregnancy, but to all Americans.

SUMMARY OF ARGUMENT

Above all else, the First Amendment forbids government from discriminating against persons exercising First Amendment rights because it disagrees with their point of view. "Viewpoint discrimination" is prohibited even in areas where government otherwise enjoys significant latitude to regulate speech, such as the use by *private* speakers of public property or public funds. The Missouri statute at issue discriminates based upon viewpoint against speech favoring abortion in both contexts, and therefore violates the First Amendment. Point IA.

The statute also imposes a viewpoint-based restriction on expenditure of public funds by *public* institutions and employees. Government has an interest, in certain circumstances, in communicating values or ideas to which it subscribes, and there are no doubt circumstances in which government may impose viewpoint restrictions on the speech of its employees or programs—such as, for example, where the *purpose* of the program is to communicate the views of government on particular subjects. But a viewpoint restriction is particularly dangerous and clearly unjustifiable when it is *not* reasonable in light of the purpose of the government program. Viewpoint restrictions on publicly supported libraries or universities are not reasonable in light of the purposes of these institutions—which have long been bastions of free thought and exploration—and they therefore violate the First Amendment. Similarly, viewpoint restrictions on doctors, nurses, and psychologists employed by the State in public health programs are inconsistent with the purpose of those programs, which is to enable persons of limited means to obtain the benefit of the training and judgment of health care professionals. To restrict the ability of such professionals to communicate their views as to the appropriate course of treatment violates the First Amendment rights of those professionals and their patients. A contrary holding would undermine the independence of all public institutions that historically provide opinion and information free from official orthodoxy. Point IB.

The vaguenes of the statutory ban on "counseling" will chill an undue amount of constitutionally protected speech in libraries and other institutions that receive state funds. As repositories of a wide variety of diverse information from different points of view, libraries do not discriminate in their acquisition or dissemination of information based on the author's viewpoint. Under the statute, the mere provision of information on abortion may reasonably be construed to be within the vague, broad term "counseling" and thus may be prohibited. As a result, information about abortion, whether neutral, pro, con, physiological, medical, historical, etc., may be suppressed as a defensive reaction to the statute's threat of de-funding. A statute creating such a profound chilling effect transgresses the bounds of the First Amendment. Point II.

ARGUMENT

I. MISSOURI'S PROHIBITION ON THE USE OF STATE FUNDS FOR ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE CONSTITUTES VIEWPOINT DISCRIMINATION VIOLATIVE OF THE FIRST AMENDMENT.

The State candidly concedes that its prohibition on the use of public funds to encourage or counsel a woman to have an abortion not necessary to save her life constitutes viewpoint-based discrimination. Appellants' Brief at 42 ("this restriction is clearly designed to prohibit the expenditure of public funds for the identified *purpose* of affirmatively advocating to a particular woman that she undertake an abortion procedure not necessary to save her life"). Indeed, the sole justification offered for the law is the state legislature's desire to establish an official orthodoxy: to prevent dissemination of pro-abortion views and to promote dissemination of anti-abortion views.[2]

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[2] *Amici* recognize that the Court of Appeals held that the scope of the ban is broader than speech advocating abortion, reaching

In almost all circumstances, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment forbid government from considering or acting on the basis of the *content* of constitutionally protected expression. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Even in the few narrowly defined circumstances in which this general principle does not apply with full force,[3] this Court has preserved what it has termed the "essence" of the content-neutrality rule: "the need for *absolute neutrality* by the government" with respect to "*the point of view* being expressed." *Young v. American Mini Theatres, Inc.*, 427 U.S. at 67 (emphasis added). Above all else, the First Amendment commands that government not discriminate on the basis of viewpoint.[4]

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materials that merely provide information about the subject. *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988). As discussed in Point II, *infra*, *amici* agree with the Court of Appeals that "the word 'counsel' is frought with ambiguity," and that its vagueness is likely to chill the dissemination of information *about* abortion as well as encouragement of abortion. *Id.* The crucial point for present purposes, however, is that the admitted purpose and primary effect of the statute is to suppress speech favorable to abortion, and to permit speech critical of abortion, by persons or institutions expending state funds. As such, the statute clearly discriminates on the basis of viewpoint.

[3] *See, e.g., Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) ("nonpublic forum" for communicative activities); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning for adult theaters).

[4] *See, e.g., id.*; *Cornelius*, 473 U.S. at 806; *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S 684, 688 (1959) ("the First Amendment's basic guarantee is freedom to advocate ideas"; viewpoint discrimination therefore strikes "at the very heart of constitutionally protected liberty"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325, 327-28 (7th Cir. 1985) (Easterbrook, J.) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986).

Because viewpoint discrimination strikes at the "very heart" of the First Amendment, *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. at 688, it has been found unconstitutional wherever it has appeared,[5] including areas in which broader constraints of the First Amendment arguably do not apply. Thus, viewpoint-based discrimination is forbidden when government bestows certain seals of approval, *e.g.*, *Healy v. James*, 408 U.S. 169, 187 (1972) (official recognition as campus organization); in government-created forums for communication, even "nonpublic" forums in which government is otherwise entitled to pick and choose among speakers and content, *Cornelius*, 473 U.S. at 800 (*see infra* pp. 12-13); in

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[5] *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *id.* at 284 (Frankfurter, J., concurring) (access to public parks); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 511 (1969) (expression by students in public school); *see Young v. American Mini Theatres, Inc.*, 427 U.S. at 64, 67, 70 (zoning restrictions on adult motion picture theaters); *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 929 (1986) (same); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 106 S.Ct. 903, 910-11 (1986) (striking down requirement that public utility permit use of "extra space" in utility's billing statements by groups advocating prescribed points of view); *Members of the Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an ordinance prohibiting the posting of signs on public property because the ordinance was viewpoint-neutral); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) (a law "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech' "), quoted with approval, *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984); *Carey v. Brown*, 447 U.S. 455 (1980) (residential picketing); *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees."); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (books for the blind program of Library of Congress).

government subsidy programs, *Regan v. Taxation With Representation*, 461 U.S. 540, 548, 550 (1983) (*see infra* pp. 13-17); and even in the collections maintained by public school libraries, *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

The statute at issue prohibits dissemination of views favoring abortion in a variety of contexts. It applies to public and nonpublic forums maintained by the State; it applies to private speakers funded (in part or whole) by the State; and it applies to public employees and institutions in the course of their duties. *Amici* will address each of these contexts in turn.

A. The Missouri Statute Is Unconstitutional As Applied To Publicly Supported Libraries, Other Public And Nonpublic Forums, And Government Subsidy Programs.

In *Pico*, this Court considered the application of the viewpoint-neutrality principle in the context of a public school library. In public schools, perhaps uniquely among governmental institutions in the United States, the inculcation of values is an express and legitimate purpose. *See* 457 U.S. at 864 (opinion of Brennan, J.); *id.* at 876 (Blackmun, J., concurring); *id.* at 896 (Powell, J., dissenting); *id.* at 909 (Rehnquist, J., dissenting); *Bethel School Dist. v. Fraser*, 478 U.S. 675, 681 (1986); *Hazelwood School Dist. v. Kuhlmeier*, 108 S.Ct. 562, 570 (1988). The Justices disagreed about the *application* of the viewpoint-neutrality principle to the facts of *Pico*, but at least *eight* Justices recognized that the First Amendment is infringed if officials remove books from a public high school library based upon the officials' disagreement with the ideas expressed in those books.[6]

[6] *See* 457 U.S. at 871 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.) ("If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution"); *id.* at 877 (Blackmun, J.) ("the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to ideas—absent sufficiently compelling reasons"); *id.* at 883 (White, J., concurring in the judgment) ("the reason or reasons underlying the school board's removal of the books" is "a material issue of fact that precluded summary judgment" in school board's favor); *id.* at 919 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (agreeing Constitution does not permit the official suppression of ideas; in the public school context, " 'the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible' ").

Many lower courts, both before and after *Pico*, have also held that viewpoint discrimination has no place in public school libraries.[7] This is entirely appropriate; the school library must complete the student's education by supplementing with a variety of viewpoints the more directed curriculum designed by local educators.

Because the viewpoint-neutrality principle governs even in *school* library cases where, in curriculum choices, government has a legitimate value-inculcative function to perform, the ban on viewpoint-based discrimination applies *a fortiori* to *public* libraries or private libraries receiving public funds.[8] Such libraries, in contrast to the school setting, are unambiguously places for "freewheel-

[7] *See, e.g., Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D. Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978); *cf. Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982) (motion picture); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986) (same); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939, 944 (D. Vt. 1986) (school play); *Bowman v. Bethel-Tate Bd. of Educ.*, 610 F. Supp. 577 (S.D. Ohio 1985) (class play).

[8] *Hazelwood School Dist. v. Kuhlmeier*, 108 S.Ct. 562 (1988), is not to the contrary; in that case this Court relied heavily on the value-inculcative role of public schools in controlling the curriculum. *E.g., id.* at 570.

ing inquiry." *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting).[9] The various opinions in *Pico* therefore foreclose any possible argument that the Missouri statute is constitutional as applied to publicly supported libraries. Governmental viewpoint censorship of library collections or of assistance provided by libraries to library users—whether to suppress pro-abortion literature, anti-abortion literature, or any other literature based upon the views of its authors—is unconstitutional, and is not less so because government accomplishes the result through a funding cut-off rather than a criminal prohibition. *See American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986).[10]

The law as applied to public and publicly supported libraries is unconstitutional for a second reason as well. They are quintessentially government forums. Through libraries, government funds help certain private citizens —authors—to communicate with others—library users. Libraries, and all other means of communication afforded by government to private speakers, are controlled by a set of rules developed in a long line of cases, rules that (at a minimum)[11] plainly prohibit exclusions that are in

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[9] *Amici* have long maintained that libraries are forums for the free communication of ideas, and that viewpoint discrimination of any kind is wholly inappropriate there.

[10] Such censorship violates the rights of both speaker and listener. Library users have a fundamental right of access to information free from governmental viewpoint censorship. *Cf. Pico*, 457 U.S. at 866-67 (Brennan, J.); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Patients in public health programs have similar interests.

[11] This Court has established a two-tiered system of review of exclusions from government forums. Forums that by tradition or designation are devoted to the free exchange of ideas are called "public forums." A speaker may be excluded from a public forum only when necessary to achieve a compelling government interest. *Cornelius*, 473 U.S. at 800; *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975). Access to all other government forums—called "nonpublic forums"—may be restricted only if the restrictions are reasonable in light of the purposes served by the forum, and if they do not constitute "viewpoint-based discrimination." *Cornelius*, 473 U.S. at 806-13.

reality efforts "to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *see Cornelius*, 473 U.S. at 800, 806-13. Thus, Missouri's viewpoint-based restrictions on the use of public funds are unconstitutional as applied to libraries and any other institution through which state funds facilitate communication by private speakers.[12]

The statute is also unconstitutional as applied to government subsidy programs. Subsidizing speech activity, like providing a place and an audience for a speaker, in-

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[12] It is clear that the viewpoint-neutrality rules apply to government forums whether or not the forums have a physical situs. *See Cornelius*, 473 U.S. at 800-801 (Court has recognized that public forums are "means of communication"; in *Perry Educ. Ass'n, supra*, Court held school's internal mail system was a forum "notwithstanding that an internal mail system lacks a physical situs"); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60 (1983) (applying public forum analysis to the United States mails).

It is also clear that the viewpoint-neutrality requirement applies equally to government forums involving government subsidization of private speech. For example, the Combined Federal Campaign ("CFC") at issue in *Cornelius* involved a subsidy, and the Court of Appeals for the District of Columbia Circuit nevertheless applied forum analysis. *NAACP Legal Defense and Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1253, 1254, 1255-56 (D.C. Cir. 1984), *rev'd on other grounds, Cornelius, supra*. In *Cornelius*, this Court did not even mention the fact that the CFC involved a subsidy, while holding that it was a nonpublic forum. Many lower court cases have applied forum analysis despite the presence of a government subsidy. *E.g., Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *mod. on other grounds*, 489 F.2d 225 (1973) (en banc), *cert. denied*, 416 U.S. 995 (1974); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971).

volves granting government property (money or land) to support speech by private parties. For all relevant purposes, a government program subsidizing a speech activity is a program that creates a (non-public) government forum. Identical interests are present in both subsidy and government property cases: the individual's interest in reaching an audience with the assistance of government, and government's interest in ensuring that its property is preserved for its intended use. Identical dangers to First Amendment interests are posed if government uses its property—whether real estate or money —to benefit or single out for harm particular viewpoints or individuals with particular points of view. Yet the Missouri statute purports to allow government funds to promote speech discouraging abortion, while prohibiting use of government funds to promote counseling favorable to abortion. Such a law necessarily creates a gross distortion of the marketplace of ideas and establishes an official orthodoxy.

This Court has repeatedly made clear that although government has no obligation to subsidize speech in the first place, if it *chooses* to subsidize some speech it may not discriminate invidiously on the basis of the viewpoints expressed. In *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), for example, this Court ruled that the Postmaster General could not deny second-class mailing privileges to publications on the ground that he considered them "morally improper." Such a denial, the Court held, would be "abhorrent to our traditions," and raise "grave constitutional questions." *Id.* at 151, 155-56. *See United States ex rel. Milwaukee S.D. Pub. Co. v. Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting) (viewpoint-based denial of a subsidy unconstitutional; claim that such a denial did not infringe constitutional rights termed "technical and insubstantial").

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this Court considered whether a complex

tax scheme violated the First and Fifth Amendments. The Court upheld the scheme, which allowed veterans' groups to use tax-deductible contributions for lobbying activities but denied other tax exempt organizations this privilege. The Constitution had not been violated, the Court explained, because the tax benefit was not granted to veterans' organizations, or denied to other organizations, based upon their views or the content of their speech. But, the Court made clear, "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ' "aim at the suppression of dangerous ideas." ' " *Id.* at 548 (citations omitted). The Court later repeated this important qualification of its holding, which is completely ignored in the submissions of appellant and its *amici*. *Id.* at 550. Thus, the Court stated, "[w]e find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* at 548. Instead, the tax subsidy was part of the Nation's time-honored, viewpoint-neutral policy of "compensating veterans for their past contributions," *id.* at 551, a policy that had "always been deemed to be legitimate," *id.* *See id.* at 551 (Blackmun, J., concurring) (agreeing that tax scheme constitutional because viewpoint-neutral). *Regan*, therefore, suggests that viewpoint-based discrimination in subsidies is forbidden by the First Amendment. *Cf. Cornelius*, 473 U.S. at 800, 806-13 (similar standard in government forum cases).

Subsequent opinions of this Court reaffirm this important prohibition of viewpoint discrimination. In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 106 S.Ct. 903 (1986), for example, the Court struck down a statute that subsidized only one side of a debate. Stating that "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsid[y] that we sustained in . . . *Regan*," *id.* at 911, the Court distinguished *Regan* and other cases upholding viewpoint-*neutral* denials of certain subsidies.

In his dissent in *FCC v. League of Women Voters*, 468 U.S. 364, 402-08 (1984), Chief Justice (then Justice) Rehnquist, author of *Regan*, once again focused on the principle that government may not impose viewpoint restrictions on speech subsidies. When government imposes any condition on its largess, he stated, it must not be "'aimed at the suppression of dangerous ideas.'" *Id.* at 407 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). The subsidy at issue in *League of Women Voters* was *not* "aimed at the suppression of dangerous ideas," Justice Rehnquist explained, because:

> "Congress' prohibition is strictly neutral. In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent. . . . Because Congress' decision . . . is . . . strictly neutral, I would hold that nothing in the First Amendment makes it unconstitutional."

468 U.S. at 407-08. *See Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722, 1731 (1987) (*Scalia*, J., dissenting) ("Perhaps a more stringent, prophylactic rule is appropriate, and can be consistently applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern . . . .").[13]

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[13] Contrary to Appellants' claims, *Lyng v. International Union*, 108 S.Ct. 1184 (1988), *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), are not in conflict with this principle; none of those cases dealt with a viewpoint-based restriction on First Amendment rights. In *Lyng*, Congress' denial of food stamp eligibility to strikers was based upon economic *conduct*, not expressive activity protected by the First Amendment. The restriction was an attempt to remain neutral in the economic dispute between employer and employee. The First Amendment claims rejected in *Lyng* were not that the denial of the subsidy was based upon viewpoint, but rather that the *consequences* of denial were altered family relationships and compelled speech. Thus, *Lyng* is irrelevant to the constitutional vice of the Missouri statute. *Maher* and *Harris* dealt with denial of public funds for abortion; no expressive activity was involved.

It is clear, in sum, that government may not single out one viewpoint for disfavor in administering subsidies, any more than it may do so in a "nonpublic forum."[14] Missouri's viewpoint-based restriction on subsidies to private organizations—whether they are libraries, health clinics, or other entities—is plainly unconstitutional.[15]

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[14] The lower courts have accordingly consistently ruled viewpoint-based discrimination to be unconstitutional in subsidy cases. In *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), for example, the district court struck down federal regulations very similar to the statute at issue here because they were "content-based." *Id.* at 147 (citing *Regan*). *Accord Planned Parenthood Fed. of America v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988). Similarly, in *Planned Parenthood Ass'n Chicago Area v. Kempiners*, 568 F. Supp. 1490 (N.D. Ill. 1983), the Court concluded that an Illinois scheme very similar to the Missouri scheme at issue violated the First Amendment because it was an "attempt to manipulate the information available to pregnant women." *Id.* at 1499. Other lower courts have reached similar conclusions outside the abortion-related-speech context. *See, e.g., Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034, n.7 (D.C. Cir. 1980); *Esquire, Inc. v. Walker*, 151 F.2d 49, 50 (D.C. Cir.), *aff'd on other grounds sub nom. Hannegan v. Esquire, Inc., supra; Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986); *Spencer v. Herdesty*, 571 F. Supp. 444 (S.D. Ohio 1983); *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632 (D.R.I. 1976); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969); *Smith v. Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

[15] Several cases establish a parallel but different limitation on government subsidies in the speech context: "government may not deny a benefit to a person *because* he exercises a constitutional right." *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) (emphasis added); *see FCC v. League of Women Voters*, 468 U.S. 364 (1984). In other words, although government may narrowly refuse to subsidize expression (in a viewpoint-neutral fashion), it may not *penalize* a speaker for engaging in such expression with *private* funds by denying a subsidy for which the

B. The Missouri Legislature May Not Impose Viewpoint-Based Restrictions On State Employees Or Facilities Where Such Restrictions Are Inconsistent With The Purposes Of The Programs At Issue.

The State, then, has no power to favor one viewpoint over another in administering government forums or subsidizing expressive activity. The State may have a greater interest in regulating speech of its *employees*, to be sure, than in regulating speech of private citizens using public funds or facilities. *See generally Connick v. Myers*, 461 U.S. 138 (1983). Conversely, use of the

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speaker would otherwise be eligible. *See id.* at 400-01; *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). *Cf. Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold *all* welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher v. Roe*, 432 U.S. 464, 474-75, n. 8 (1977) (same). Just such an unconstitutional penalty would be imposed under the statute at issue if the statute were construed as requiring denial of *all* public funds, for whatever purpose, to any program that provided abortion counseling in addition to several activities eligible for subsidies. Although certain *amici* suggest that Missouri does not intend so to construe the statute, *see* Brief of Amicus Curiae of the Catholic Health Association of the United States at 6-7 (suggesting that recipients of public funds might still be permitted to counsel in favor of abortions so long as only private funds are used for this purpose), other *amici* suggest the contrary, *see Brief* Amicus Curiae of the American Academy of Medical Ethics at 14 (suggesting that all state funds would be denied to a program counseling in favor of abortion). Significantly, appellant makes no mention of this crucial issue in its brief, despite devoting several pages to attempting to explicate the statute. Appellant's Brief at 36-44. Moreover, neither appellant nor its *amici* suggest how a grantee *could* financially segregate its subsidized activities from its privately funded abortion-counseling services without imposing a substantial burden on the opportunities of speaker and listener to exchange information. *Cf. Regan v. Taxation With Representation*, 461 U.S. at 545, n. 6; *id.* at 551 (Blackmun, J., concurring). Therefore, the statute is apparently unconstitutional under the cases cited above. *See Massachusetts v. Bowen*, 679 F. Supp. 137, 144-45, 146 (D. Mass. 1988).

public fisc to control the speech of public employees may pose less of a threat to the free exchange of ideas and opinions in society than does its use to bias the debate among private citizens and entities. Nevertheless, public employees do not surrender all First Amendment rights when they accept public employment, *see, e.g., Rankin v. McPherson*, 107 S.Ct. 2891 (1987), and viewpoint discrimination, when imposed on public employees with little justification, infringes public employees' rights and the rights of the public to a free and balanced flow of information. For this reason, as noted above, restrictions prohibiting state libraries from disseminating literature favoring one side of a political debate would raise grave constitutional concerns, notwithstanding the fact that the libraries are public institutions.

Viewpoint-based restrictions such as the one at issue, when applied to public employees and institutions, must be subjected to a modified "nonpublic forum" test. In *Cornelius*, this Court pronounced that in a nonpublic forum, governmental speech restrictions are constitutional "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." 473 U.S. at 806. Thus, viewpoint-based restrictions *or* restrictions inconsistent with the purpose served by the government program or facility violate the First Amendment in that context.[16] At a minimum, restrictions on public employee speech should be unconstitutional if they are viewpoint-based *and* inconsistent with the purpose of the type of program at issue and the employees' public function, as measured by the traditions and standards generally applicable to such programs and such employees. *Cf. Rankin v. McPherson*, 107 S.Ct. at 2896 ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply be-

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[16] A similar two-pronged test prevails in the subsidized speech area. *See Regan*, 461 U.S. at 550; *League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting).

cause superiors disagree with the content of employees' speech."); *Pico*, 457 U.S. at 919 (Rehnquist, J., dissenting) (" 'the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible' ").

Thus, a State should be permitted to impose viewpoint-based restrictions on its employees only when those restrictions are consistent with and reasonable in light of the purposes of the type of government program at issue and the employees' normative function. To take an extreme example, a restriction prohibiting state equal employment opportunity officers from advocating racial hatred on the job would certainly be justified as consistent with the purposes of the program at issue and the employees' function. On the other hand, viewpoint restrictions on public libraries would be inconsistent with their traditional function as facilitators of "freewheeling inquiry." *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting). And such restrictions on university professors or universities would similarly be inconsistent with the historic role of the university as a place of unfettered discourse and inquiry and its tradition of academic freedom. *See Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). For this reason, such restrictions cannot be tolerated.

Considered in light of this standard, the viewpoint restrictions at issue are just as repugnant to the Constitution as applied to health care professionals such as doctors, nurses, or psychologists serving in public health clinics. The basic purpose of such clinics is to provide citizens of limited means with the benefits of the expertise and judgment of these professionals, expertise and judgment otherwise not within their reach. As demonstrated in the briefs *amicus curiae* of the American Psychological Association and the American Medical Association, each health service profession has a noble tradition and ethical rules of long-standing requiring members to provide advice and counsel in the patient's best interest. These traditions are quintessentially communicative, involving the physician's or counselor's discourse with his or her patient, and are no less central to the professional functions of doctors, psychologists, and nurses than academic freedom is to universities or libraries. Viewpoint restrictions on the professional's expression of his or her professional judgment to a patient, particularly when those restrictions are motivated by moral, theological, or political "policy choices" [17] rather than good faith medical judgments, are completely inconsistent with the primary purpose of public health programs and health care professionals' function within such programs.

Obviously, the State may not be permitted to define the "purpose" of a program or the "function" of an employee in such a way as to pervert the customary functions of the program or employee at issue. The State should not be permitted to define the purpose of a library or university, for example, as disseminating only speech of one particular viewpoint. Nor should a State be permitted to define a public health doctor's role as advocating one particular view to his or her patient, regardless of his or her professional opinion. To permit such *ad hoc* redefinition would be to validate *any* restraint, however pernicious to the marketplace of ideas. It is against the tradition of free discourse in library or university, or, in the health care context, the tradition of professional advice in the patient's interest unfettered by external orthodoxy, that any state viewpoint restraint must be measured. Only in this way can institutions essential to the marketplace of ideas remain free from subversion through manipulation of government funds.

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[17] *See* Appellant's Brief at 37.

The "abortion question" is one of the most divisive moral and theological issues of our day. But if Missouri chooses to offer its less affluent citizens free or subsidized access to health care professionals, it may not force those professionals to censor their professional opinions to accommodate the non-health-related "policy choices" made by a majority of the state legislature. Because this statute does just that, it unconstitutionally restricts public health professionals' First Amendment rights to express their professional opinion to their patients, and violates those patients' rights to receive medical or other health-care advice free from extraneous state-imposed viewpoint-bias.

If this Court holds otherwise, and indicates that States enjoy *carte blanche* to use their purse strings to forbid the expression of particular views even if the prohibition is not consistent with the essential purpose of the program or institution at issue, a serious blow will be struck not only at the freedom of public health doctors, psychologists, and their patients, but also at the freedom of all Americans to obtain uncensored opinion and information from their libraries. As noted, libraries, like health care profesionals, must rely upon their mission as an unfettered source of information and opinion as their shield against financially imposed state censorship. For these reasons it is imperative that this Court reject the viewpoint discrimination embodied in section 188.205.

II. THE VAGUENESS OF THE STATUTORY RESTRICTION ON "COUNSELING" WILL UNCONSTITUTIONALLY CHILL A RANGE OF SPEECH FAR BROADER THAN "ADVOCACY" OF ABORTION.

The Court of Appeals correctly observed that the statute's inherent vagueness will chill a quantity of speech far greater than the "advocacy" the State claims it wishes to censor. Many public employees understandably are extremely sensitive to threats to their job security or the security of the funding for their program. *See Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968);

Rankin v. McPherson, 107 S.Ct. at 2896. The same is true of recipients of state largess. The disjunctive phrase "encouraging or counseling," contained in the statute, thus will suggest to state functionaries the need to self-censor "counseling" that does *not* encourage abortion, but merely provides information *about* abortion to women considering whether to have one. As the Court of Appeals observed, such a broad construction is necessary in order to prevent the words "or counseling" from becoming surplussage. Thus, if the statute is upheld, it would not be unreasonable for libraries to construe it as affecting the kind of information about abortion they may acquire and disseminate. The vagueness of the statute and its potential chilling effect therefore independently render the statute unconstitutional. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

CONCLUSION

For all of the foregoing reasons and the reasons set forth in appellees' brief, *amici* respectfully urge this Court to affirm the judgment of the Court of Appeals for the Eighth Circuit that Mo. Stat. Ann. section 188.205 violates the First Amendment.

Respectfully submitted,

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March 30, 1989

AMICUS CURIAE

BRIEF

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Parham v. J.R., 442 U.S. 584 (1979) 27
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Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988) 23
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Mo. Rev. Stat. § 188.205 22
Mo. Rev. Stat. § 188.210 22
Mo. Rev. Stat. § 188.215 22

MISCELLANEOUS:

Adler, *Abortion: A Social-Psychological Perspective*, 35 *J. Soc. Issues* 100 (1979) 21, 26
Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 *Am. J. Orthopsychiatry* 446 (1975) 10, 19, 21
Adler, *Psychological Responses of Women Following Abortion* (1989) 19
Adler, *Sample Attrition in Studies of Psychological Sequelae of Abortion: How Great a Problem?*, 6 *J. Applied Soc. Psychology* 240 (1976) 17

TABLE OF AUTHORITIES—Continued

Page

Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in Adolescent Abortion* (G. Melton ed. 1986) 19, 20, 21

AERA, APA, NCME, Standards for Educational and Psychological Testing (1985) 7

A. Anastasi, Psychological Testing (5th ed. 1982) .. 7, 15

APA, *Ethical Principles of Psychologists*, 36 *Am. Psychologist* 633 (1981) 29

APA, *General Guidelines for Providers of Psychological Services*, 42 *Am. Psychologist* 1 (1987) .. 29

APA, *Specialty Guidelines for the Delivery of Services by Counseling Psychologists*, 36 *Am. Psychologist* 652 (1981) 28

Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 *Brit. J. Obstetrics & Gynecology* 1115 (1980) 13, 15, 21, 22

Athanasiou, Oppel, Michelson, Unger & Yager, *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortions*, 5 *Fam. Plan. Persp.* 227 (1973) 9, 13, 16

Babikian & Goldman, *A Study of Teen-Age Pregnancy*, 128 *Am. J. Psychiatry* 755 (1971) 6

Belsey, Greer, Lal, Lewis & Beard, *Predictive Factors in Emotional Response to Abortion*, 11 *Soc. Sci. & Med.* 71 (1977) 8, 11, 15

Bersoff, *Psychologists and the Judicial System*, 10 *L. & Hum. Behav.* 151 (1986) 3

Bersoff, *Social Science Data and the Supreme Court*, 42 *Am. Psychologist* 52 (1987) 4

Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 *Western J. Med.* 188 (1975) .. 16, 19, 21, 22

Blumberg, Golbus & Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 *Am. J. Obstetrics & Gynecology* 799 (1975) 8, 10, 23

Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 *Am. J. Psychiatry* 312 (1962) 10

TABLE OF AUTHORITIES—Continued

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Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration Abortion*, 13 *Soc. Psychiatry* 135 (1978) 16, 21

Bracken, Hachamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 *J. Nervous & Ment. Disorder* 154 (1974) 10, 13, 19

Bracken, Klerman & Bracken, *Abortion, Adoption or Motherhood: An Empirical Study of Decision-making During Pregnancy*, 130 *Am. J. Obstetrics & Gynecology* 251 (1978) 19

Bradley, *Abortion and Subsequent Pregnancy*, 29 *Can. J. Psychiatry* 494 (1984) 12

Brewer, *Induced Abortion After Feeling Fetal Movements: Its Causes and Emotional Consequences*, 10 *J. Biosoc. Sci.* 203 (1978) 8, 12, 15, 19

Brief for *Amicus Curiae* American Psychological Association in *Blue Shield v. McCready*, 457 U.S. 465 (1982) 22

Brief for Focus on the Family and Family Research Council of America 3, 6, 14

Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 *Am. J. Obstetrics & Gynecology* 347 (1971) 9

Cates, *Adolescent Abortions in the United States*, 1 *J. Adolescent Health Care* 18 (1980) 20, 21

Cavenar, Maltbie, Sullivan, *Aftermath of Abortion*, 42 *Bull. Menniger Clin.* 433 (1978) 14

Cohen & Roth, *Coping with Abortion*, 10 *J. Hum. Stress* 140 (1984) 16, 18, 19

Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 *Ariz. L. Rev.* 51 (1988) .....

Croghan, *Areas of Potential Psychological Vulnerability in the New Era of Liberalized Abortion*, 11 *Psychology* 35 (Aug. 1974) 7

Cvejic, Lipper, Kinch & Benjamin, *Follow-up of 50 Adolescent Girls 2 Years After Abortion*, 116 *Can. Med. Ass'n. J.* 44 (1977) 13, 15

Dauber, Zalar & Goldstein, *Abortion Counseling and Behavior Change*, 4 *Fam. Plan. Persp.* 23 (1972) 25

TABLE OF AUTHORITIES—Continued

Page

David, Rasmussen & Holst, *Postpartum and Post-abortion Psychotic Reactions*, 13 *Fam. Plan. Persp.* 88 (1981) 9, 12

Ewing & Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 *Am. J. Psychiatry* 37 (1973) 8, 10, 15

Ford, Castelnuovo-Tedesco & Long, *Abortion: Is it a Therapeutic Procedure in Psychiatry?* 218 *J. Am. Med. Ass'n.* 1173 (1971) 8, 13, 16

Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 *Am. J. Orthopsychiatry* 503 (1977) 15, 17, 20

Freeman, Rickels, Huggins, Garcia & Polin, *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 *Obstretics & Gynecology* 630 (1980) 12, 16, 17

Friedman, Greenspan & Mittleman, *The Decision-Making Process and the Outcome of Therapeutic Abortion*, 131 *Am. J. Psychiatry* 1332 (1974) .. 8, 10, 19, 21, 22

George, *An Empirical Study of Medical Termination of Pregnancy*, 25 *Psychological Studies* 118 (1980) 16

Giannelli, *The Admissibility of Novel Scientific Evidence: Frey v. United States, a Half-Century Later*, 80 *Colum. L. Rev.* 1197 (1980) 4

Handy, *Psychological and Social Aspects of Induced Abortion*, 21 *Brit. J. Clinical Psychology* 29 (1982) 10, 12, 24

Hittner, *Feelings of Well-Being Before and After an Abortion*, 9 *Am. Ment. Health Counselors Ass'n J.* 98 (1987) 13, 15

Illsley & Hall, *Psychosocial Aspects of Abortion: A Review of Issues and Needed Research*, 53 *Bull. World Health Organ.* 83 (1976) 6, 12, 18

S. Isaac & W. Michael, Handbook in Research and Evaluation (1971) 14

Jacques, *Abortion and Psychological Trauma*, 27 *Med. Arts & Sci.* 52 (1973) 19, 22, 24

TABLE OF AUTHORITIES—Continued

Page

Kaltreider, *Psychological Factors in Mid-Trimester Abortion*, 4 *Psychiatry in Med.* 129 (1973) 10, 25

Kaltreider, Goldsmith & Margolies, *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 *Am. J. Obstetrics & Gynecology* 235 (1979) 11, 17

C. Everett Koop to President Reagan, Letter, January 9, 1989 18

Kumar & Robson, *Previous Induced Abortion and Ante-natal Depression in Primaparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 *Psychological Med.* 711 (1978) 9, 15

Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 *J. Psychosomatic Obstetrics and Gynecology* 141 (1985) 12, 15, 19, 20, 21, 22, 24

Lidz, *Reflections of a Psychiatrist in* 22 *Therapeutic Abortions* 276 (H. Rosen ed. 1954) 14

E. Lind, J. Shepard & J. Cecil, Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981) 4

Lipper, Cvejic, Benjamin & Kinch, *Abortion and the Pregnant Teenager*, 109 *Can. Med. Ass'n. J.* 852 (1973) 11, 12, 15, 16

Lipper & Feigenbaum, *Obsessive-Compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion*, 30 *Am. J. Psychotherapy* 666 (1976) 14

W. Loh, Social Research in the Judical Process (1984) 3, 4

Lyons, Larson, Huckeba, Rogers & Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966 to 1985 in Values and Public Policy* 77 (G. Regier ed. 1988) 6

Major, Mueller & Hildebrandt, *Attributions, Expectations, and Coping with Abortion*, 47 *J. Personality & Soc. Psychology* 585 (1985) 13, 21

TABLE OF AUTHORITIES—Continued

Page

Marecek, *Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion* 96 (G. Melton ed. 1986) 19, 20
Marder, *Psychiatric Experiences with a Liberalized Therapeutic Abortion Law*, 126 *Am. J. Psychiatry* 1230 (1970) 26
Melton, *Bringing Psychology to the Legal System*, 42 *Am. Psychologist* 488 (1987) 3
Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion: Psychological and Legal Issues* 11 (G. Melton ed. 1986) 6
Mester, *Induced Abortion and Psychotherapy*, 30 *Psychotherapy & Psychosomatics* 98 (1978) 15
Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477 (1986) 4
J. Monahan & L. Walker, Social Science in Law (1985) 3, 4
Monahan & Walker, *Social Science in Law: A New Paradigm*, 43 *Am. Psychologist* 465 (1988) 4
Moseley, Follingstad & Harley, *Psychological Factors that Predict Reaction to Abortion*, 37 *J. Clin. Psychology* 276 (1981) 12, 13, 16, 20, 21
Mueller, *Causal Attributions, Perceived Self-Efficacy, and Copying with a Negative Life Event* (1986) 25
Mueller & Major, *Self-Blame, Self-Efficacy, and Adjustment to Abortion, J. Personality & Soc. Psychology* (in press) 25
National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing (1987) 20
National Academy of Sciences/Institute of Medicine, Legalized Abortion and the Public Health 9 (1975) 3, 5, 11, 20
Niswander, Singer & Singer, *Psychological Reaction to Therapeutic Abortion*, 114 *Am. J. Obstetrics & Gynecology* 29 (1972) 9, 10, 16

TABLE OF AUTHORITIES—Continued

Page

Notman & Nadelson, *Reproductive Crises in Women in Psychotherapy* (A. Brodsky & R. Hare-Mustin eds. 1980) 26
Oliver & Simmons, *Depression as Measured by the DSM-III and the Beck Depression Inventory in an Unselected Adult Population*, 52 *J. Consulting & Clin. Psychology* 892 (1984) 16
Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 *Am. J. Orthopsychiatry* 432 (1980) 19
Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 *Am. J. Orthopsychiatry* 48 (1972) 19, 20, 21
Osofsky, Osofsky, Rajan & Spitz, *Psychosocial Aspects of Abortion in the United States*, 42 *Mt. Sinai J. Med.* 456 (1975) 11, 13, 19, 20
Patt, Rappaport & Barglow, *Follow-up of Therapeutic Abortion*, 20 *Arch. Gen. Psychiatry* 408 (1969) 9
Payne, Kravitz, Notman & Anderson, *Outcome Following Therapeutic Abortion*, 33 *Arch. Gen. Psychiatry* 725 (1976) 8, 13, 15, 16, 19, 21
Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 *J. Nervous & Ment. Disease* 417 (1966) 10, 11, 20
Peres-Reyes & Falk, *Follow-Up After Therapeutic Abortion in Early Adolescence*, 28 *Arch. Gen. Psychiatry* 120 (1973) 13, 16, 21
Robbins, *Out-of-Wedlock Abortion and Delivery: The Importance of the Male Partner*, 21 *Soc. Probs.* 334 (1984) 16, 17, 18
Robbins & DeLamater, *Support from Significant Others and Loneliness Following Inducted Abortion*, 20 *Soc. Psychiatry* 92 (1978) 21
Rosen, *State Anxiety and Abortion*, 1 *Anxiety Research* 115 (1988) 11, 20
Schmidt & Priest, *The Effects of Termination of Pregnancy*, 54 *Brit. J. Med. Psychology* 267 (1981) 18

TABLE OF AUTHORITIES—Continued

Page

Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents in Adolescent Abortion* 24
Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979) 10, 20, 21
Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 *Psychology of Women Q.* 79 (1976) 11, 15, 19, 21
Simon & Senturia, *Psychiatric Sequelae of Abortion: Review of the Literature, 1935-1964*, 15 *Arch. Gen. Psychiatry* 378 (1966) 6
Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 *Am. J. Psychiatry* 59 (1967) 8, 10, 16, 17
Smith, *A Follow-Up Study of Women Who Request Abortion*, 43 *Am. J. Orthopsychiatry* 574 (1973) 13, 19, 21, 24
Spaulding & Cavenar, *Psychoses Following Therapeutic Abortion*, 135 *Am. J. Psychiatry* 364 (1978) 15
A. Speckard, The Psycho-Social Aspects of Stress Following Abortion (1987) 8, 15, 17
Tishler, *Adolescent Suicide Attempts Following Elective Abortion*, 68 *Pediatrics* 670 (1981) 13, 15
Wallerstein, Kurtz & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 *Arch. Gen. Psychiatry* 828 (1972) 5, 17

BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA) is a nonprofit scientific and professional organization founded in 1892, with more than 70,000 members. APA believes that the expertise of its scientific and professional members can help inform the Court's decision in this singularly important case. APA intends to provide relevant information not offered by the parties or their supporting *amici*. APA has participated frequently as an *amicus* in this Court, including three cases involving the right to an abortion—*Hartigan v. Zbaraz*, 484 U.S. 171 (1987); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); and *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This *amicus* brief will address only the issues raised by Question (7)—whether *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled—and Question (4)—whether the Constitution prohibits appellants from declaring that public funds may not be used to encourage or counsel a woman to have an abortion not necessary to save her life.

Appellants' argument that this Court should overrule *Roe* rests in part on their claim that the *Roe* Court did not fully comprehend the alleged psychological threats to a woman's health brought about by seeking and obtaining an abortion. On this question, APA has relevant information. Many of APA's members have studied the psychological effects of abortion or have published comprehensive reviews of the substantial body of research literature on this topic. Their work reveals that appellants' claims cannot be supported. Point I.

A large number of APA members are licensed practitioners who provide mental health services to individual clients. Those services include counseling pregnant women who raise the question of abortion during ongoing treatment or during counseling specifically related to abortion. Research shows that such counseling promotes informed consent and protects the psychological health of women seeking abortions. Depriving women of such services in publicly-financed facilities is antagonistic to the very goals appellants say they seek to achieve and unduly interferes with professional discretion. Point II.

ARGUMENT

I. AVAILABLE SCIENTIFIC LITERATURE DOES NOT SUSTAIN APPELLANTS' ARGUMENT THAT *ROE v. WADE* SHOULD BE OVERRULED BECAUSE OF ABORTION'S ALLEGED ADVERSE PSYCHOLOGICAL EFFECTS.

"Since *Roe* was decided in [January] 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, at 420 n.1 (1983). "[T]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

Despite the continuing vitality of those decisions and their recent reaffirmation, appellants ask the Court to use the instant case as a vehicle for reconsidering and overruling *Roe*. So modern a precedent as *Roe* should not be overruled unless there is a compelling reason to do so.[1]

[1] The Court should overrule precedent only "when *convinced* of former error." *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) *quoting Smith v. Allwright*, 321 U.S.–649, 665 (1944) (emphasis added).

Justice White has asserted that it is permissible "to overrule decisions . . . where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Id.* at 787 (White, J., dissenting). Unquestionably, methodologically rigorous scholarship should help inform legal decisionmaking, especially when the issue is fundamentally an empirical one.[2] Some of those who want the Court to overrule *Roe* claim there is now a substantial body of scientific evidence proving there are significant, negative, and often permanent psychological effects on women who obtain elective abortions. Thus, they say, in keeping with the government's interest in protecting maternal health, States should be permitted to enact laws that more closely regulate abortions than is presently the case, and such laws should no longer be subjected to strict scrutiny.[3]

Amicus agrees that health comprises more than physical health. "[P]hysical, emotional, psychological, [and] familial . . . factors [all] may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).[4] Thus, research on

[2] *See, e.g., W. Loh, Social Research in the Judicial Process* (1984) [hereinafter *Loh*]; *J. Monahan & L. Walker, Social Science in Law* (1985) [hereinafter *Monahan & Walker*]; Bersoff, *Psychologists and the Judicial System*, 10 *L. & Hum. Behav.* 151 (1986); Melton, *Bringing Psychology to the Legal System*, 42 *Am. Psychologist* 488 (1987).

[3] *See, e.g.*, Brief for Appellants at 12-18; Brief for the United States at 8-24; Brief for Focus on the Family and Family Research Council of America at 13-28.

[4] *See City of Akron*, 462 U.S. at 467 (O'Connor, J., dissenting) ("Health-related factors . . . go well beyond . . . the *physical* safety of a particular procedure"); *Colautti v. Franklin*, 439 U.S. 379, 394 (1979) ("Attendant circumstances" include "psychological and emotional as well as physical"); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 70 (1976) (effects of abortion include those "that are both physical and mental"); *United States v. Vuitch*, 402 U.S. 62, 73 (1971) ("[T]his construction accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being"). *See generally National Academy of Sciences/Institute of Medicine, Legalized Abortion and the Public Health* 9 (1975) [hereinafter

the psychological effects of a woman's decision to abort is highly relevant to any decision by this Court on the continued validity of *Roe*.

The extent to which a body of social science evidence has gained general acceptance within the scientific community is critical to its acceptance by the judicial system.[5] There is no uniform standard by which general acceptance is determined but it can be ascertained by the application of several evaluative criteria.[6] The quality of empirical research is established by the use of valid methods, its support by a body of other research, scrutiny through critical peer review in the scientific community, and subsequent publication in respected journals.

The most important criterion is validity. Social scientists distinguish between two kinds of research validity—internal and external.[7] *Internal* validity "refers to the trustworthiness of a piece of research on its own terms. . . . To have high validity, a study must rule out, or control for, competing hypotheses that may account for an observed state of affairs." *Social Authority, supra* note 5, at 502 (1986). *External* validity refers to the

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NAS/IOM] ("The health effects of abortion include physical, mental, emotional, and social outcomes of the procedure").

[5] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 *Colum. L. Rev.* 1197 (1980); Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477 (1986) [hereinafter *Social Authority*].

[6] These criteria have been proposed by legal scholars trained in social science methodology and familiar with the uses of social science research by the courts. *See, e.g., Loh, supra* note 2; *Monahan & Walker, supra* note 2; Bersoff, *Social Science Data and the Supreme Court*, 42 *Am. Psychologist* 52 (1987); Monahan & Walker, *Social Science in Law: A New Paradigm*, 43 *Am. Psychologist* 465 (1988).

[7] *See E. Lind, J. Shepard & J. Cecil, Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law* (1981).

extent to which research can be generalized across different people, different settings, and over time.

In this context, *amicus* will evaluate the research on the psychological effects of abortion. APA will first show that the studies relied upon by the Court when it first asserted that abortion has negative psychological effects were too few and not germane to elective abortions. Second, APA will show that the studies relied on by appellants' supporting *amici* are lacking in basic requirements of scientific acceptability. Finally, APA will demonstrate that the scientifically acceptable studies that have been performed contradict any claim that elective abortion has substantial negative psychological effects.

A. The Court Relied in 1981 on Tentative, Fragmentary, and Irrelevant Findings When it Concluded Abortion Produces Negative Psychological Effects in Women.

The Court has stated that the "emotional[] and psychological consequences of an abortion are serious and can be lasting." *H. L. v. Matheson*, 450 U.S. 398, 411 (1981). This is not a judgment of law but an empirical claim. Its scientific credibility depends on the validity of the research that supports it. The studies on which the Court relied in 1981 fail to meet minimal scientific validity criteria and are irrelevant to the questions before the Court in this case.[8] Sound decisionmaking demands that the Court base its reconsideration of

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[8] The Court cited two articles to support its conclusion, *see, id.*, at 411 n.20, published prior to the Court's decision in *Roe* when elective abortions were difficult to obtain and most abortions were either illegal or performed only for therapeutic reasons. The first article, Wallerstein, Kurtz, & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 *Arch. Gen. Psychiatry* 828 (1972) [hereinafter Wallerstein et al.] limited its study to women receiving *therapeutic abortions, i.e.*, abortions where there is a substantial risk that continuation of pregnancy would gravely impair the health of the woman or that the child would be born with a grave physical or mental defect, or where the pregnancy resulted from felonious intercourse. *See NAS/IOM, supra* note 4, at 133. Wallerstein et al. candidly

Roe on valid research, insofar as its decision is grounded on empirically-based judgments.[9]

Even after *Roe*, researchers concluded that an objective review of findings:

> fully corroborates the already widespread opinion that past research in this field has been inadequate in scope, faulty in methodology, unsystematically organized, and in general motivated and directed towards problems posed by ideological rather than scientific considerations.[10]

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admitted "that this study is sociologically skewed (since it draws in its entirety upon young unmarried women) as well as methodologically skewed because of the high follow-up refusal rate (which may have resulted in a heavier weighing toward those experiencing difficulties)." *Id.* at 831. The second article, Babikian & Goldman, *A Study of Teen-Age Pregnancy*, 128 *Am. J. Psychiatry* 755 (1971), "was in fact an account of rather unsystematic psychoanalytic impressions of a sample of adolescents who carried their pregnancies to term." Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in Adolescent Abortion* 11 (G. Melton ed. 1986).

[9] Appellants' supporting *amici* do not fulfill the obligation to rely on valid research. The most egregious use of unacceptable "scholarship" is found in the Brief for Focus on the Family and Family Research Council of America. They purport to support the argument that abortions produce serious adverse psychological effects by numerous references to published reports. However, a "systematic review on the psychosocial sequelae of abortion" performed by the Family Research Council itself concludes that these very studies are "without sufficient methodological standards to assure the reader of the conclusions [they draw]." Lyons, Larson, Huckeba, Rogers & Mueller, *Research on the Psychosocial Impact of Abortion: A Systematic Review of the Literature 1966 to 1985 in Values and Public Policy* 77, 82 (G. Regier ed. 1988).

[10] Illsley & Hall, *Psychosocial Aspects of Abortion: A Review of Issues and Needed Research*, 53 *Bull. World Health Organ.* 83, 99 (1976) [hereinafter Illsley & Hall]. Similarly, in a review of thirty years of pre-*Roe* research, the authors noted that "[d]eeply held personal convictions frequently seem to outweigh the importance of data, especially when conclusions are drawn." Simon & Senturia, *Psychiatric Sequelae of Abortion: Review of the Literature, 1935-1964*, 15 *Arch. Gen. Psychiatry* 378, 387 (1966) [hereinafter Simon & Senturia]. "The literature on the psycho-

B. Empirical Research on the Psychological Effects of Abortion Generally Lacks the Methodological Rigor Necessary to Justify Overruling *Roe*.

The persuasiveness of any empirical research will depend on five major factors: (1) Rigor of its research design; (2) accurate definition of the independent variable, *i.e.*, the variable from which an outcome will be predicted—in this case the abortion itself; (3) accurate definition of the dependent variable, *i.e.*, the outcome one is studying—in this case the psychological effects of abortion; (4) reliability and validity of measures used to study the dependent variable;[11] and (5) representativeness of the sample of human participants used from which generalizations are drawn. The published studies upon which appellants' supporting *amici* most heavily rely are flawed in one or more of these respects.

1. *Rigor of the research design.*

Drawing valid inferences about the psychological effects of abortion on women depends on a sound research design. The best way to ascertain whether there are such effects on women who obtain abortions is to contrast these women to relevant comparison groups.[12] Yet, the

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logical sequelae for women who have obtained an abortion is a classic illustration of the danger of biased and polemical reporting." Croghan, *Areas of Potential Psychological Vulnerability in the New Era of Liberalized Abortion*, 11 *Psychology*, Aug. 1974, at 35, 36.

[11] "*Reliability* refers to the degree to which test scores are free from errors in measurement." *AERA, APA, NCME, Standards for Educational and Psychological Testing* 19 (1985). The more reliable a measurement instrument is, the more consistent or repeatable its measurements will be. Validity "concerns *what* the test measures and how well it does so." *A. Anastasi, Psychological Testing* 27 (5th ed. 1982) [hereinafter *Anastasi*].

[12] Choosing a comparison group is partly a function of the question the researcher frames. If the question is whether abortion produces more psychological injury than other kinds of surgery on the genital tract, then this suggests one kind of comparison group. If the question is whether abortion produces more psychological injury than unwanted pregnancy, this suggests another kind of comparison group.

use of such groups in abortion research has been inconsistent and many studies use no comparison sample at all.[13]

When a single group of subjects is examined without comparison to a group that differs only on the independent variable nothing can be concluded about the dependent variable, *i.e.*, the effect of the procedure, because confounding variables could contribute to or be causing any observed effects.[14] These confounding variables can be accounted for only by studying comparison groups that share these variables. At a minimum, the groups being studied should be matched on significant variables to rule out alternative explanations for differences between abortion and comparison groups. But such matching is rarely done.[15]

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[13] Studies not using a comparison group include *A. Speckhard, The Psycho-Social Aspects of Stress Following Abortion* (1987) [hereinafter Speckhard]; Belsey, Greer, Lal, Lewis & Beard, *Predictive Factors in Emotional Response to Abortion*, 11 *Soc. Sci. & Med.* 71 (1977) [hereinafter Belsey et al.]; Blumberg, Golbus & Hanson, *The Psychological Sequelae of Abortion Performed for a Genetic Indication*, 122 *Am. J. Obstetrics & Gynecology* 799 (1975) [hereinafter Blumberg et al.]; Brewer, *Induced Abortion After Feeling Fetal Movements: Its Causes and Emotional Consequences*, 10 *J. Biosoc. Sci.* 203 (1978) [hereinafter Brewer, *Induced Abortion*]; Ewing & Rouse, *Therapeutic Abortion and a Prior Psychiatric History*, 130 *Am. J. Psychiatry* 37 (1973) [hereinafter Ewing & Rouse]; Ford, Castelnuovo-Tedesco & Long, *Abortion: Is it a Therapeutic Procedure in Psychiatry?* 218 *J. Am. Med. Ass'n.* 1173 (1971) [hereinafter Ford et al.]; Friedman, Greenspan & Mittleman, *The Decision-Making Process and the Outcome of Therapeutic Abortion*, 131 *Am. J. Psychiatry* 1332 (1974) [hereinafter Friedman et al]; Payne, Kravitz, Notman & Anderson, *Outcome Following Therapeutic Abortion*, 33 *Arch. Gen. Psychiatry* 725 (1976) [hereinafter Payne et al.]; Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 *Am. J. Psychiatry* 59 (1967) [hereinafter Simon et al.].

[14] In abortion research these confounding variables include, *e.g.*, previous mental illness, relationship with the potential father, marital status, other stressful events in the woman's life.

[15] Even careful researchers who have matched comparison and experimental groups on relevant variables have neglected to consider fully other extraneous influences that may contaminate results. *See, e.g.*, Athanasiou, Oppel, Michelson, Unger & Yager, *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortions*, 5 *Fam. Plan. Persp.* 227 (1973) [hereinafter Athanasiou et al.]; David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 *Fam. Plan. Persp.* 88 (1981) [hereinafter David et al.]. Both researchers controlled for age, race, prior history of pregnancy, marital status, and socioeconomic level, but did not control for whether pregnancy had been desired. Niswander, Singer & Singer, *Psychological Reaction to Therapeutic Abortion*, 114 *Am. J. Obstetrics & Gynecology* 29 (1972) [hereinafter Niswander et al.], compared women who obtained abortions to those who carried to term but did not match the two samples on other relevant variables and did not test to see if the two samples were equivalent. Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 *Am. J. Obstetrics & Gynecology* 347 (1971) [hereinafter Brody et al.], also compared women choosing abortions to those carrying to term, but the sample of women who chose an abortion contained significantly more single women than those who gave birth.

Studies of the psychological effects of abortion should evaluate women prior to the abortion to establish a baseline for the existence of any psychological disturbance and then reevaluate them after the abortion. Many studies, relying on "post-test only" designs, fail to control for the possibility of preexisting differences within and between groups on the dependent variable of psychological effects, thus making it difficult to draw any useful inferences from them. In fact, many investigators use retrospective assessment as a substitute for pretesting; they ask women to recall after the abortion how they felt prior to the abortion.[16] Retrospective assessment is likely to distort the data and render the results unreliable.

2. *Abortion as an independent variable.*

The five decades of research studying the psychological effects of abortion on women do not examine the same

[16] *See, e.g.*, Kumar & Robson, *Previous Induced Abortion and Ante-natal Depression in Primaparae: Preliminary Report of a Survey of Mental Health in Pregnancy*, 8 *Psychological Med.* 711 (1978) [hereinafter Kumar & Robson]; Patt, Rappaport & Barglow, *Follow-up of Therapeutic Abortion*, 20 *Arch. Gen. Psychiatry* 408 (1969).

event or medical procedure because of changing technology, legal circumstances, and social climate.[17] Research prior to 1960 primarily examined *illegal* abortion. Studies conducted between 1960 and 1973 primarily examined *therapeutic* abortion.[18] None of the pre-1973 studies are generalizable to individuals choosing to have abortions in the current sociocultural climate for several reasons: (1) the criteria used by physicians to justify therapeutic abortions varied widely across practitioners and the jurisdictions in which they practiced;[19] (2) illegal and therapeutic abortions were obtained in a generally socially disapproving environment, in contrast to the present era when a woman's right to choose an abortion is legally sanctioned and supported by a very large segment of the public;[20] (3) women granted therapeutic abortions for psychiatric rea-

[17] "[F]rom a research perspective, the influence of sociological factors on psychological aspects of abortion means that past literature, even when relatively recent, may not be applicable to current problems if the attitudes of women, their families and doctors have changed and/or if legal, economic or welfare provisions regarding pregnancy have changed." Handy, *Psychological and Social Aspects of Induced Abortion*, 21 *Brit. J. Clinical Psychology*, 29, 29 (1982) [hereinafter Handy].

[18] For representative studies *see, e.g.*, Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 *Am. J. Orthopsychiatry* 446 (1975) [hereinafter Adler]; Blumberg et al., *supra* note 13; Brody et al., *supra* note 15; Ewing & Rouse, *supra* note 13; Friedman et al., *supra* note 13; Kaltreider, *Psychological Factors in Mid-Trimester Abortion*, 4 *Psychiatry in Med.* 129 (1973) [hereinafter Kaltreider]; Niswander et al., *supra* note 15; Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 *J. Nervous & Ment. Disease* 417 (1966) [hereinafter Peck & Marcus]; Simon et al., *supra* note 13.

[19] *See, e.g.*, Bolter, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 *Am. J. Psychiatry* 312 (1962).

[20] *See, e.g.*, Bracken, Hachamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 *J. Nervous & Ment. Disorders*, 154 (1974) [hereinafter Bracken et al.]; Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979).

sons are more likely to have a history of emotional disturbance making it more likely that such women would experience post-abortion psychological problems, whether or not related to the abortion itself; and, (4) women granted therapeutic abortions for physical reasons frequently planned to carry to term and would, therefore, have been more likely than women who chose abortion voluntarily to mourn the loss of the fetus.[21]

But even studies of the outcomes of legal elective abortions do not invariably investigate the same medical procedure.[22] There are at least four medical procedures in current use [23] and each of these procedures may have a differential impact on the patient.[24]

Finally, some studies relied upon by appellants' supporting *amici* were conducted in foreign countries.[25] Because of differing cultural, religious, political, and legal

[21] *See, e.g.*, Peck & Marcus, *supra* note 18.

[22] "Investigations of the psychological sequelae must be examined separately for the therapeutic abortion population, the illegal abortion population, and the abortion on request population." Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 *Psychology of Women* Q. 79, 90 (1976) [hereinafter Shusterman].

[23] These procedures include saline injection, dilation and curretage, vacuum aspiration, and prostaglandin instillation. *See NAS/IOM, supra* note 4, at 20-22.

[24] The procedure used may also depend on whether the abortion was performed in the first or second trimester, which may have an effect on the woman as well. *See, e.g.*, Kaltreider, Goldsmith & Margolies, *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 *Am. J. Obstetrics & Gynecology* 235 (1979); Osofsky, Osofsky, Rajan & Spitz, *Psychosocial Aspects of Abortion in the United States*, 42 *Mt. Sinai J. Med.* 456, 464 (1975) [hereinafter Osofsky et al.].

[25] *See, e.g.*, Belsey et al., *supra* note 13 (England); David et al., *supra* note 15 (Denmark); Lipper, Cvejic, Benjamin & Kinch, *Abortion and the Pregnant Teenager*, 109 *Can. Med. Ass'n. J.*, 852 (1973) [hereinafter Lipper et al.] (Canada); Rosen, *State Anxiety and Abortion*, 1 *Anxiety Research* 115 (1988) [hereinafter Rosen] (Sweden).

rules, abortion may have "a different meaning from country to country and from one period to another. Research studies that are all formally concerned with an event called abortion may, in fact, be measuring different phenomena." [26]

Consequently, to be useful, research on the psychological effects of abortion must describe the type of abortion procedure used and the sociocultural and political climate in which it was performed.[27]

3. *Psychological effects as a dependent variable.*

Another limitation on the abortion literature is disagreement concerning which psychological conditions to measure as dependent variables. Diverse conditions have been chosen, including doubt, embarrassment, fear of disapproval, regret, dissatisfaction, anxiety, guilt, anger, hostility, sense of loss, depression, neurosis, and psychosis.[28] Other investigators have sought to identify be-

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[26] Illsley & Hall, *supra* note 10, at 84-85. "The results of studies performed in one country may not be comparable with the results of studies carried out in another country, and may possibly be contradictory as a direct result of the social and legal context in which they occur." Handy, *supra* note 17, at 29.

[27] In addition, the study should describe how long the procedure has been in use, how experienced the physician is in performing the procedure, the gestational stage of the pregnancy, and the reason for the abortion.

[28] *See, e.g.*, Bradley, *Abortion and Subsequent Pregnancy*, 29 *Can. J. Psychiatry* 494 (1984) (depression, social adjustment, self-esteem); Brewer, *Induced Abortion*, *supra* note 13 (depression); Brewer, *Incidence of Post-Abortion Psychosis*, 1 *Brit. Med. J.* 476 (1977); David et al., *supra* note 15 (admission to psychiatric hospital); Freeman, Rickels, Huggins, Garcia & Polin, *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 *Obstetrics & Gynecology* 630 (1980) [hereinafter Freeman et al.] (anxiety, depression, phobias, somatization, neurosis and psychosis); Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 *J. Psychosomatic Obstetrics & Gynecology* 141 (1985) [hereinafter Lazarus]; guilt, sense of loss, depression, worry); Lipper et al., *supra* note 25 (emotional instability, regret); Moseley, Follingstad & Harley, *Psychological*

havioral manifestations such as suicide attempts or sexual dysfunction.[29]

This wide array of dependent variables reflects a lack of consensus regarding symptoms, severity, and duration of psychological effects of abortion. Reported outcomes such as regret or guilt are not necessarily indicative of personality problems or mental illness and may be regarded as rational or pathological depending on the predilections of the researcher.[30] Furthermore, researchers have used inconsistent and widely variable time periods to measure psychological effects. Effects have been measured while the patient is still in the recovery room [31] and others from three days to ten years post-abortion.[32]

Factors that Predict Reaction to Abortion, 37 *J. Clin. Psychology* 276 (1981) (depression) [hereinafter Moseley et al.]; Payne et al., *supra* note 13 (anxiety, anger, depression, guilt, shame).

[29] *See, e.g.*, Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 *Brit. J. Obstetrics & Gynecology* 1115 (1980) (sexual dysfunction) [hereinafter Ashton]; Tishler, *Adolescent Suicide Attempts Following Elective Abortion*, 68 *Pediatrics* 670 (1981) (case study of two adolescents) [hereinafter Tishler].

[30] These symptoms may be more the result of unwanted pregnancy than abortion; abortion may, in fact, lessen these symptoms, not exacerbate them, in many people. *See* Part I(C), *infra*.

[31] *See, e.g.*, Bracken et al., *supra* note 20; Hittner, *Feelings of Well-Being Before and After an Abortion*, 9 *Am. Ment. Health Counselors Ass'n.* J. 98 (1987) [hereinafter Hittner]; Major, Mueller & Hildebrandt, *Attributions, Expectations, and Coping with Abortion*, 47 J. *Personality & Soc. Psychology* 585 (1985) [hereinafter Major et al.]; Moseley et al., *supra* note 28.

[32] *See, e.g.*, Athanasiou et al., *supra* note 15 (16 months); Cvejic, Lipper, Kinch & Benjamin, *Follow-up of 50 Adolescent Girls 2 Years After Abortion*, 116 *Can. Med. Ass'n.* J. 44 (1977) [hereinafter Cvejic et al.] (2 years); Ford et al., *supra* note 13 (6 months); Lipper et al., *supra* note 25 (over course of 1 year); Osofsky et al., *supra* note 24 (1 month, 6-12 months); Payne et al., *supra* note 13 (1 day, 6 weeks, 6 months); Perez-Reyes & Falk, *Follow-Up After Therapeutic Abortion in Early Adolescence*, 28 Arch. *Gen. Psychiatry* 120 (1973) [hereinafter Perez-Reyes & Falk] (6 months); Smith, *A Follow-Up Study of Women Who Request Abortion*, 43 Am. J. *Orthopsychiatry* 574 (1973) [hereinafter Smith] (1-2 years).

There is little agreement how soon any claimed negative effects of abortion may become manifest or how enduring they are.

Without adequate definition, it is difficult to make a clear distinction between any putative diagnostic rubric such as "post-abortion stress syndrome" [33] and a normal psychological process in response to a life stress that is limited in duration and intensity and does not require psychological intervention. In general, ambiguity in the definition of the dependent variable limits the usefulness of the data.

4. *Psychometric soundness of research measures.*

A variety of techniques have been used to study the psychological effects of abortion. These techniques include case studies, interviews, questionnaires, and tests.

Several published reports, including many in the post-*Roe* era, rely solely or heavily on case studies, *i.e.*, in-depth investigations of an individual. Such studies have very limited scientific utility not only because of the problems created by a totally inadequate research design, but because they preclude evaluation of the reliability and validity of the observer's judgment.[34]

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[33] The existence of a "post-abortion stress syndrome" has been suggested in Brief for Focus on the Family and Family Research Council of America at 22-24. Neither the American Psychiatric Association in its Diagnostic and Statistical Manual nor *amicus* APA recognize such a syndrome.

[34] *See* S. Isaac & W. Michael, *Handbook of Research and Evaluation* 20 (1971) ("cases studies are limited in their representativeness [and] do not allow valid generalizaitons to the population from which their units came;" "[c]ase studies are particularly vulnerable to subjective biases . . . because [they] neatly fit[] the researchers' preconceptions."). For representative case studies *see, e.g.*, Cavenar, Maltbie & Sullivan, *Aftermath of Abortions*, 42 *Bull. Menninger Clin.* 433 (1978) (2 cases of therapeutic abortion); Lidz, *Reflections of a Psychiatrist in* 22 *Therapeutic Abortions* 276 (H. Rosen ed. 1954) (2 cases); Lipper & Feigenbaum, *Obsessive-Compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion*, 30 *Am. J. Psychotherapy* 666 (1976) (1 case); Mester, *Induced Abortion and Psychotherapy*, 30 *Psychotherapy & Psychosomatics* 98 (1978) (2 cases); Spaulding & Cavenar, *Psychoses Following Therapeutic Abortion*, 135 *Am. J. Psychiatry* 364 (1978) (2 cases); Tishler, *supra* note 29 (2 cases).

Many researchers have measured women's responses to abortion through questionnaires, sometimes in combination with interviews.[35] Those measures typically are neither standardized nor subjected to reliability and validity studies. Standardization refers to measuring responses under uniform conditions across large numbers of people so that an individual's response can be compared to average responses in a normative population. Nonstandardized measures, however, are common in abortion studies. None of the studies assess the reliability of measures, *i.e.*, whether two independent raters score the interviews or questionnaires in the same way. Neither have questionnaires been validated, *i.e.*, proven to actually measure the psychological outcome the researcher claims to measure. Without standardization and without studies of reliability and validity, it is difficult to assess whether the reported research findings are accurate or predictive of future behavior.[36]

Some studies have used tests to supplement information gained in interviews or questionnaires. For example, many researchers have used the Minnesota Multiphasic Personality Inventory, a standardized test used

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[35] *See, e.g.*, Speckhard, *supra* note 13; Ashton, *supra* note 29; Belsey et al. *supra* note 13; Bracken et al., *supra* note 20; Brewer, *Induced Abortion*, *supra* note 13; Cvejic et al., *supra* note 32; Ewing & Rouse, *supra* note 13; Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 *Am. J. Orthopsychiatry* 503 (1977) [hereinafter Freeman]; Hittner, *supra* note 31; Kumar & Robson, *supra* note 16; Lazarus, *supra* note 28; Lipper et al., *supra* note 25; Payne et al., *supra* note 13.

[36] *See Anastasi*, *supra* note 11. "The literature has included anecdotes, which are not solid scientific material; surveys, which often have lacked depth, particularity and precision; and interviews, which often have been uncontrolled and retrospective." Shusterman, *supra* note 22, at 102.

to construct personality profiles,[37] or checklists of possible psychological problems.[38] Although such instruments may have more psychometric integrity than subjective measures like interviews, they identify many emotional responses that are not pathological. There is considerable disagreement among investigators, for example, as to which cutoff scores are appropriate for distinguishing a true psychological disorder from a normal life stress.[39] Even a statistically significant increase in post-abortion scores might remain in the nonpathological range, but many authors report scores without specifying whether the scores are indicative of genuine psychological disorder.[40] These data analyses yield few, if any, legitimate conclusions about the real-world significance of the results and thus are of no assistance to the Court in resolving Question 7.[41]

5. *The characteristics of the groups studied.*

Most studies of the psychological effects of abortion fail to discern whether the samples of human participants

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[37] *See, e.g.*, Athanasiou et al., *supra* note 15; Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 *Western J. Med.* 188 (1975) [hereinafter Blumberg & Golbus]; Ford et al., *supra* note 13; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Robbins, *Out-of-Wedlock Abortion and Delivery: The Importance of the Male Partner*, 21 *Soc. Probs.* 334 (1984) [hereinafter Robbins]; Simon et al., *supra* note 13.

[38] Athanasiou et al., *supra* note 15; Cohen & Roth, *Coping with Abortion*, 10 J. Hum. Stress 140 (1984) [hereinafter Cohen & Roth]; Freeman et al., *supra* note 28; Moseley et al., *supra* note 28.

[39] *See, e.g.*, Oliver & Simmons, *Depression as Measured by the DSM-III and the Beck Depression Inventory in an Unselected Adult Population*, 52 *J. Consulting & Clin. Psychology* 892 (1984).

[40] *See, e.g.*, Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration Abortion*, 13 *Soc. Psychiatry* 135 (1978) [hereinafter Bracken]; George, *An Empirical Study of Medical Termination of Pregnancy*, 25 *Psychological Studies* 118 (1980); Niswander et al., *supra* note 15; Payne et al., *supra* note 13.

[41] Moreover, no standardized scales of positive functioning or well-being have been used in measuring the effects of abortion on women. Thus, the total picture remains incomplete.

studied are representative or typical of the population from which they are gleaned. Many other studies are comprised only, or predominantly of women of one race, single women, or women of one social class.[42] Furthermore, almost all research on psychological effects use volunteers who essentially select themselves as participants. It is highly likely that these "self-selecters" have characteristics that distinguish them from women who abort but who do not volunteer for such studies or from women who do not choose abortion but who do volunteer.[43] These methodological factors severely lessen generalizability of the results because they may give a false impression that emotional responses to abortion are higher for the population as a whole than the baseline for such difficulties in women experiencing other stressful events.

Many abortion studies are of limited value because they investigate small groups of participants making it difficult to control for the effect of extraneous variables or to generalize from the small sample to the larger population. A great number of researchers have been forced to use small samples because of the lack of volunteers or attrition in the volunteers with which they started. One survey of 17 studies of the psychological effects of abortion found that the range of initial sample lost to attrition was 13% to 86%,[44] and that those participants who complete such studies differ from those who do not complete them on important variables. *Id.*[45]

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[42] *See, e.g.*, Freeman et al., *supra* note 28; Kaltreider, *supra* note 18; Robbins, *supra* note 37; Wallerstein et al., *supra* note 8 (using all or almost all women of the same race); Simon et al., *supra* note 13 (same for social class).

[43] *See, e.g.*, Speckhard, *supra* note 13, where the sample of women consisted of those answering an advertisement for patients who had serious problems after an abortion.

[44] Adler, *Sample Attrition in Studies of Psychological Sequelae of Abortion: How Great a Problem?* 6 *J. Applied Soc. Psychology* 240 (1976).

[45] *See* Freeman, *supra* note 35 (those who refused participation in the study were younger, more likely to be single, more

In sum, the abortion decision involves "a constant interaction between individual psychology, social pressures and constraints, and individual actions that precipitate societal responses, which, in turn, have an impact on the social and psychological state of the woman . . . . Research on abortion should always be formulated in full cognizance of this context." Illsley & Hall, *supra* note 10, at 86. Unfortunately, most research on the effects of abortion has not done so. A great deal more rigorous research in a variety of situations with a more diverse and clearly defined group of human participants is needed to describe and measure meaningfully the psychological effects of abortion. The most theoretically and methodologically sound research is yet to be done; indeed, the Surgeon-General has recently concluded that most extant studies of mental health effects of abortion are "flawed methodologically." [46] At this time, "convincing" scientific findings that abortion is psychologically harmful to women do not exist.[47]

C. The Existing Evidence Does Not Support the View that there are Substantial Adverse Emotional and Psychological Consequences of the Decision to Have an Abortion.

Given these methodological problems, any conclusions about the *cause* of psychological effects of abortion on women are, at best, tentative. However, competent studies exist that *describe* women's normative psychological response to abortions and the results of more recent and

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ambivalent about abortion, and more likely to have been forced by others to obtain an abortion than volunteers completing the study). *See also* Cohen & Roth, *supra* note 38; Robbins, *supra* note 37; Schmidt & Priest, *The Effects of Termination of Pregnancy*, 54 *Brit. J. Med. Psychology* 267 (1981), all noting heavy attrition rates.

[46] Letter from C. Everett Koop to President Reagan at 2 (Jan. 9, 1989).

[47] "[F]ar-reaching" constitutional rules "should not be based on the results" of studies that suffer from serious methodological flaws. *Lockhart v. McCree*, 476 U.S. 162, 172-173 (1986).

more sophisticated studies reveal the risk factors that may evoke adverse response in the few women in which they occur.

With regard to competently designed and conducted descriptive studies, there are significant convergent findings. Five major reviews of the psychological and psychiatric literature published between 1975 and 1989 all confirm that for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects.[48]

There is consensus among researchers that abortion—like any significant life event—has psychological implications.[49] When women experience regret, depression, or guilt, however, such feelings are mild and diminish rapidly without adversely affecting general functioning. Severe emotional responses are rare,[50] even in young

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[48] Marecek, *Consequences of Adolescent Childbearing and Abortion in Adolescent Abortion* 96 (G. Melton ed. 1986) [hereinafter Marecek]; *NAS/IOM*, *supra* note 4; Adler, *Psychological Responses of Women Following Abortion* (1989) (testimony on behalf of APA to Subcommittee on Human Resources and Intergovernmental Relations of the House of Representatives Committee on Government Operation); Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in Adolescent Abortion*, *supra*, at 74 [hereinafter Adler & Dolcini]; Shusterman, *supra* note 22.

[49] Adler & Dolcini, *supra* note 48; Cohen & Roth, *supra* note 38; Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 *Am. J. Orthopsychiatry* 432 (1980) [hereinafter Olson].

[50] *See, e.g.*, Adler, *supra* note 18; Adler & Dolcini; *supra* note 49; Blumberg & Golbus, *supra* note 37; Bracken, Klerman & Bracken, *Abortion, Adoption or Motherhood: An Empirical Study of Decision-making During Pregnancy*, 130 *Am. J. Obstetrics & Gynecology* 251 (1978); Bracken et al., *supra* note 20; Brewer, *Induced Abortion*, *supra* note 13 (1978); Friedman et al., *supra* note 13; Jacques, *Abortion and Psychological Trauma*, 27 *Med. Arts & Sci.* 52 (1973) [hereinafter Jacques]; Lazarus, *supra* note 28; Marecek, *supra* note 48; Olson, *supra* note 49; Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 *Am. J. Orthopsychiatry* 48 (1972) [hereinafter Osofksy & Osofsky]; Osofsky et al., *supra* note 24; Payne et al., *supra* note 13; Shusterman, *supra* note 22; Smith, *supra* note 32.

women.[51] To the contrary, the great majority of women who have had an abortion express feelings of relief.[52]

Moreover, there is evidence that positive psychological changes occur as a result of abortions. Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress, as measured by standardized psychological tests.[53] Other researchers have noted improved contraceptive use after abortions, with women reporting feelings of increased self-directedness, autonomy, and efficiency.[54]

The focus of current research is on the variables that predict diverse emotional responses to abortion. Abortion does not take place independently of a woman's intrapersonal and interpersonal context. Thus much research has moved away from testing causal hypotheses (does abortion cause adverse effects) to testing conditional hypotheses (under what conditions will abortions be related to adverse responses). These more finely-grained studies have proved illuminating.

For those few women who do experience negative psychological responses there appear to be four categories of women who are at risk. In the first category are women who desire to carry to term but cannot because of medical

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[51] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." Olson, *supra* note 49, at 440. "Very few teenagers have severe psychiatric complications after induced abortion." Cates, *Adolescent Abortions in the United States*, 1 *J. Adolescent Health Care* 18, 22 (1980) [hereinafter Cates]. *See generally National Academy of Sciences, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (1987).

[52] *See, e.g.*, Adler & Dolcini, *supra* note 48; Cates, *supra* note 51; Lazarus, *supra* note 28; Marecek, *supra* note 48; Osofsky & Osofsky, *supra* note 50; Osofsky et al., *supra* note 24.

[53] *See* Moseley et al., *supra* note 28; Peck & Marcus, *supra* note 18; Rosen, *supra* note 25; Shusterman, *supra* note 22.

[54] *See* Freeman, *supra* note 35.

or genetic indications.[55] Conversely, those who elect abortion for other reasons are relatively free from adverse responses. In the second category are women who have difficulty deciding to abort, or are pressured into it. Conversely those women who are satisfied with their decision prior to an abortion have fewer, if any, negative responses.[56] In the third category are women who do not perceive that their decision to abort is supported by others influential in their lives. Conversely, those who perceive support from those they are close to appear to have positive outcomes after an abortion.[57] Finally,[58] those with a previous history of serious emotional problems

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[55] *See, e.g.*, Ashton, *supra* note 29; Blumberg & Golbus, *supra* note 37; Freeman, *supra* note 35; Friedman et al., *supra* note 13; Lazarus, *supra* note 28; Major et al., *supra* note 31.

[56] *See, e.g.* Adler, *supra* note 18; Adler & Dolcini, *supra* note 48; Friedman et al., *supra* note 13; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Shusterman, *supra* note 22; Smith, *supra* note 32. Married women report their decision as being more difficult, Bracken, *supra* note 40, as do Catholic women and women who seek an abortion in the second trimester. Osofsky & Osofsky, *supra* note 50.

[57] *See, e.g.*, Adler & Dolcini, *supra* note 48; Cates, *supra* note 51; Moseley et al., *supra* note 28; Robbins & DeLamater, *Support from Significant Others and Loneliness Following Induced Abortion*, 20 *Soc. Psychiatry* 92 (1978) [hereinafter Robbins & DeLamater]; Shusterman, *Predicting the Psychological Consequences of Abortion*, 13 *Soc. Sci. & Med.* 683 (1979); Smith, *supra* note 32.

[58] Other factors that relate to the psychological outcome of abortions have been identified as well, *e.g.*, the woman's defensive and coping style, her age, religion, education, prior history of pregnancy, the type of abortion used, and pain during the procedure. *See* Adler, *supra* note 18; Adler, *Abortion: A Social-Psychological Perspective*, 35 *J. Soc. Issues* 100 (1979) [hereinafter *Social-Psychological Perspective*]; Adler & Dolcini, *supra* note 48; Bracken, *supra* note 40; Bracken et al., *supra* note 20; Cates, *supra* note 51; Friedman et al., *supra* note 13; Major et al., *supra* note 31; Moseley et al., *supra* note 28; Payne et al., *supra* note 13; Perez-Reyes & Falk, *supra* note 32; Robbins & DeLamater, *supra* note 57; Smith, *supra* note 32; *see generally* Shusterman, *supra* note 22.

appear to have the greatest chance of responding negatively after abortion.[59]

In sum, the most definitive research is yet to be done. Recent and better designed studies have begun the necessary process of examining a wide variety of variables associated with negative outcomes of abortion. Nevertheless, although more research is needed, recent and objective descriptive or normative studies suggest that abortion does not evoke or cause serious psychological disorders in the vast majority of women.

II. APPELLANTS' BAN ON THE USE OF PUBLIC FUNDS TO ENCOURAGE OR COUNSEL A WOMAN TO HAVE AN ABORTION IS ANTAGONISTIC TO THE STATE'S INTEREST IN PROMOTING INFORMED CONSENT AND PROTECTING THE HEALTH AND WELFARE OF ITS CITIZENS AND UNDULY INTERFERES WITH PROFESSIONAL DISCRETION.

Appellant makes it "unlawful for a doctor, nurse or other health care personnel,[60] a social worker, a counselor or person of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life." Mo. Rev. Stat. § 188.210 (1986). The State also prohibits the use of public facilities, Mo. Rev. Stat. § 188.215 (1986), or public funds for such purposes. Mo. Rev. Stat. § 188.205 (1986). All three restrictions were declared unconstitutional by the courts below but only the public funds provision is currently at issue. Nevertheless, any ban on the use of public funds for abortion-related counseling would necessarily preclude such counseling by public employees in public institutions, or in private programs or institutions supported by State funds.

[59] *See, e.g.*, Ashton, *supra* note 29; Blumberg & Golbus, *supra* note 37; Friedman et al., *supra* note 13; Jacques, *supra* note 50; Lazarus, *supra* note 28; Payne et al., *supra* note 13.

[60] Psychologists are recognized as health care providers under federal and state law. *See Blue Shield v. McCready*, 457 U.S. 465 (1982) and Brief for *Amicus Curiae* American Psychological Association submitted in that case; Mo. Rev. Stat. § 337 *et seq.* (1981).

The prohibition on the use of public funds for abortion-related counseling significantly undermines important interests that the State claims it wishes to advance. The prohibition essentially denies a significant proportion of women seeking abortions or coping with an unwanted or problem pregnancy the benefit of gathering and receiving crucial information uncensored by the State and unduly restricts health care providers' ability to communicate their professional judgment and requires them to violate ethical requirements to provide such information.[61]

A. Appellant's Provision Undermines the Health of its Citizens and May be Antagonistic to its Goal of Preventing Future Unwanted Pregnancies.

The Court has recognized that the "decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67 (1976). "A requirement that the woman give what is truly a voluntary and informed consent, as a general proposition, is, of course, proper and is surely not unconstitutional." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986).[62] *Amicus* strongly endorses pre-abortion counseling to en-

[61] Appellants seek to persuade the Court that the words "encourage" and "counsel" refer only to affirmative advocacy of abortions. Brief for Appellants at 42-44. The Eighth Circuit disagreed, holding that the scope of those phrases, particularly the word "counsel," was "much broader than the interpretation offered by the state." *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988). *Amicus* will adopt the meaning of the terms used by the court of appeals.

[62] "An intelligent decision requires the input of all available data, and the ignorance of the psychological aspects of selective abortion precludes a fully informed decision." Blumberg et al., *supra* note 13, at 808.

sure that consent is informed and that a trained professional will be available to discuss any psychological or related problems the woman might have.[63]

Research demonstrates that pre-abortion counseling is beneficial.[64] One study, for example, of all women who contacted the Pregnancy Consultation Service in St. Louis during an entire year, found that "[e]ighty-six percent of the women felt that counseling was helpful to them. Most frequently mentioned were the emotional support provided by the counselor and the information given regarding the abortion procedure." [65] Whatever psychological difficulties a woman may experience as a result of abortion may be substantially ameliorated through pre-abortion counseling.[66]

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[63] "The clinician, whether abortion counselor or therapist, typically has two roles. . . . The first is to assist [the woman] in examining all alternatives, thus increasing the likelihood that her ultimate decision is mature, independent, and carefully deliberated. The second role is to provide support through the decision-making process and through the abortion or pregnancy itself." Scott, *Legal and Ethical Issues in Counseling Pregnant Adolescents in Adolescent Abortion* 120-121 (citations omitted).

[64] "[F]ew would disagree that competent and compassionate treatment, a description of the procedure, and contraceptive advice are basic requisites. More than that, however, the clinician must be aware of those factors and special circumstances which may predispose women to undesirable sequelae. This information can best be used preventively and postoperatively to provide additional support or brief psychotherapy for those who really need it." Lazarus, *supra* note 28, at 148. "It seems there is a need for pre-abortion counselling concerning both medical and psychological aspects of abortion and that a combination of medical and non-medical counsellors may be beneficial. Abortion counseling may be an area in which psychologists and gynaecologists could usefully work together as a team, with the gynaecologists providing medical advice and the psychologist helping the woman clarify the various psychosocial problems surrounding her pregnancy." Handy, *supra* note 17, at 36.

[65] Smith, *supra* note 32, at 583. "Only seven percent of the women did not feel that counseling was helpful to them." *Id.*

[66] "[T]hrough adequate counseling and evaluation, psychological injury [associated with abortion] can be minimized. Jacques, *supra* note 50, at 58 (1973). The major role of the abortion counselor "is to provide the support which will, hopefully, bring the woman through this crisis in her life with a minimum of trauma and will help her gain an understanding of the circumstances which led to the unwanted conception and to action which will prevent the need for repeat abortion." Dauber, Zalar, & Goldstein, *Abortion Counseling and Behavior Change*, 4 *Fam. Plan. Persp.* 23, 23 (1972).

In one of the more recent, better controlled studies, 283 women who underwent first trimester vacuum aspiration abortions were randomly divided into experimental groups and a control group. The women in the experimental groups received one of two kinds of pre-abortion counseling designed either to minimize self-blame or to enhance self-efficacy. The control group received a presentation on a therapeutically-neutral subject. "Women exposed to the experimental treatments coped significantly better than women exposed to the no treatment control group . . . . They had significantly better moods and a tendency toward fewer physical complaints immediately post-abortion than women who were exposed to the no treatment control condition." [67]

Pre-abortion counseling may be especially important to women seeking abortions in the second trimester. "A pilot descriptive study . . . suggests that the women who presented in the second trimester were initially different psychologically and underwent a more stressful experience." Kaltreider, *supra* note 18, at 133. As a result, professionals "who deal with the mid-trimester abortion applicant" may be particularly helpful in approaching "the issue of ambivalence in the patient," permitting "the patient to recognize her emotional turmoil and then to make a reasoned decision." *Id.*[68]

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[67] Mueller, *Causal Attritions, Perceived Self-Efficacy, and Coping with a Negative Life Event* 99 (unpublished doctorial dissertation available from APA); *see* Mueller & Major, *Self-Blame, Self-Efficacy, and Adjustment to Abortion, J. Personality & Soc. Psychology* (in press).

[68] "The descriptive data suggests that mental health specialists are appropriate partners to the gynecologist for this potentially high-risk group." *Id.; see* note 64, *supra*.

Counseling may also be effective in encouraging women to return for post-abortion checkup: "94 of 99 women who received counseling returned to the hospital for a check-up while only 60 of 99 uncounseled women did so. Return for follow-up could . . . provide further information about and encouragement for contraceptive use." *Social-Psychological Perspective*, *supra* note 58, at 108-109. In contrast, communication of negative attitudes by hospital personnel can contribute directly to the incidence of post-abortion guilt, remorse, and depression.[69]

In sum, counseling can produce positive psychological results while serving important state interests. In the exercise of its governmental functions, the State should be protecting women from unnecessary mental health risks, promoting informed, intelligent, and self-determinative decisionmaking, and providing information that will help reduce the need for future abortions.[70] Forbidding the use of public funds for abortion counseling, and thereby forbidding the use of publicly-supported health care professionals and facilities for such counseling, undermines the very goals appellants assert in support of the statutory provision at issue in this case.

B. Appellant's Provision Interferes with Professional Judgment and Requires Psychologists to Violate Basic Ethical Precepts.

In many different settings, this Court has stressed the deference that should be shown to judgments made by

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[69] *See* Marder, *Psychiatric Experiences with a Liberalized Therapeutic Abortion Law*, 126 *Am. J. Psychiatry* 1230 (1970); Notman & Nadelson, *Reproductive Crises in Women in Psychotherapy* (A. Brodsky & R. Hare-Mustin eds. 1980).

[70] The State has an interest in ensuring that a woman's decision is "informed and freely given and is not the result of coercion." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 65 (1976). "The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman." *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 443 (1983).

qualified professionals.[71] It is particularly important that professional judgment be exercised freely because in discussing reproductive options the woman necessarily relies on professional guidance in making, and coming to terms with, decisions she has a constitutional right to make. Since, in the abortion context, professional judgment is inextricably related to exercise of a constitutional right, legislation that burdens exercise of professional judgment burdens the exercise of that right. These principles require deference to the judgment of health care professionals involved in counseling women about reproductive options, and respect for women's constitutional right to exercise their choice unburdened by the State's attempt to inject its policy preferences into their decisionmaking process.

It is not surprising, therefore, that the Court has stressed the important role of professional judgment in the abortion decision.[72] Health care professionals, such as psychologists, exercise professional judgment

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[71] *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Bell v. Wolfish*, 441 U.S. 520 (1979).

[72] In *Roe*, 410 U.S. at 165, the Court noted that its decision "vindicates the right of the physician to administer medical treatment according to his professional judgment." In *Doe v. Bolton*, 410 U.S. 179, 192 (1973), the Court again emphasized the importance of giving the physician the "room he needs" to exercise professional "judgment." In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 80, the Court warned against "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." In *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977), the Court cautioned against "placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision." In *Colautti v. Franklin*, 439 U.S. 379, 387 (1979), the Court reiterated the "importance of affording the physician adequate discretion in the exercise of his medical judgment." Finally, in *City of Akron*, 462 U.S. at 427, the Court recognized that "the full vindication of the woman's fundamental right" to an abortion requires that the exercise of professional judgment encompass "both assisting the woman in the decisionmaking process and implementing her decision should she choose an abortion."

in the pregnancy counseling context. In refusing to sustain a local ordinance's requirement that only physicians could counsel patients seeking abortions, the Court noted that, "[t]he State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *City of Akron*, 462 U.S. at 448.

The Court has also recognized that a health care professional engaged in counseling pregnant women who seek an abortion cannot be confined to a simple "recital of pertinent medical facts. On the contrary, it is clear that the needs of patients for information and an opportunity to discuss the abortion decision will vary considerably." *Id.* at 448 n.38. It is the performance of these functions for which counseling services are directly relevant and for which psychologists are specially trained. Such services "are intended to help . . . persons develop a variety of problem-solving and decision-making capabilities." [73]

The Court has clearly stated that "individual counseling should be available for those persons who desire or need it." *City of Akron*, 462 U.S. at 448 n.38. But, appellants' provision effectively precludes the vast majority of those persons who depend on free or low cost public services from the opportunity to obtain appropriate counseling in reproductive decisionmaking. This kind of absolute bar runs afoul of the Court's admonition that

[73] APA, *Specialty Guidelines for the Delivery of Services by Counseling Psychologists*, 36 *Am. Psychologist* 652, 654 (1981). "Counseling psychological services refers to services . . . intended to help persons acquire or alter personal-social skills, improve adaptability to changing life demands, enhance environmental coping skills, and develop a variety of problem-solving and decision-making capabilities. Counseling psychological services are used by individuals, couples, and families of all age groups to cope with problems connected with sex, marriage, family, [and] other social relations.

the State may not place "obstacles in the path of the [professional] upon whom she was entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977).

Furthermore, appellants' statute forbids therapists from addressing abortion in any treatment context carried out by public employees in public facilities. Reproductive issues, including abortion, arise frequently in treatment in such public settings as community mental health clinics or public university counseling centers. A therapist in these situations will not know when therapy begins what topics the patient will eventually raise or will need to be raised. Once the therapeutic relationship is created and developed, it would damage the patient, place the therapist in an ethical dilemma, and unduly interfere with professional discretion, if the therapist were barred from discussing the full range of appropriate reproductive issues and alternatives.

The primary responsibility of professional psychologists is "to protect the welfare of those who seek their services," APA *Ethical Principles of Psychologists*, 36 *Am. Psychologist* 633, 633 (1981)[74] and they are urged to "facilitate[] optimal human functioning." *General Guidelines, supra* note 74, at 7 (Guidelines 2.4.1). A therapist's role is to interact with the patient to maximize her achievement of those objectives, and it is imperative that professional judgment, not state-imposed moral absolutes, guide the therapeutic process. Achievement of those goals is undermined by appellants' statute, which forces the therapist to refrain from discussing abortion even if the patient directly requests it and interferes with the clinician's duty to act in conformity with his/her best judgment as to the most appropriate treat-

[74] "The promotion of human welfare is the primary principle guiding the professional activities of all members of the psychological service unit." APA, *General Guidelines for Providers of Psychological Services*, 42 *American Psychologist* 1, 7 (1987) (Guideline 3.1) [hereinafter *General Guidelines*].

ment the patient requires. These restrictions are antagonistic to proper counseling, forces the therapist to abandon the patient and forego his/her professional responsibility, and places the patient between her therapist and the State.

In sum, appellants' prohibition is counter to the State's interest in ensuring that its most needy citizens receive objective, vital information and effective counseling to ameliorate the mental health and physical problems that may arise prior to, during, and after the decision to abort. The prohibition shows a degree of insensitivity and lack of concern toward some of its most vulnerable citizens inappropriate to a governmental entity.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed and the decision in *Roe v. Wade* should be reaffirmed.

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March 30, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE *

The National Association of Public Hospitals ("NAPH") is an association of over eighty-five public and nonprofit hospitals throughout the country. Most NAPH hospitals are owned by local governmental entities (cities, counties, or hospital authorities); others are private nonprofit entities that fulfill a public mission shared by all NAPH members—service to all patients regardless of their ability to pay.

One of NAPH's members is Truman Medical Center of Kansas City, Missouri, where two of the plaintiff-appellees are employed. The testimony of physicians who practice at Truman Medical Center, as well as the hospital's Associate Administrator of Finance, was relied on heavily by the District Court. Another NAPH member, the St. Louis Regional Medical Center, is also located

* Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

in Missouri and, therefore, is directly affected by the Missouri statute at issue.

Among the questions presented in this case is whether a state may prohibit the use of a "public facility" for the purpose of performing or assisting an abortion not necessary to save the life of the mother, as Missouri has done. In addition, the Court will consider whether Missouri may restrict the expenditure of "public funds" for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Because the majority of NAPH members are public facilities, receive public funds, and have professional relationships with physicians and health care professionals who receive public funds, NAPH has an interest in this case.[1] Many of the NAPH members that are private nonprofit entities also have an interest in this case because they would be considered "public facilities" under statutes like Missouri's.

It is not the intent of NAPH to address in this brief the moral or philosophical questions relating to the status of the fetus or to the moment at which life may be said to begin. Nor will this brief explore every constitutional issue raised by the Missouri statute, which are thoroughly explored in the briefs of the parties and of other *amici curiae*. Rather, the purpose of this brief is to present a more complete description of how public hospitals operate within the health care system. Because the State of Missouri has argued that certain provisions of its statute do no more than determine the way in which public monies shall be expended, NAPH seeks in this brief to explain the broader effect of these provisions on public and private health care providers, as well as patients.

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[1] Public hospitals performed approximately 41,000 abortions in 1985. Unpublished data from the Alan Guttmacher Institute, provided in a conversation with Stanley Henshaw, Deputy Director of Research (Mar. 23, 1989).

SUMMARY OF ARGUMENT

Through its restrictions on the use of public facilities for the purpose of performing or assisting an abortion and on the use of public funds for the purpose of encouraging or counseling an abortion (except when necessary to save the life of the mother), Missouri has intruded deeply into the physician-patient relationship. Far from being a mere decision by the state as to the allocation of its monies, Missouri's statutory restrictions on the use of public facilities and public funds will reduce, if not eliminate, access to abortion for many whose only access to such services is at public hospitals, and will prevent certain physicians from providing complete medical services and information to their patients.

These effects follow from the role of public hospitals within the health care delivery system. Because private physicians often have staff privileges at public hospitals, the "public facilities" provision severs the relationship between such private physicians and their patients just at the point when the provision of medical services is most necessary. Many of the patients thus denied medical services are "private-pay" patients, for whom the State would not be expending public funds in any case. The Missouri statute thus has the effect of prohibiting non-publicly-funded abortion services.

Moreover, the "public facilities" provision applies to certain *private* hospitals that lease their land from county or local governments. This restriction on non-governmental entities with respect to abortion services goes well beyond any restrictions on such services that this Court has heretofore approved.

Finally, the restriction on public funds for the purpose of encouraging or counseling a woman to obtain an abortion places intolerable obstacles in the way of a publicly-funded physician's ability to meet his professional and ethical obligations. The "public funds" provision contradicts this Court's teaching that physicians

and patients must be accorded the freedom to reach treatment decisions in accordance with accepted medical practice.

ARGUMENT

I. MISSOURI'S RESTRICTION ON PERFORMING OR ASSISTING AN ABORTION IN PUBLIC FACILITIES HAS THE EFFECT OF PROHIBITING CONSTITUTIONALLY PROTECTED CONDUCT, AND IT IS THEREFORE UNCONSTITUTIONAL.

Under Mo. Ann. Stat. § 188.215 (Vernon Supp. 1989), it is "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother." The statute defines "public facility" to mean "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof." § 188.200(2).

This provision severely inhibits the ability of women to obtain an abortion, and is thus repugnant to the federal Constitution, in at least three ways. It prevents *private* physicians with staff privileges at public hospitals from treating their patients there. It effectively denies essential medical services to *private* (non-publicly-funded) patients who cannot obtain such services elsewhere than at public hospitals. And it prohibits the performance of abortions not necessary to save the life of the mother in certain *private* hospitals.

A. The "Public Facilities" Provision Unconstitutionally Infringes the Rights of Physician and Patient to Reach Medical Treatment Decisions Because It Prevents Physicians With Staff Privileges at Public Hospitals from Treating Their Patients There.

The court below held § 188.215 unconstitutional. *Reproductive Health Service v. Webster*, 851 F.2d 1071, 1082 (8th Cir. 1988). This Court should affirm that judgment, because the inescapable effect of § 188.215 is to interfere with the relationship between a *private*

physician and his patients. Section 188.215 thus impermissibly burdens the privacy rights of patients, which encompass the liberty of a private physician to exercise his best judgment in implementation of the patient's treatment choice.

The complex web of relationships among private physicians, patients, and public hospitals illustrates this point. Public hospitals, like other hospitals, rely on private physicians to provide medical services. Under the most common arrangement, private physicians are granted staff privileges, including the freedom to admit their own private patients to the hospital—*which may provide certain essential services that are not widely available elsewhere in the region.*[2] In return, the physician provides the hospital with his particular clinical specialties, which may redound to the benefit of the hospital's publicly-funded patients.[3]

A patient and physician may therefore have a long-standing relationship that is disrupted by the physician's inability under the Missouri statute to perform an abortion on the premises of the public hospital where he has staff privileges. If the physician has no staff privileges elsewhere, this may mean that he cannot serve the patient to the best of his ability and medical judgment. This situation is particularly offensive to constitutional guarantees when a hospital abortion is medically

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[2] Truman Medical Center in Kansas City, Missouri, offers one of three perinatal centers (handling high-risk pregnancies) and one of three Level I trauma centers in the two-state metropolitan area.

[3] Hospitals generally make practical distinctions among "private-pay" patients, who either carry third-party insurance or can pay for medical services from their own private funds; publicly insured patients (those who are covered by the Medicare or Medicaid programs); and "public," "charity," or "self-pay" patients, who do not have such sources of payment and whose care likely will be paid for by the hospital itself.

Federal regulations implementing the Hill-Burton Act recognize the concept of charity patients in their definition of "uncompensated care." 42 C.F.R. § 53.111(b)(6) (1988).

indicated—*e.g.*, when there is a possibility of medical complications. Under such circumstances, the woman is effectively prevented from obtaining complete medical services from the physician who best knows her medical history. As explained *infra*, this problem is especially acute in rural areas where health care providers are scarce.

The State can find no support for this blanket prohibition in such cases as *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977). In *Maher*, this Court held that a state was not constitutionally required to provide funding for nontherapeutic abortions; in *Poelker*, the Court held that a city is not constitutionally required to provide publicly-financed hospital services for certain abortions. As the court below observed, those cases do not provide constitutional support for Missouri's "public facilities" restriction: "'There is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.'" 851 F.2d at 1081 (quoting *Nyberg v. City of Virginia*, 667 F.2d 754, 758 (8th Cir. 1982), *appeal dismissed, cert. denied*, 462 U.S. 1125 (1983)).

B. The "Public Facilities" Provision Effectively Denies Essential Medical Services to Non-Publicly-Funded Patients Who Cannot Obtain Such Services Elsewhere.

As noted above, § 188.215 prohibits the use of public facilities for the purpose of performing or assisting an abortion that is not necessary to save the life of the mother. Significantly, this prohibition applies *regardless of whether public funds or public employees are used* in providing the service. As a result, this prohibition has the effect of denying abortion services in public hospitals to those *private-paying* patients to whom other hospitals are unavailable. This prohibition therefore has

a far greater impact on the availability of hospital abortion services than did the restrictions of public funding upheld in *Maher* and *Poelker*.

There are a number of reasons why a woman may be unable to obtain an abortion elsewhere than in a public hospital, even though she carries insurance or has the money to pay for the procedure (*i.e.*, is a private-paying patient). The most obvious reason is geographic: There may be no other hospital in the region where the abortion can be performed. *See Nyberg*, 667 F.2d at 758 n.2. In fact, there may be no other hospital at all. A public hospital may be the only hospital where an abortion can be obtained.

This problem is particularly acute in certain rural or sparsely populated areas, where a public hospital may be the "sole community provider." It is common in such regions for a county's sole practitioner in the area of obstetrics and gynecology to occupy an office adjacent to the public hospital; the relationship between the two is intimate and essential. Physicians in such communities frequently lack sophisticated medical equipment in their own offices, and they rely on hospital facilities for performance of even rudimentary medical procedures. According to one study:

> In many U.S. counties, a hospital is the only facility where an abortion can be obtained. Physicians in small communities may judge that existing demand does not justify their equipping their offices to provide abortion services, and . . . may, therefore, prefer to use hospital facilities. . . . In addition, hospitals are needed for instillation abortions and for high-risk patients.

Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Perspectives 63, 67 (Mar./Apr. 1987). *See also Hospital Payments Under the Medicare Program: Hearings Before the Subcomm. on Health of the House Ways and*

Means Comm., 101st Cong., 1st Sess. (Mar. 1, 1989) (statement of Rep. Byron L. Dorgan) ("When a rural hospital closes its doors, patients can find themselves so far away from a physician and health care facility that routine health maintenance becomes extremely difficult. . . . In many rural areas, preservation of the hospital and preservation of access to health care are virtually indistinguishable"); *id.* (statement of Rep. Robert H. Michel) ("When [rural hospitals] close down, doctors and other health care personnel disappear along with them"). Clinics are few and far between in such rural areas.

Moreover, even if there is a private hospital in the area, there may be obstacles to admission of the private-paying patient to that hospital, as the court below noted. 851 F.2d at 1081. Such obstacles may be a result of the private hospital's admission policies. For example, abortions are most commonly performed in hospitals (rather than in clinics or in the office of a physician) when there is a risk of medical complications for which the patient may need further hospital services. In such cases, even if the patient can afford to pay for the abortion procedure, *and therefore requires no public subsidization*,[4] she is likely to be denied admission to a private facility if she is uninsured for the possible additional services. The public hospital is more likely to treat an uninsured

[4] It is perfectly conceivable that a public facility, at least as defined in § 188.200(2), *see infra* note 6, could perform medical services that are not subsidized by public funds. For example, the Associate Administrator of Finance at Truman Medical Center testified in the District Court that the hospital routinely recovers from the patient the full cost of abortions. *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 428 n.55 (W.D. Mo. 1987). A physician also testified that his private practice patients at the University of Missouri Medical Center are charged a full fee. *Id.* The Missouri statute evidently contemplates the reality that medical services can be performed in "public facilities" without the expenditure of public funds, since otherwise the separate provisions covering "public facilities" and "public funds" would be redundant.

patient; restrictions on the ability of such public hospitals to treat these patients is therefore likely to deny them access to hospital abortions.[5]

Under these circumstances, a prohibition such as Missouri's "public facilities" provision effectively denies the availability of abortion services. For private-paying patients—those for whose treatment no public funds would be expended—validation of the "public facilities" provision in the Missouri statute would far surpass anything approved by this Court in such cases as *Maher* and *Poelker*. By placing such a burden on the ability of the private-paying (non-publicly-subsidized) patient to obtain a hospital abortion, Missouri has violated the constitutional rights of patients to choose and obtain appropriate medical treatment, and of their physicians to provide such treatment.

C. The "Public Facilities" Provision Is Unconstitutional Because It Prohibits the Performance of Abortions Not Necessary to Save the Life of the Mother in Certain Private Hospitals.

Section 188.215 is unconstitutional for another reason as well. The statute's definition of "public facility,"[6] which embraces *private* hospitals that lease governmental facilities, is overbroad; it infringes a woman's constitutional right to terminate her pregnancy in a private, non-governmental hospital facility, a right that encompasses the liberty of her physician to exercise his best

[5] As noted by the District Court, Truman Medical Center provided 97% of all hospital-based abortions at a 16-week or greater gestational age performed in Missouri in 1985. 662 F. Supp. at 428 n.57.

[6] The statute defines "public facility" to include "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof." Mo. Ann. Stat. § 188.200(2) (Vernon Supp. 1989).

medical judgment. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983).

Hospitals have varied and complex legal structures. Among the membership of NAPH are former public hospitals that have reorganized to become non-governmental, tax-exempt, nonprofit corporations. By this process of reorganization, a new nonprofit corporation is established under state law for the purpose of operating the hospital.

In most cases, a central goal of the reorganization process is the preservation of the hospital's mission to provide care to indigents and community access to important medical services.[7] To this end, the governmental body typically retains ownership of the hospital real estate. The hospital is then operated by the newly created private nonprofit corporation through a lease, which includes contractual obligations for the ongoing provision of indigent care and access to services. The hospital's legal rights and obligations, as well as its license, are held by this private corporation; it is the *corporation*, and not the hospital's real and personal property, that constitute the hospital for legal purposes.

The typical new hospital corporation is, legally, a private entity, no longer treated as a public institution for purposes of either state or federal law. For example, the hospital cannot claim the protection of sovereign immunity, nor may it claim the exemption for public employers under the National Labor Relations Act.[8] It is

[7] Public hospitals and their private, nonprofit counterparts often offer essential services—for example, neonatal intensive care units, burn centers, trauma centers, and poison control centers—that are not profitable or that for other reasons are not offered by other hospitals in a given region.

[8] *See Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570 (8th Cir. 1981) (Truman Medical Center not a political subdivision and thus is subject to NLRB jurisdiction); *cf. Board of Trustees of Memorial Hosp. of Fremont County, Wyo. v. NLRB*, 624 F.2d 177 (10th Cir. 1980) (lessee of hospital from county was private employer, though stringent contractual restrictions created joint employment status with county, precluding NLRB jurisdiction). The commonality of hospital *mission* is the reason that the NAPH includes such reorganized nonprofit hospitals as members, in addition to public hospitals more strictly defined.

the nature of the reorganized hospital's *mission*, and not legal status as a "public" entity, that the reorganized hospital shares with its public hospital counterparts.

By its terms, therefore, the Missouri statute prohibits the performance of abortions by physicians in institutions which are in all pertinent respects private institutions, but which lease facilities from state or local governments.

As discussed above, *Maher* and *Poelker* do not hold that the performance of abortions in public facilities may be prohibited. It is even clearer that these cases do not support such restrictions in *non*-governmental facilities. This Court should not extend the holdings in *Maher* and *Poelker* so as to enable a State to prohibit a physician from performing an abortion, or a woman from obtaining one, in any facility that the State chooses to characterize as a public facility. Such a holding would not merely protect a State's decision to allocate its funds; it would permit the State to control the affairs of private facilities and to limit the rights of physicians and patients to pursue a medically indicated course of treatment there.

The effect of Missouri's "public facilities" restriction on *private* facilities is illustrated by the record in this case. Truman Medical Center in Kansas City, Missouri, is a former public hospital which was reorganized as a nonprofit corporation in 1962. Because Jackson County and the city of Kansas City have retained ownership of the hospital's real estate, and lease the facility to the corporation, Truman Medical Center is regarded as a "public facility" under § 188.200(2),[9] notwithstanding

[9] *See* 662 F. Supp. at 411.

the fact that it is otherwise considered a private entity for purposes of both state and federal law.

Therefore, as applied to such hospitals as Truman Medical Center, the Missouri statute's "public facilities" restriction is as constitutionally impermissible as other restrictions that this Court has struck down because they substantially infringe a woman's fundamental right to choose an abortion. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron*, 462 U.S. at 452; *Roe v. Wade*, 410 U.S. 113 (1973).

D. The "Public Facilities" Provision Will Prevent Public Teaching Hospitals from Providing Complete Medical Training in Obstetric and Gynecological Specialties, and Thus Will Ultimately Limit Access to Hospital Abortion Services.

Many public hospitals are teaching hospitals.[10] Such teaching hospitals play integral roles in the training of physicians, either as one station in the student's "rotation" through various departments, or as the hospital at which a physician performs his residency. The joint pedagogic mission of public hospitals and medical schools is thus compromised if the public hospital is unable to serve in this training role.[11]

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[10] Of the approximately 1524 government-owned hospitals in the country, approximately 209 are teaching hospitals. Data supplied by Linda Fishman, Research Associate, Association of American Medical Colleges (Council of Teaching Hospitals) (Mar. 27, 1989), derived from data contained in the 1988 American Hospital Association Guide to the Health Care Field, 1987 Annual Survey. Over 75% of NAPH members are teaching hospitals.

[11] Nationwide, teaching programs affiliated with public hospitals are currently the most likely to provide their residents with the opportunity to receive training in abortion techniques. Darney, Landy, MacPherson & Sweet, *Abortion Training in U.S. Obstetrics and Gynecology Resident Programs*, 19 Family Planning Perspectives 158, 159-60 (Jul./Aug. 1987).

Moreover, there was testimony at trial in this case that clinical instruction in abortion procedures is a necessary part of the medical curriculum in state medical schools in Missouri, which are considered "public facilities" under § 188.200(2). 662 F. Supp. at 429 n.63. Although the District Court did not accept this argument, the statute's restriction on the academic freedom of medical schools and their faculties raises grave questions under the First Amendment. *Cf. Epperson v. Arkansas*, 393 U.S. 97 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See* brief *amicus curiae* of American Civil Liberties Union *et al.* These restrictions on public hospital training and state medical education will have the inevitable effect of restricting access to abortion services, due to the diminished number of physicians capable of competently performing those services.

II. MISSOURI'S RESTRICTION ON THE USE OF "PUBLIC FUNDS" FOR THE PURPOSE OF ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION IS UNCONSTITUTIONAL BECAUSE IT IS A VIEWPOINT-DISCRIMINATORY REGULATION OF SPEECH, IT CONFLICTS WITH THE PROFESSIONAL AND ETHICAL OBLIGATIONS OF PHYSICIANS, AND IT INTERFERES WITH THE RIGHTS OF PHYSICIAN AND PATIENT TO REACH TREATMENT DECISIONS ACCORDING TO ACCEPTED MEDICAL PRACTICE.

The Missouri statute makes it "unlawful for any funds to be expended . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." Mo. Ann. Stat. § 188.205 (Vernon Supp. 1989).[12] This prohibition is no mere restraint on the use of public funds for the performance of specific medical procedures; it intrudes upon the right and responsi-

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[12] An additional portion of this section, proscribing the use of public funds for the purpose of performing or assisting an abortion, is not before the Court.

bility of publicly-paid physicians and health care professionals to discuss medical treatment options openly and completely with their patients. The "public funds" prohibition is therefore unconstitutional under the standards set forth by this Court, which emphasize the need for physicians and patients to reach such medical decisions consensually and free of state regulations that undermine accepted medical practice: "The full vindication of the woman's right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'" *City of Akron*, 462 U.S. at 427 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)). *See also Thornburgh*, 476 U.S. at 762.

As is argued by the brief *amicus curiae* of the American Civil Liberties Union *et al.*, such restrictions on "counseling" cannot be squared with the First Amendment.[13] By permitting funding for medical counseling that promotes treatment alternatives to abortion, while forbidding counseling a woman to have an abortion (except where necessary to save her life), Missouri is engaging in clear "viewpoint discrimination," which is impermissible under the First Amendment. Such discrimination is no less unconstitutional because the State describes it as a mere removal of a subsidy rather than an outright prohibition of the speech. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. ——, 107 S.Ct. 1722, 1727 (1987) (content-based tax discrimination is "particularly repugnant to First Amendment principles"); *id.*, 107 S.Ct. at 1731 (Scalia, J., dissenting) (viewpoint discrimination may require a more stringent standard under the First Amendment); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (legislature may not "discriminate invidiously in its subsidies in such a way" as to suppress ideas).

[13] As the Court below found, the "encourage and counsel" provision is also void for vagueness. 851 F.2d at 1077-79.

Moreover, because it reaches "counseling," the "public funds" provision is distinguishable from the restrictions at issue in *Maher v. Roe*, *supra*, and *Harris v. McRae*, 448 U.S. 297 (1980). In those cases, this Court stressed that the absence of public subsidization for abortions (while childbirth was subsidized) left a woman seeking an abortion in no worse position than she would have been had the government provided no funds for medical assistance at all. *Maher*, 432 U.S. at 474; *McRae*, 448 U.S. at 315. Where medical counseling is concerned, however, this reasoning does not apply. When a physician discusses treatment options with a patient, the failure to discuss or even to advocate appropriate or medically indicated courses of action can be extremely injurious to the patient's health. Partial disclosure or advice may be more dangerous than none at all.

The appropriate medical policy in such situations, in fact, is *full* disclosure. Hospitals, physicians, nurses, and other health care professionals are held to a variety of professional, statutory and regulatory standards with respect to their medical practice. So far as the medical profession itself is concerned, ethical canons and standards of accepted medical practice apply to *all* licensed physicians and health care professionals, whether their salaries are paid out of "public" or "private" funds.

Thus, for example, paragraph 8.07 of the *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* provides:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good med-

> ical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

As is thoroughly illustrated in the brief *amicus curiae* of the American Medical Association *et al.*, this ethical canon has clear application where a woman's *health* may be threatened by the continuation of a pregnancy, although the condition may not be life-threatening under the terms of the Missouri statute. Under such circumstances, physicians subject to the statute's prohibitions would be required to contravene not only sound medical practice but also these professional ethical obligations. The only alternative would be for the publicly-paid physician, having explained to the patient the dangers to her health, to refer her to another, private, physician to discuss medical options. Apart from the fact that this scenario would represent a major intrusion into the physician-patient relationship, it raises the conundrum, discussed *supra*, for patients who may be uninsured or for whom such a private physician may be unavailable.[14]

Physicians and health care professionals are subject to other guidelines, including state licensure laws. For example, the Missouri state licensure law itself provides that proceedings to revoke a physician's medical license may be initiated for "unethical conduct" or "unprofessional conduct" in the performance of his duties, for

[14] Even patients who are insured by the Medicaid program have difficulty gaining access to obstetrical services, in part because clinics are overburdened and some private physicians are unwilling to accept Medicaid patients. *Medicaid Infant Mortality: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (Feb. 8, 1989) (statement of Richard H. Schwarz, M.D., FACOG, for the American College of Obstetricians and Gynecologists). *Accord id.* (statement of Sara Rosenbaum, Director of Programs and Policy, Children's Defense Fund). Obtaining prenatal care from a physician in private practice is even more difficult if one is uninsured.

"[t]erminating the medical care of a patient . . . without making other arrangements for the continued care of a patient," or for "[a]ny conduct or practice which is or might be harmful or dangerous to the mental or physical health of a patient." Mo. Ann. Stat. §§ 334.100(2)(4), 334.100(2)(4)(j), 334.100(2)(5) (Vernon Supp. 1989). Hospitals and nurses are also subject to licensure laws in Missouri. *See* Mo. Ann. Stat. chs. 197, 335. Finally, doctors and hospitals are civilly liable in tort for failure to apprise patients of treatment options that could have prevented injury to the patient. *See East v. United States*, 629 F. Supp. 682, 685-86 (E.D. Mo. 1986); *Harrell v. Witt*, 755 S.W.2d 296, 299 (Mo. Ct. App. 1988).

These statutory and common-law principles do more than conflict with the restrictions of the Missouri statute at issue in this case. They also illustrate how deeply the Missouri statute intrudes into the professional and ethical imperatives of physicians. The statute essentially prohibits certain physicians from doing what they may consider to be the most urgent of their professional obligations: to counsel patients as to their treatment options. It is antithetical to the professional mission of physicians, indeed to that of all licensed health care professionals,[15] for the State to place limits on the treatment options that they may discuss with their patients, simply because they may be paid by the State.

[15] To the extent that the "public funds" provision applies to non-physician personnel or to medical students who are paid with public funds, the statute's prohibition on their performance or assistance of abortions impedes the ability of a private physician to perform abortions at the hospital where he has staff privileges. It would become necessary for the physician to provide his own assistant, whom the hospital would have to "credential." The introduction of additional private personnel would add significantly to the cost of the medical services.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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March 30, 1989

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BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC HEALTH ASSOCIATION, *et al.* IN SUPPORT OF APPELLEES

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Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983)..... 6

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Moore v. City of East Cleveland, 431 U.S. 495 (1977).. 4

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) 24

Schmerber v. California, 384 U.S. 757 (1965) 5

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 3, 8, 26

Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891)..... 5

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United States v. Vuitch, 402 U.S. 62 (1971) 9

Winston v. Lee, 470 U.S. 753 (1985) 5

Statute:

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Mo. Rev. Stat. § 188.029 (1986) 2, 29
Mo. Rev. Stat. § 188.205 (1986) 2, 26
Mo. Rev. Stat. § 188.210 (1986) 2, 28
Mo. Rev. Stat. § 188.215 (1986) 2, 28

Other Authorities:

American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920 (1979) 27

American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) . 27

American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* (1986) 24, 27

American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981) 27

American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580 (1981).... 27

American Public Health Association Recommended Program Guide for Abortion Services (Revised 1979), 70 Am. J. Pub. Health 652 (1980) 23, 27

F. Arias, *High Risk Pregnancy and Delivery* (1984) 15, 26, 27

Atrash, MacKay, Binkin & Hogue, *Legal Abortion Mortality in the United States: 1972 to 1982*, 156 Am. J. Obstetrics & Gynecology 605 (1987) 16

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Baldwin & Cane, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34 (1980) 15

Birdsall & Chester, *Contraception and the Status of Women: What is the Link?*, 19 Fam. Plan. Persp. 14 (1987) 14

W. Blackstone, *Commentaries* (1765) 4

R. Blatt, *Prenatal Testing* (1988) 29, 30

S. Burrow & T. Ferris, *Medical Complications During Pregnancy* (1982) 15, 26

M. Calderone, *Abortion in the United States* (1958).... 17

Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982) 14, 16, 17, 18

Cates & Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86 (1976)..... 18

Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. Am. Med. Assoc. 192 (1982) 11

Centers for Disease Control, *Maternal Mortality: Pilot Surveillance in Seven States*, 34 Morbidity & Mortality Weekly Rep. 709-11 (1985)..... 13

Children's Defense Fund, *The Health of America's Children* (1987) 22

C. Chung, P. Steinhoff & R. Smith, *Effects of Induced Abortion on Subsequent Reproductive Function and Pregnancy Outcome* (1981) 16

Corman, Joyce & Grossman, *Birth Outcome Production Function in the United States*, 22 J. Hum. Resources 339 (1987) 16

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H. David, Z. Dytrych, Z. Matejcek & V. Schuller, *Born Unwanted: Developmental Effects of Denied Abortion* (1988) 15

David & Matejcek, *Children Born to Women Denied Abortion*, 13 Fam. Plan. Persp. 32 (1981) 15

Ellerbrock, Atrash, Rhodenhiser, Hogue & Smith, *Abortion Surveillance, 1982-1983*, 36 Morbidity & Mortality Weekly Rep. 11SS, 41SS (Feb. 1987).....21, App. 1b

R. Gold, A. Kenney & S. Singh, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States* (1987) 12, 29

Haynes, *Cerebral Hypoxia from Air Embolus Following Attempted Abortion*, 71 Am. J. Obstetrics & Gynecology 1111 (1956) 19

Henshaw, *Characteristics of U.S. Women Having Abortions*, 19 Fam. Plan. Persp. 5 (1987) 14, 1b

Henshaw, *Reducing Teenage Childbearing*, 78 Am. J. Pub. Health 619 (1988)..... 23

Henshaw, Forrest & Van Vort, *Abortion Services in the United States 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987).....22, App. 1b

Hogue, Cates & Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 Epidemiological Reviews 66 (1982)..... 16

Joyce, *The Social and Economic Correlates of Pregnancy Resolution Among Adolescents in New York City, by Race and Ethnicity: A Multivariate Analysis*, 78 Am. J. Pub. Health 626 (1988) 23

Koenig & Zelnik, *Repeat Pregnancies Among Metropolitan Area Teenagers: 1971-1979*, 14 Fam. Plan. Persp. 341 (1982) 14

PAGE

LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Med. Assoc. 1988 (1982)..... 11

J. Legge, *The Unintended Consequences of Policy Change: The Effect of a Restrictive Abortion Policy*, 15 Admin. & Soc'y 243 (1983)..... 20

Lettermaier, Liskin, Church & Harris, *Mothers' Lives Matter: Maternal Health in the Community*, s.L (7) Population Reports 4 (1988) 20

J. Locke, *A Letter Concerning Toleration* (1955) 4

J. Locke, *Two Treatises of Government* (P. Laslett rev. ed. 1963) 4

F. Maitland, *The Forms of Action at Common Law* (1909) 4

Marieskind, *Caesarean Sections*, 7 Women & Health 179 (1982) 13

Adolescent Abortion: Psychological and Legal Issues (G. Melton ed. 1986) 14

J. Mill, *On Liberty* (1988) 4

Miller, Stokes & Warland, *The Effect of Legalization and Public Funding of Abortion on Neonatal Mortality: An Intervention Analysis* (1985) 16

E. More-Cavar, *International Inventory of Information on Induced Abortion* (1974)..... 18

National Center for Health Statistics, *Advance Report of Final Natality Statistics, 1985*, 36 Monthly Vital Statistics Rep. 13 (Supp. Jul. 17, 1987).....App. 1b

National Center for Health Statistics, *Vital Statistics of the United States, 1965* (1967).....App. 1b

PAGE

National Institute of Child Health, *Caesarean Childbirth: Report of a Consensus Development Conference* (1981) 12

New York City Department of Health, Bureau of Health Statistics and Analysis, *Summary of Vital Statistics 1980-1987* (1987)..... 21

Pakter, O'Hare, Helpern & Nelson, *Impact of the Liberalized Abortion Law in New York City on Deaths Associated with Pregnancy: A Two-Year Experience*, 49 Bull. N.Y. Acad. Med. 804 (1973) 21

Pakter, O'Hare, Nelson & Svigir, *Two Years Experience in New York City with the Liberalized Abortion Law: Progress and Problems*, 63 Am. J. Pub. Health 524 (1973) 21

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* (1982) .. 25

J. Pritchard & P. MacDonald, *Williams Obstetrics* (1980) 15

Rhoads et al., *The Safety and Efficacy of Chorionic Villus Sampling for Early Prenatal Diagnosis of Cytogenic Abnormalities*, 320 New Eng. J. Med. 609 (1989) 29

Rochat, Koonin, Atrash & Jewett, *Maternal Mortality in the United States: Report from the Maternal Mortality Collaborative*, 72 Obstetrics & Gynecology 91 (1988). 11

Rosenfield, *Roe v. Wade and the Public's Health*, Nation's Health 10 (Mar. 1989) 19

E. Royston & S. Armstrong, *Preventing Maternal Deaths* (forthcoming 1989) 20

PAGE

Simons, *Abortions Across Latin America Rising Despite Illegality and Risks*, N. Y. Times, Nov. 26, 1988, at 1, col. 4 20

C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986* (1986) 11, 14, 16

Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Fam. Plan. Persp. 26 (1984).....15, 16, 18

Tietze, *The Effect of Legalization of Abortion on Population Growth and Public Health*, in C. Tietze, F. Jaffe, E. Weinstock & J. Dryfoss, *Abortion 1974-1975; Need and Services in the United States, Each State & Metropolitan Area* 110 (1976) .....App. 1b

B. van den Berg & C. Chieng, *Maternal Mortality and Differentiation by Cause of Death* in *New Developments in Analysis of Mortality and Causes of Death* 239 (1986) 18, 20

Veprovsky & Ostreich, *Traumatic Perforation of the Uterus Following Attempted Self-Induced Abortion with a Rubber Catheter*, 68 Am. J. Obstetrics & Gynecology 1615 (1954) 19

Wilkerson, *Infant Mortality: Frightful Odds in Inner City*, N. Y. Times, June 26, 1987, at 1, col. 2..... 22

Zakin, Godsick & Segal, *Foreign Bodies Lost in the Pelvis during Attempted Abortion with Special Reference to Urethral Catheters*, 70 Am. J. Obstetrics & Gynecology 233 (1955) 19

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of thirteen *amici curiae* committed to the protection of personal health and the prevention of disease. They represent a broad range of professional, academic, state, municipal, consumer and political interests in the promotion of public health.

Amici have a particular interest in the Court's resolution of this case because they believe that the continued availability of abortion services for all women is an essential component of basic public health care. The Missouri statute at issue intrudes into the physician-patient relationship and threatens women with higher rates of mortality and morbidity. This case raises important issues concerning the government's power to impose these increased health risks upon pregnant women.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court. Descriptions of the individual amici are set forth in Appendix A of this brief.

PRELIMINARY STATEMENT

Amici urge affirmance of the judgment of the United States Court of Appeals for the Eighth Circuit striking down certain provisions of Missouri's 1986 abortion regulation statute (the "Missouri statute"). Amici also urge that state regulation of abortion should continue to be subject to the strict scrutiny standard of review, because such regulation threatens the lives and health of pregnant women.

The Missouri statute declares in its challenged preamble that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being." Mo. Rev. Stat. § 1.205.1 (1) & (2) (1986).[1] Also under review are prohibitions (with exceptions only where necessary to save the life of the mother) on the expenditure of

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1 Although amici American Public Health Association (APHA) et al. do not address this provision, they join in the views expressed thereon by appellee Reproductive Health Services.

public funds for the purpose of counseling or encouraging abortion, on the performance or assistance of abortions by public employees, and on the performance or assistance of abortions in public or publicly funded facilities. *Id.* §§ 188.205, 188.210 & 188.215. Without exception, the Missouri statute requires that all doctors in the State of Missouri perform tests to make specific findings of fetal viability before performing any abortion on a woman whom the physician has reason to believe is twenty or more weeks pregnant. *Id.* § 188.029.

Five publicly employed doctors and nurses and two nonprofit corporations filed this action to invalidate these and other provisions of the Missouri statute. The district court declared several provisions unconstitutional, including those cited above, and Missouri appealed. With the exception of overturning the district court's invalidation of the ban, contained in § 188.205, on the expenditure of public funds for the performance of abortions, the court of appeals affirmed in full. The State of Missouri now appeals that decision. One of the issues certified by this Court was "[w]hether the *Roe v. Wade*, 410 U.S. 113 (1973), trimester approach for selecting the test by which state regulation of abortion services is reviewed should be reconsidered and discarded in favor of a rational basis test." Jurisdictional Statement at II.

SUMMARY OF ARGUMENT

All individuals have a fundamental right to be free from government-mandated harm to health. Absent extraordinary circumstances, this right restrains the state from inflicting health risks on citizens and from dictating the degree of risk an individual should bear.

State laws impeding a woman's right to an abortion interfere with the individual's freedom from governmental imposition of health risks. Such laws have disastrous effects on the health of women, subjecting them to the risks associated with pregnancy and childbirth, delayed abortions, illegal abortions and self-induced abortions. The fundamental principle that the state cannot constitutionally compel a woman to risk her health

requires strict scrutiny of any state action that limits access to abortion.

The Missouri statute challenged here directly impinges on the individual's right to be free from government-mandated harm. Central to this right is respect for individual autonomy in deciding matters affecting one's own health. The ban on abortion counseling harms women's health by undermining the physician-patient relationship and preventing physicians from conveying medically necessary information to their patients. The ban on the performance of abortions by public employees or in public facilities prevents women from obtaining abortions to preserve their health. The blanket requirement that physicians conduct a series of tests on pregnant women to determine fetal viability compels women to submit to potentially dangerous procedures and overrides the judgment of treating physicians as to what procedures are medically necessary or advisable for their patients. Each of these provisions violates the constitutional principle that the state may not harm citizens by thrusting health risks upon them, and therefore each must be struck down.

ARGUMENT

1. THE RIGHT NOT TO HAVE GOVERNMENT COMPEL HARM TO HEALTH IS FUNDAMENTAL TO OUR JURISPRUDENCE.

Missouri contends that the right to choose an abortion "has no basis in liberty interests that are either 'implicit in the concept of ordered liberty,' *Thornburgh*, 476 U.S. at 792, or otherwise deeply rooted in this 'Nation's history and tradition.' *Id.*" Brief for Missouri at 15. Missouri is wrong. Nothing is more fundamental or central to ordered liberty and to this Court's jurisprudence than the right to be protected from government actions that threaten individual life or health.

At the core of any democratic society lies the common understanding that the state is formed to further the welfare of its citizens, not to harm them. Three centuries ago, John Locke described the commonwealth as "a society of men constituted

only for the procuring, preserving, and advancing their own civil interests," at the forefront of which he identified health. J. Locke, *A Letter Concerning Toleration* 17 (1955). Thus, "[government's] Power in the utmost Bounds of it, is limited to the publick good of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave or designedly to impoverish the Subjects." J. Locke, *Two Treatises of Government* 403 (P. Laslett rev. ed. 1963); *see also* J. Mill, *On Liberty* 69, 72 (1988) ("Over himself, over his own body and mind, the individual is sovereign . . . . Each is the proper guardian of his own health, whether bodily *or* mental and spiritual.") In short, in the absence of compelling communal interests, the structure of our constitutional system forbids the state from imposing health risks upon its citizens.[2]

This restraint on governmental power is undoubtedly fundamental, being required by "the teachings of history [and] solid recognition of the basic values that underlie our society." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). Long before the United States Constitution was enacted, the right to be free from unwanted physical harm was already embedded in thirteenth-century English common law. F. Maitland, *The Forms of Action at Common Law* (1909). In its earliest manifestation, the tort of battery, the right to be free from physical harm continues to protect the individual against even the slightest unwanted touching. A few years before the American revolution, Sir William Blackstone wrote that "the preservation of a man's health from such practices as may annoy it . . . are rights to which every man is entitled . . . ." 1 W. Blackstone, *Commentaries* *130 (1765). Almost a hundred years ago, this Court aptly observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from

2 Such communal interests would include the nation's compelling need to draft an army to insure its preservation. *See Jacobson v. Massachusetts*, 197 U.S. 11, 28-29 (1905).

all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

The health interests protected by the Constitution and our nation's traditions prohibit the accomplishment of even legitimate government goals by means which expose individuals to danger. Even where the state is entitled to act, it must do so in a manner that respects the health of each individual citizen. This obligation was evident in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), a case which implicated both the individual's right to health preservation and the need for society to protect itself against an epidemic threatening the health of the whole community. The Court upheld a mandatory smallpox vaccination law on the ground that the state's compelling interest in protecting communal health was sufficiently strong to override a general reluctance to submit to vaccination. Nevertheless, the Court felt bound to exclude a statutory interpretation that would constitute a legislative decision to vaccinate an individual "[i]f it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination by reason of his then condition, would seriously impair his health, or probably cause his death." *Id.* at 39.

The freedom of individuals to exercise their autonomy in determining for themselves the extent to which they will assume health risks has deep roots in the United States Constitution. Thus, the Court has permitted compelled blood samples, but only after assuring itself that "for most people the procedure involves virtually no risk, trauma or pain." *Schmerber v. California*, 384 U.S. 757, 771 (1966). In forbidding forced surgery to remove a bullet for use as evidence, the Court held that

> [a] crucial factor in analyzing the magnitude of the intrusion in *Schmerber* is the extent to which the procedure may threaten the safety or health of the individual. . . . Notwithstanding the existence of probable cause, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.

Winston v. Lee, 470 U.S. 753, 761 (1985). Similarly, the existence of potential health risks, in addition to the concern for

personal autonomy, precludes government officials from constitutionally forcing dangerous electroconvulsive treatment or psychotropic drugs upon unwilling individuals. *E.g.*, *Lojuk v. Quandt*, 706 F.2d 1456, 1465 (7th Cir. 1983). As the Court has observed, "[a]mong the historic liberties . . . was a right to be free from and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

Justice Stevens' concurring opinion in *Carey v. Population Services International*, 431 U.S. 678 (1977), illustrates the nature of this limitation on permissible government action. Even though the objective of deterring sexual conduct among teenagers is a legitimate one, the state cannot seek to accomplish its goal by proscribing contraceptives, because that action increases the risk of unwanted pregnancies and venereal disease. While acknowledging that the state may properly perform a teaching function, Justice Stevens insisted that "an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate." *Id.* at 715. And, apart from its teaching role, the state is constitutionally precluded from injuring individuals as a means of regulating the behavior of those who engage in officially disfavored conduct. "This kind of government-mandated harm is . . . appropriately characterized as a deprivation of liberty without due process of law." *Id.* at 716.

As Justice Stevens has made clear, the government can promote its interests in ways, such as educational campaigns, that respect individual autonomy and do not threaten the lives or health of its citizens. The existence of a legitimate government interest does not justify government-mandated harm to the health of women.

II. *ROE V. WADE* AND SUCCEEDING CASES REFLECT THE FUNDAMENTAL PREMISE THAT GOVERNMENT MAY NOT, IN DISREGARD OF INDIVIDUAL AUTONOMY, COERCE INDIVIDUALS TO ASSUME INCREASED HEALTH RISKS.

The historic liberty to be free from governmental actions that adversely affect individual health was exemplified in *Roe v. Wade*. In holding that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153, the Court repeatedly displayed its concern for the effects of state regulation of abortion upon the health of pregnant women.[3] Crucial to its holding was the recognition that:

> The detriment that the State would impose upon the woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.

Id.

The Court initially acknowledged the constitutional significance of public health concerns by setting forth in detail the respective positions on abortion of the present amicus, the American Public Health Association (APHA), and the American Medical Association. *Id.* at 142-46. The Court then reasoned that restrictions on abortion could not be imposed in the first trimester because abortion was safer than childbirth during that period. *Id.* at 149, 163.[4] It also concluded that regulation was permissible after the first trimester to promote the state's "important and legitimate interest in preserving and protecting

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3 By locating a woman's right to choose whether or not to bear a child within the constitutional right to be free from government-mandated harm to health, amici APHA et al. do not mean to suggest that her decision is not also encompassed within the right to privacy. On the contrary, amici firmly endorse the commitment to privacy embodied in *Roe v. Wade*.

4 Today, legal abortion is substantially safer than childbirth throughout pregnancy. *See infra* at 15-16.

the health of the pregnant woman." *Id.* at 162; *see also id.* at 148-50. For the same reason, while it acknowledged the state's interest in protecting a viable fetus, the Court made crystal clear that at no point in pregnancy—even after the fetus becomes viable—may the state regulate or proscribe abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. Nor did the two dissenters in *Roe v. Wade* and its companion case, *Doe v. Bolton*, dispute the health rights of pregnant women. Neither contested the constitutional right of a woman to obtain an abortion when her "life or health" is in jeopardy. 410 U.S. 179, 221 (1973) (White & Rehnquist, JJ., dissenting).

While the Court has acknowledged a *state* interest in the protection of viable fetal life, it has never recognized *the fetus itself* as having enforceable constitutional rights. "No member of this Court has ever suggested that a fetus is a 'person' within the meaning of the fourteenth amendment." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring). In other words, this case, like other challenges to state restrictions on access to legal abortion, does not require this Court to mediate a conflict between the legal rights of a woman and those of her fetus, but rather to define the extent of the state's power to dictate that a woman must undergo health risks greater than those she wishes to bear.

On every occasion it has addressed the issue, this Court has unequivocally held that a pregnant woman's health cannot be sacrificed in order to protect her fetus. Striking down a Pennsylvania statute that limited women to the abortion technique that would best ensure that a fetus be aborted alive, the Court insisted that a woman must be free to choose the method of abortion that furthers her own health, regardless of its effect upon the prospects of fetal survival. "[T]he woman's life and health must *always* prevail over the fetus' life and health when they conflict." *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (emphasis added). Similarly, in *Thornburgh*, the Court found an abortion regulation unconstitutional because "it required a trade-off between the woman's health and fetal

survival and failed to require that maternal health be the physician's paramount consideration." 476 U.S. at 768-69.

The protected health interest is a broad one. In *Doe v. Bolton*, the Court defined "health" to include:

> all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All those factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

410 U.S. at 192, quoted in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 467 (1983) (O'Connor, J., dissenting); *see also United States v. Vuitch*, 402 U.S. 62, 72 (1971) ("health" must be interpreted according to "general and modern understanding" which includes psychological as well as physical well-being).

Public health data demonstrate that forcing women to carry unwanted fetuses to term subjects them to the risk of grave physical and psychological injury. The dissent in *Roe v. Wade* and *Doe v. Bolton* thus rested on the mistaken factual assumption that those cases concerned only "those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc." 410 U.S. at 179. As this brief will show, there is no such thing as a pregnancy that does not put a woman's life and health at risk. It is precisely because serious health concerns are at stake in all pregnancies, and particularly those that are unwanted, that the Court is constitutionally bound to protect the right to choose abortion.

III. RESTRICTING ACCESS TO LEGAL ABORTION VIOLATES THE FUNDAMENTAL RIGHT OF INDIVIDUALS TO BE FREE FROM GOVERNMENT-MANDATED HARM TO THEIR HEALTH.

Missouri urges this Court to replace *Roe v. Wade*'s strict scrutiny analysis with a rational basis test for reviewing state regulation of abortion services. The criminalization of abortion that would follow promises a devastating impact on women's health. In the alternative, Missouri urges this Court to replace the *Roe v. Wade* analysis with an untried formulation that would apply strict scrutiny to abortion regulations only when they "unduly burden" the right to choose. If adopted, this standard—which has been renounced by its original proponent, *see* Amicus Brief for the United States at 22—would lead to a proliferation of state restrictions on access to legal abortion with consequent risks to individual life and health.[5]

Faced with such restrictions, a pregnant woman is left with three alternatives. First, she can unwillingly carry the fetus to term, thus being subjected to the serious health risks set forth below. Second, confronted with insurmountable costs or reduced availability of legal abortion services, women who see no practical alternative may resort to potentially lethal back-alley practitioners or self-induced abortions. Third, some women may eventually succeed in obtaining legal abortions, but at greater risk to their health than if the abortion were obtained promptly after consultation with her physician. Thus all regulations that impede, delay or deny access to legal abortion jeopardize women's lives and health.

5 As previous cases show, such restrictions could include the following requirements: the presence of two doctors during abortions; use of the abortion technique most likely to ensure that the fetus be aborted alive; prior approval of any abortion by a hospital committee; confirmation of the performing doctor's medical judgment by two additional doctors who have independently examined the patient; viability tests; mandatory waiting periods; parental consent; spousal consent; the placement of an infant who survives an attempted abortion as an "abandoned ward of the state" with resulting termination of the rights of the natural parents; disclosure to a woman of so-called "detrimental physical and psychological effects" of abortion; and disclosure of private records to the public.

A. Restricting Access to Legal Abortion Would Subject Pregnant Women to Risks of Mortality and Morbidity.

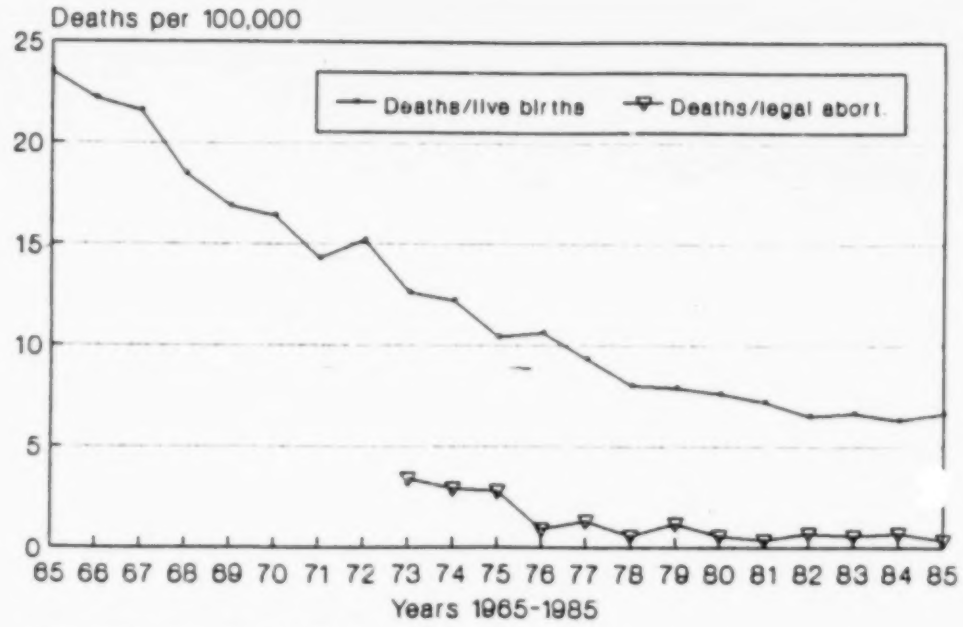
One obvious alternative for a woman who finds her access to legal abortion blocked by the state is to continue her pregnancy despite her desire to terminate it. By preventing the woman who chooses not to bear a child from obtaining a legal abortion, the state forces her to endure a much higher risk of death from pregnancy and childbirth. The state also forces her to undergo similarly elevated risks of serious medical complications. C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986* 111 (1986); *see also* LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Med. Assoc. 188, 190-91 (1982); Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. Am. Med. Assoc. 192, 195-96 (1982).

As shown in Figure 1, in 1985 the death rate resulting from pregnancy or childbirth was 6.6 per 100,000 live births.[6] In the same year the risk of mortality from legal abortion was more than 16 times lower at 0.4 deaths per 100,000 legal abortions performed. Put in hard numbers, as shown by Figure 2, in 1985 250 women died from their pregnancies and childbirth compared to just 6 women who chose legal abortions. The women who died as a result of continuing their pregnancies were the victims of complications arising from cesarean sections, embolism, hypertensive disease, ectopic pregnancy, hemorrhage, and cerebrovascular accidents. Rochat, Koonin, Atrash & Jewett, *Maternal Mortality in the United States: Report from the Maternal Mortality Collaborative*, 72 Obstetrics & Gynecology 91, 93 (1988).

Similarly, health damage short of death is much more frequent as a result of pregnancy and childbirth than as a result of legal abortion. Out of every 10 women who go through pregnancy and childbirth, 6 are treated for some medical complication, and 3 out of 10 are treated for major complications.

6 This figure excludes those who ended their pregnancies by legal abortion or who died from ectopic pregnancies or miscarriages.

Figure 1: Number of maternal deaths per 100,000 live births and per 100,000 legal abortions, 1965-1985

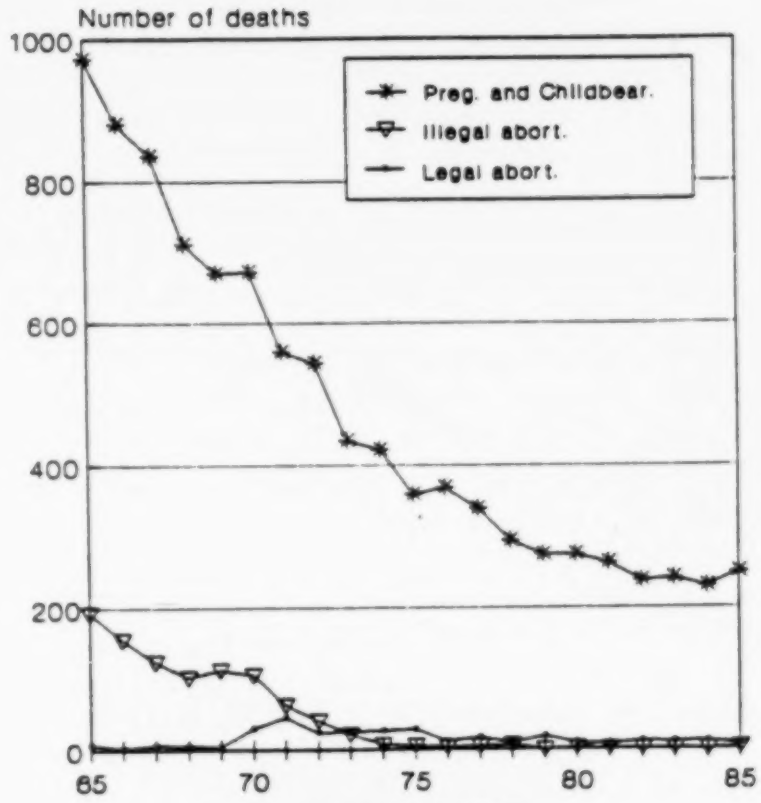


Sources: see Appendix B.

The most common health problems occur during labor and delivery. These problems include such complications as severe lacerations of the perineal muscle, cervix or vagina and severe postpartum hemorrhage. Due to complications, roughly 2 out of 10 deliveries are by cesarean section, a major surgical procedure that invariably subjects women to substantial risks to life and health. R. Gold, A. Kenney & S. Singh, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States* 10 (1987). The medical risks of cesarean section include death, infection, organ trauma, pulmonary embolus, delayed wound healing, hernia, bowel obstruction and hemorrhage, in addition to surgical pain and disfigurement. National Institute of Child Health, *Caesarean Childbirth: Report of a Consensus Develop-*

ment Conference 635 (1981). As many as one-third of cesarean patients suffer from post-operative infections. Marieskind, *Cesarean Sections*, 7 Women & Health 179, 186 (1982).

Figure 2: Maternal deaths due to pregnancy and childbearing, illegal abortions, and legal abortions, 1965-1985



Sources: see Appendix B.

Note: Studies have shown that maternal mortality, including that due to pregnancy and childbearing, is undercounted by the vital statistics system. *See* Centers for Disease Control, *Maternal Mortality: Pilot Surveillance in Seven States*, 34 Morbidity & Mortality Weekly Rep. 709-11 (1985). Similarly, the numbers of deaths from illegal and legal abortion before 1972 are understated because they are not adjusted for underreporting. The temporary increase in deaths due to legal abortions in the early 1970s is explained by the legalization of abortion in certain states and the consequent dramatic increase in the number of legal abortions performed, combined with the relative novelty of the procedures for most practitioners.

In marked contrast, about 86 percent of legal abortions are performed during the first trimester by a simple procedure called suction curettage. This procedure takes about ten minutes and can be done with local or general anesthesia. Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5, 6 (1987). Adjusted to take account of other methods of legal abortion used at later stages of gestation, the rate of major complications for women with no preexisting complications or concurrent sterilization was less than 0.5 percent for the period from 1975 to 1978. C. Tietze & S. Henshaw, *Induced Abortion, A World Review 1986* 104 (1986). Only 0.7 percent of first trimester legal abortions entail intra-abdominal operations and second trimester legal abortion methods lead to major surgery in only 0.1 to 0.2 percent of cases. Thus the risk of having to undergo major surgery resulting from legal abortion is roughly one hundredth that of carrying a pregnancy to term. Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586, 1587 (1982).

There is evidence that the risk to a woman of continuing rather than terminating her pregnancy may be substantially greater when the pregnancy is unwanted. Women with negative attitudes towards their pregnancies have a higher rate of postpartum infection, hemorrhages and postpartum depression than those who want to carry their pregnancies to term. *Id.* These serious health risks can include lasting psychological damage. One study of Czechoslovakian women revealed that only 27 percent of women denied the right to choose abortion were able to cope fully with the resulting pregnancy and child.[7] Half of the women showed signs of mental disturbance and emotional strain for a considerable length of time after giving

7 On the other hand, women who have a full range of reproductive options open to them are more likely to take charge of their lives and their fertility. *See* Birdsall & Chester, *Contraception and the Status of Women: What is the Link?*, 19 Fam. Plan. Persp. 14 (1987). For example, research shows that unmarried teenagers whose first pregnancy ended in abortion were only half as likely to become pregnant a second time as those unmarried teenagers whose first pregnancy resulted in a live birth. Koenig & Zelnik, *Repeat Pregnancies Among Metropolitan-Area Teenagers: 1971-1979*, 14 Fam. Plan. Persp. 341, 342 (1982); *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

birth. H. David, Z. Dytrych, Z. Matejcek & V. Schuller, *Born Unwanted: Developmental Effects of Denied Abortion* 48 (1988).[8]

For some women, the risks associated with childbirth are especially grave. Pregnancy exacerbates the health conditions of women who suffer from heart disease, diabetes, hypertension, kidney disease, sickle cell anemia, epilepsy and malignant tumors. *See generally* F. Arias, *High Risk Pregnancy and Delivery* (1984); G. Burrow & T. Ferris, *Medical Complications During Pregnancy* (1982). For example, a woman suffering from diabetes may become blind through the worsening during pregnancy of pre-eclampsia. There is also evidence that a series of pregnancies will advance her diabetes at a faster rate. Other risks increased through pregnancy for a woman with an aggravated diabetic condition are an increased likelihood of infection and postpartum hemorrhage and an increased need for a cesarean section. J. Pritchard & P. MacDonald, *Williams Obstetrics* 680, 743 (1980). Today, an increased proportion of pregnancies in high-risk groups are terminated by abortions, thereby protecting the health of pregnant women. Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Fam. Plan. Persp. 26, 26-27 (1984).

Over the last several decades, all aspects of obstetrical care have improved, but most dramatic of all have been the advances in the safety of legal abortion procedures. Between 1973—the year *Roe v. Wade* made legal abortion available nationwide—and 1985, as shown in Figure 1, the death rate for legal abortions fell more than eight times from 3.4 to 0.4 deaths per 100,000 procedures. As noted above, *Roe v. Wade*'s prohibition of state regulation in the first trimester was based on the fact that legal abortion during the first trimester was safer than continuing the pregnancy. Today, at *no* point in pregnancy is

8 Studies of children born to women denied abortions demonstrate that involuntary childbirth harms the psychological health of the children as well as that of the mothers. *See generally* H. David, Z. Dytrych, Z. Matejcek & V. Schuller, *Born Unwanted: Developmental Effects of Denied Abortion* 93-101 (1988); David & Matejcek, *Children Born to Women Denied Abortion*, 13 Fam. Plan. Persp. 32, 33 (1981); Baldwin & Cane, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34, 37 (1980).

the risk of death from legal abortion higher than the risk of death from childbirth. C. Tietze & S. Henshaw, *Induced Abortion, A World Review 1986* 110-11 (1986); *see also* Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Fam. Plan. Persp. 26, 26-27 (1984); Atrash, MacKay, Binkin & Hogue, *Legal Abortion Mortality in the United States: 1972 to 1982*, 156 Am. J. Obstetrics & Gynecology 605 (1987). The increased safety of abortion procedures is due to their availability early in gestation, increased medical expertise and improved medical technology. Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586, 1587 (1982).[9]

B. Denial of Access to Legal Abortion Would Relegate Women to the Dangers of Self-Induced and Back-Alley Abortions, Which Include Death.

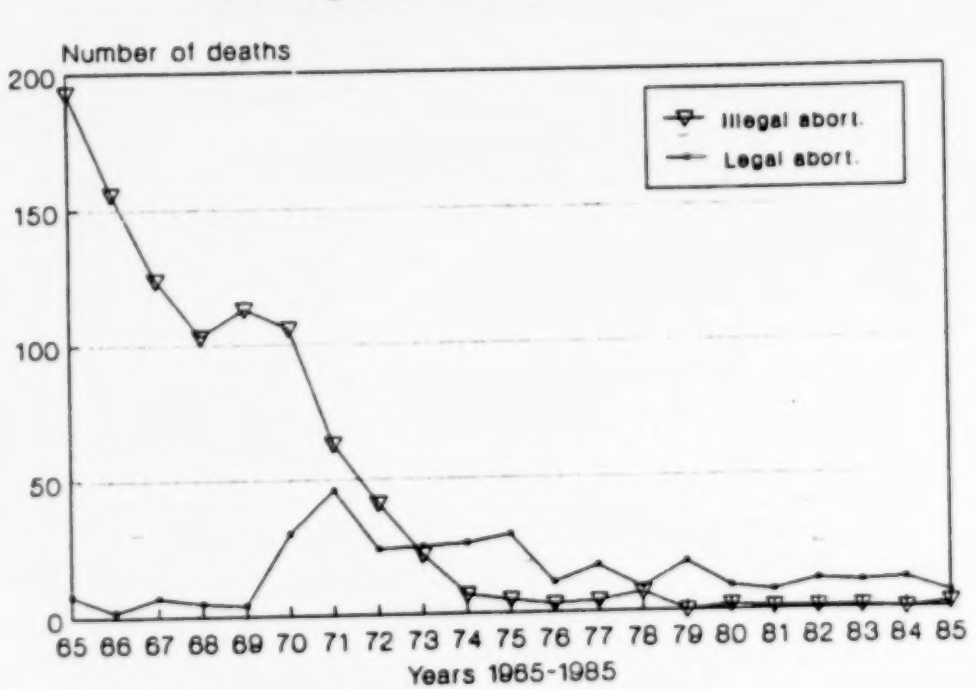
Another alternative available to women whose access to legal abortion is blocked by the state is to put their lives and health in the hands of back-alley practitioners or to attempt dangerous self-induced abortions. Tragically, the experience prior to *Roe v. Wade* showed that when the state prohibited legal abortion, many desperate women did "choose" this option of last resort. Although difficult to quantify, it has been estimated that the

9 Contrary to the assertions appearing in the brief of *amicus curiae* Focus on the Family and Family Research Council of America, legal abortion does not adversely affect subsequent pregnancy outcomes, nor does it lead to an epidemic rise in miscarriages, premature births or low birthweight babies. Studies have shown no demonstrable increase in the frequency of fetal loss in any one of the trimesters of pregnancy among women who have previously had abortions. Nor is there any significant association between prior induced abortion and low birthweight, ectopic pregnancy, complications of pregnancy or labor, or congenital malformations. C. Chung, P. Steinhoff & R. Smith, *Effects of Induced Abortion on Subsequent Reproductive Function and Pregnancy Outcome* (1981); Hogue, Cates & Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 Epidemiological Reviews 66 (1982). To the contrary, by reducing the incidence of low birthweight babies, the availability of legal abortion has significantly lowered neonatal mortality rates in the United States. Miller, Stokes & Warland, *The Effect of Legalization and Public Funding of Abortion on Neonatal Mortality: An Intervention Analysis* (1985); *see also* Corman, Joyce & Grossman, *Birth Outcome Production Function in the United States*, 22 J. Hum. Resources 339 (1987).

yearly total of illegal abortions in the United States prior to legalization was somewhere between 200,000 and 1,200,000. M. Calderone, *Abortion in the United States* 180 (1958).

Figure 3 shows that in 1965, while restrictions were still in place, 193 women died as a result of illegal abortions in the United States. Twenty years later, with legal abortion available nationwide, only 2 such deaths occurred (indeed, the previous year not a single death had resulted from illegal abortions). Combining that figure with the low rate of only 6 deaths resulting from legal abortion, less than 10 women died as a result of abortions in 1985 compared to over 200 a couple of decades previously, before abortion was legalized.

Figure 3: Maternal Deaths due to illegal and legal abortions, 1965–1985



Sources: see Appendix B.

Thus, the legalization of abortion has radically reduced the numbers of women killed and injured in attempts to terminate their pregnancies. Cates & Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 86-87 (1976). One researcher estimated that a total of 1,500 deaths were averted during the 1970s by the legalization of abortion and that the number of life-threatening, but not fatal, complications that were averted probably reached several tens of thousands. Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Fam. Plan. Persp. 26 (1984); *see also* Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982). Only two decades ago, as shown by Figure 2, abortion (almost always illegal) accounted for more than one fifth of all maternal deaths, whereas today, despite the greatly increased numbers of legal abortions, it represents less than one twentieth of the total. Deaths from illegal abortions have been practically eradicated.

Apart from mortality rates, the availability of legal abortion has reduced morbidity—meaning illness—resulting from self-induced and back-alley abortions. In the 1960s, complications resulting from illegal abortions accounted for more than 20 percent of all pregnancy-related admissions to municipal hospitals in New York and California. E. More-Cavar, *International Inventory of Information on Induced Abortion* (1974). Abortion-related complications requiring hospitalization fell sharply during the 1970s, with the steepest drop coming in 1973 following *Roe v. Wade*. Since 1973, such hospitalizations have been minimal. Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982). In contrast, in developing countries where legal abortion is still not generally available, 20 to 40 percent of admissions to maternity wards have been attributed to complications from illegal abortions. B. van den Berg & C. Chieng, *Maternal Mortality and Differentiation by Cause of Death* in *New Developments in Analysis of Mortality and Causes of Death* 250 (1986).

The case of just one woman illustrates the personal and societal costs that result from government-denied access to legal abortion. A twenty-two year old mother of a three-year old daughter, this woman was brought unconscious into a Texas

emergency room on January 17, 1953. Two weeks after learning of her pregnancy,

> she went into the bathroom, inserted a rubber catheter into the vagina, and injected air through it with a bulb syringe. A few minutes later her husband found her lying unconscious on the bathroom floor. He said she appeared blue, and had trouble breathing. He brought her immediately to Parkland Hospital.

Haynes, *Cerebral Hypoxia from Air Embolus Following Attempted Abortion*, 71 Am. J. Obstetrics & Gynecology 1111, 1111-12 (1956). Upon arrival at the hospital, the patient was starved of oxygen and her breathing labored. Her arms were limp and all reflexes absent. Frothy pink fluid bubbled from her mouth. She displayed the symptoms of neurological damage. A tracheotomy was done to allow her to breathe. After she aborted the fetus, the patient suffered repeated convulsions throughout the night and next morning demonstrated spastic paralysis. Her eyes were unable to focus. This woman was lucky to survive at all. Her condition—cerebral hypoxia following intrauterine administration of air (in those days a common method of self-induced abortion)—is normally fatal. Two weeks later, she was still being sedated to control her "frightful screaming," which was interrupted only by occasional monosyllables. Although her bodily functions gradually returned, the brain damage caused by her self-induced abortion had rendered her "totally irrational" and at the time of discharge she showed the mental status of a small child. *Id.* The medical literature abounds with similar horror stories of the victims of restricted access to legal abortion. *See, e.g.*, Rosenfield, *Roe v. Wade and the Public's Health*, Nation's Health 10 (Mar. 1989); Zakin, Godsick & Segal, *Foreign Bodies Lost in the Pelvis during Attempted Abortion with Special Reference to Urethral Catheters*, 70 Am. J. Obstetrics & Gynecology 233 (1955); Veprovsky & Ostreich, *Traumatic Perforation of the Uterus Following Attempted Self-Induced Abortion with a Rubber Catheter*, 68 Am. J. Obstetrics & Gynecology 1615 (1954).

Despite the dangers of illegal abortions, the sad truth is that women will continue to obtain them. According to the Pan

American Health Organization, an estimated 20 to 25 percent of pregnancies are illegally aborted in Latin America, where legal abortion is generally unavailable. These illegal abortions are the leading pregnancy-related cause of mortality. Simons, *Abortions Across Latin America Rising Despite Illegality and Risks*, N. Y. Times, Nov. 26, 1988, at 1, col. 4. The World Health Organization estimates that 115,000 to 200,000 women die each year because of illegal abortions. E. Royston & S. Armstrong, *Preventing Maternal Deaths* (forthcoming 1989); *see also* Lettenmaier, Liskin, Church & Harris, *Mothers' Lives Matter: Maternal Health in the Community*, s.L (7) Population Reports 4 (1988). Predictably, in light of these facts, when Romania restricted access to legal abortions in 1966, maternal deaths sharply increased. J. Legge, *The Unintended Consequences of Policy Change: The Effect of a Restrictive Abortion Policy*, 15 Admin. & Soc'y 243, 251 (1983).

The health consequences of abortion in terms of mortality and morbidity depend largely on the quality of the procedures used and the skill of the provider. "If abortions are illegal according to the laws of the land they are often performed by medically untrained persons utilizing crude methodology, and may have direct consequences on a woman's health." B. van den Berg & C. Chieng, *Maternal Mortality and Differentiation by Cause of Death* in *New Developments in Analysis of Mortality and Causes of Death* 239, 247 (1986).

Increased mortality and morbidity would certainly result in the United States if states are permitted to restrict or delay access to abortion. In 1970, by liberalizing its abortion laws before *Roe v. Wade* was decided, New York was one of the first states to acknowledge that denying or delaying access to abortion had exposed women to often fatal perils. As its health administrators later recalled:

> One of the most compelling reasons for favoring a liberalized abortion law was to reduce or eliminate the disastrous effects following illegal or criminal abortions carried out under clandestine, unsafe circumstances—usually by unskilled, unqualified persons. Before the statute was changed, deaths due to such abortions constituted the

leading cause of maternal death. How many criminal abortions took place year after year is conjectural but clearly these accounted for thousands of women being admitted to hospitals because of sepsis, hemorrhage, and shock. The more fortunate victims survived, although often invalidated for long periods and rendered reproductive cripples. To the women the cost in health was great. The burden cast on their families was likewise great since many of the patients were mothers of young children. The community and the hospitals often had to assume the financial burdens since most of these women were poor. The proportion of septic and otherwise complicated abortions with consequent fatalities was highest in poor minority groups. Women who had greater economic security managed to obtain relatively safe abortions under better conditions.

Pakter, O'Hare, Helpern & Nelson, *Impact of the Liberalized Abortion Law in New York City on Deaths Associated with Pregnancy: A Two-Year Experience*, 49 Bull. N.Y. Acad. Med. 804, 805 (1973).[10]

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10 Interestingly, the early legalization of abortion in New York did not ameliorate the strains formerly placed on health care facilities by illegal abortions. Rather, the staggering demand for legal abortions from out-of-state residents exacerbated the existing burdens on the obstetrical and gynecological resources of the state.

Immediately after the introduction of legal abortion in 1970, thousands of women thronged to New York City from other states. Fully two thirds of the 334,865 abortions performed during the next two years were to nonresidents. Pakter, O'Hare, Nelson & Svigir, *Two Years Experience in New York City with the Liberalized Abortion Law: Progress and Problems*, 63 Am. J. Pub. Health 524 (1973). In 1973, after abortions became available nationwide, the numbers of women from out of state seeking abortions in New York City dropped dramatically. In 1986, for example, less than one in twelve of the 89,054 women who obtained abortions in New York City were nonresidents. New York City Department of Health, Bureau of Health Statistics and Analysis, *Summary of Vital Statistics 1986* 12 (1987). In the post-*Roe* period, approximately 90 percent of all abortions in the United States have been performed on women in their state of residence. Ellerbrock, Atrash, Rhodenhiser, Hogue & Smith, *Abortion Surveillance, 1982-1983*, 36 Morbidity & Mortality Weekly Rep. 11SS, 41SS (Feb. 1987).

In short, restricted access to abortion services drives desperate women to inflict potentially lethal injuries upon themselves or to put their lives in the hands of illegal back-alley practitioners. Notwithstanding the existence of safe abortion procedures based on advanced technology, illegal abortions will inflict serious injury and take many lives if states such as Missouri are permitted to impede or deny access to legal abortion.

C. The State Imposes Risks on Women's Health by Delaying Access to Legal Abortion.

State regulations requiring involvement of more than one physician in any legal abortion, compulsory waiting periods, committee approval rules, or specified testing procedures, all create delay and expense. Some women, especially young or poor women, may be sufficiently intimidated by these non-medically based obstacles to forego completely their right to choose an abortion. In that event, as we have demonstrated, the state imposes upon them the significant health risks of continued pregnancy and childbirth.

The inevitable delay resulting from the denial of medically appropriate abortion information and referral or from the imposition of non-medically based requirements may make it impossible for women, particularly if they are poor, to obtain a legal abortion. In many areas of the United States, abortion services are difficult to locate. As many as 21 percent of metropolitan areas and 91 percent of nonmetropolitan areas lack abortion providers. Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (1987). Moreover, once a provider is located, transportation may be difficult to arrange or afford. A woman may have difficulty scheduling time away from work without losing her job. Access to a telephone may be limited or nonexistent. Language barriers may prevent her from finding the proper clinic. *See* Henshaw, *Reducing Teenage Childbearing*, 78 Am. J. Pub. Health 619 (1988).

In this manner, non-medically based state regulation of abortion can transform a simple and inexpensive out-patient visit into a burdensome and costly ordeal. The women who are most likely to forego their right to choose an abortion as a result are poor women most in need of quality health care. Among these, women of color are disproportionately represented. *See* Joyce, *The Social and Economic Correlates of Pregnancy Resolution Among Adolescents in New York City, by Race and Ethnicity: A Multivariate Analysis*, 78 Am. J. Pub. Health 626 (1988).

The greater the delay imposed by the state, the harder it becomes for the pregnant woman to freely make and implement an informed decision as to her best course of action. Of those who routinely perform first trimester abortions, 57 percent do not perform abortions during the second trimester, and second trimester abortions are often more expensive even if a provider is located. Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63, 68-69 (1987). Moreover, although the risk of complications from legal abortion is dramatically less than that from pregnancy and childbirth, it remains true that for each week of delay, the risk of complications increases by 20 percent and the risk of death increases by approximately 50 percent. *See American Public Health Association Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 654 (1980).

Thus, by imposing increased cost and delay upon a woman seeking legal abortion, the state forces her into a situation where her ability to obtain a safe abortion is dramatically reduced. In this way, non-health based state regulations, deceptively innocuous on their face, risk the health of pregnant women.

If states are permitted once again to criminalize or restrict access to legal abortion, jurisdictions such as the present amicus New York City would suffer. The obstetrical and gynecological health care systems of many states and major cities are already woefully overburdened and unable to provide care for poor, pregnant women. Children's Defense Fund, *The Health of America's Children* 10-15 (1987); Wilkerson, *Infant Mortality: Frightful Odds in Inner City*, N. Y. Times, June 26, 1987, at 1, col. 2. The renewed demand for legal abortion from out-of-state residents would severely strain the obstetrical and gynecological facilities of cities and states that continue to allow legal abortion.

IV. THE MISSOURI STATUTE UNCONSTITUTIONALLY JEOPARDIZES WOMEN'S HEALTH.

A. The Fundamental Right to be Free from Government-Mandated Harm to Health Can Be Protected Only by Respecting Individual Autonomy in Making Health Care Decisions.

Because of the risks associated with pregnancy, childbirth and illegal abortions, the rule expressed in *Roe v. Wade* and succeeding cases—that a woman's health or life must always prevail over other state interests, including the state interest in potential human life—is essential to protect the individual from government-mandated harm. Critical to the constitutional protection against such harm is respect for the woman's autonomy in making her own decision as to what health risks she chooses to bear.

It is a central principle of sound public health care as well as of our longstanding legal traditions[11] that individuals, with the benefit of complete and objective information, should make their own health care decisions. *E.g.*, American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* ¶ 8.07 (1986) ("The patient should make his own determination on treatment"). Such decisions should not be made by doctors, lawyers or legislators.

This principle does not rest exclusively on the respect for individual autonomy that underlies our constitutional structure. Within the physician-patient relationship, it is understood that fully informed patients who actively make decisions about their own health options are the persons most likely to make the right decisions. As the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research pointed out, this is because patients who are fully informed by their physicians about their conditions and the

11 In the words of Judge Cardozo, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Schloendorff v. New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914), quoted in *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

available treatment alternatives are more likely to comply with proposed therapies and to experience speedier recovery from surgery. They are also more likely to protect their own well-being by monitoring their medication and by recognizing and reporting any symptoms requiring reevaluation of a particular therapy. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 69-70 (1982).

Meaningful exercise of the individual's right to make decisions affecting his or her own health depends upon the integrity of the physician-patient relationship. As reflected in legal and ethical rules of practice, developed from the time of Hippocrates, an open and uninhibited physician-patient relationship is essential for the physician to make a correct diagnosis and to identify the available health options for the patient to consider. Such a relationship cannot exist when the state forbids the physician from presenting information, offering advice and taking actions based *solely* upon the welfare of the patient. The physician whose conduct is controlled by some conflicting, state-prescribed restraint, regardless of what non-medical ideology it serves, is not truly functioning as a physician at all. When the government imposes such restraints, it deprives patients of the health care they have sought and to which they are entitled.

B. By Distorting the Information Available to Women, Depriving Them of Their Physicians' Best Judgment, and Forcing Them to Submit to Medically Unnecessary Tests, the Missouri Statute Unconstitutionally Subjects Women to Harm to Their Health.

The Missouri statute now under review and the abortion regulations this Court has previously declared unconstitutional all have one thing in common: they compel health care professionals to practice their profession according to a state agenda that dislodges the health of the patient from its historic and proper place as the physician's sole concern. By enacting such legislation, Missouri's lawmakers have usurped the role of the individ-

ual as an autonomous decision maker in matters affecting her own health, and in doing so have endangered the lives and health of Missouri women.

1. The Ban on Counseling or Encouraging Abortion Harms the Health of Women.

The Missouri statute forbids the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." Mo. Rev. Stat. § 188.205 (1986). The statute thus bans the use of public funds to give information or referrals concerning abortion to a woman whose health is endangered by continuing her pregnancy. This will have an especially cruel impact upon women suffering from serious medical conditions, such as heart disease, kidney disease, severe hypertension, sickle-cell anemia and severe diabetes. As we have seen, it is vital for a woman with any one of these conditions to be informed that if her method of contraception fails, she may face serious health consequences if she does not have an abortion as soon as possible. *See generally* F. Arias, *High Risk Pregnancy and Delivery* (1984); G. Burrow & T. Ferris, *Medical Complications During Pregnancy* (1982). By forbidding health care personnel from advising a woman that an abortion would benefit her health, the Missouri statute does exactly what this Court outlawed in *Roe*, *Thornburgh* and *Colautti*: it sacrifices a woman's health for the sake of a fetus.

Moreover, from a medical point of view, the "necessary to save her life" exception is impossible to apply. When consulted by a patient who seeks advice or treatment, a physician's ethical obligation is to advise and treat that patient to the best of his or her medical abilities. There are many instances in which pregnancy poses serious risks to health, but there is no practicable way to determine whether those instances will necessarily result in death. *See generally* F. Arias, *High Risk Pregnancy and Delivery* (1984). Yet the statute permits physicians to fully inform their patients only when they determine that an abortion is *necessary* to preserve a patient's life.

The ban on abortion counseling also harms women's health by destroying the integrity of the physician-patient relationship.

The ethical and professional guidelines of amicus APHA, as well as those of the American Medical Association, the American Psychological Association and other professional groups, require the accurate and complete communication of treatment alternatives, including medically appropriate information about abortion to pregnant women, and also referrals where necessary.[12] Missouri's ban on abortion counseling will force physicians and other health care professionals to depart from accepted medical standards. In preferring fetal life, Missouri has unconstitutionally chosen to impose health risks upon pregnant women.

The statute at issue here does much more than merely fail to subsidize abortion procedures. *Cf. Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). By insisting upon the injection of incomplete, censored and misleading information into the sensitive dialogue between a woman and her publicly funded health care provider, Missouri will induce many women to assume increased health risks. The element of trust in a health care provider is particularly important when a woman has just been told that she is pregnant. At that moment, when she may be upset and frightened, uncertain as to what she

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12 *See American Public Health Association Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 652, 653 (1980) ("Education about abortion procedures and services should be the responsibility of all health agencies and professionals concerned with the care of women. . . . The medical professional has an obligation to establish referral relationships for the provision of abortion as with any other specialized medical services."); *see also* American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) ("In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy."); American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920, 921 (1979) (all options, including abortion, should be explored with pregnant teenagers); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981) (termination of pregnancy should be considered a civil right of the pregnant woman); American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* §§ 8.04, 8.07, 8.11 (1984); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981).

should do, she must be able to trust her health care provider to give her the accurate, complete and unbiased information she needs to make decisions. But instead the state forces a physician to abandon his or her patient and places pregnant women in a worse position than if the state had played no role at all. If Missouri's ban on counseling is upheld, pregnant women will be dangerously misled by partial and biased information. By disrupting the physician-patient dialogue to further its non-medical agenda, Missouri has unconstitutionally legislated that women endure increased risks to their health.

2. The Ban on the Use of Public Facilities or Public Employees to Perform Abortions Harms the Health of Women.

The Missouri statute also prohibits the use of public facilities or public employees to perform or assist abortions even when the abortion is paid for by private funds. Mo. Rev. Stat. §§ 188.210 & 188.215 (1986). Missouri's ban on the involvement of public employees in the performance of abortions, qualified only by an unworkable exception for abortions necessary to save a woman's life, will deny legal abortions to women who need them. Significantly, the ban applies even to a woman with certain health conditions, such as heart disease or sickle-cell anemia, for whom death as a result of childbirth may not be imminent, but who faces morbidity and possibly even mortality unless she obtains an abortion. If that woman does not have access to a private physician or a private facility, she will be prevented from consulting with or obtaining an abortion from any-qualified practitioner even though an abortion is medically indicated. For such women, the harm Missouri imposes by this provision is readily apparent.

3. The Blanket Requirement that Physicians Make Findings of Gestational Age, Fetal Weight and Lung Maturity Harms the Health of Women.

In addition, Mo. Rev. Stat. § 188.029 (1986) forbids a physician from performing an abortion on a woman "he has reason to believe is carrying an unborn child of twenty or more weeks

gestational age" without first fulfilling certain requirements. Specifically, the physician must determine if the "unborn child" is viable by performing tests to establish its gestational age, weight, and lung maturity, and must enter these findings and determination of viability in the medical record of the mother. There are *no* exceptions to these requirements.

Roe v. Wade and succeeding cases establish that if at any point either the life or the health of the pregnant woman is endangered, her right to terminate her pregnancy is protected. In such circumstances, fetal viability has no bearing on her constitutionally protected decision to choose an abortion. Requiring a determination of viability will impose health risks upon pregnant women. When a woman suffers from a condition that makes pregnancy dangerous and abortion is medically indicated, mandatory testing for viability will certainly cause her unnecessary anguish, which may deter her from obtaining the abortion that would protect her life or health.

Moreover, the performance of the required tests causes delay which increases risks to health. *See supra* at 23. And the tests themselves may prove harmful to pregnant women. Amniocentesis, for example, can cause bleeding as well as maternal cell contamination and infection. R. Blatt, *Prenatal Testing* 194 (1988). Amniocentesis also presents a small but significant risk of causing miscarriage. *See* Rhoads et al., *The Safety and Efficacy of Chorionic Villus Sampling for Early Prenatal Diagnosis of Cytogenic Abnormalities*, 320 New Eng. J. Med. 609 (1989).[13]

Furthermore, requiring that the tests be performed will burden the right to choose an abortion by greatly increasing the cost of the procedure. Amniocentesis, for example, the only test available to determine lung maturity, costs from $350 to $700. R. Blatt, *Prenatal Testing* 79 (1988). The increased costs for these medically unnecessary tests may delay a woman's ability to obtain an abortion, thereby adding risk to the procedure, or even prevent her from obtaining one altogether.

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13 Amici respectfully refer the Court to the *amicus curiae* brief of the American Medical Association, which more fully discusses the dangerous and medically inappropriate nature of Missouri's testing requirements.

In sum, the Missouri statute is unconstitutional because it endangers the health of women. It tears asunder the physician-patient relationship, denies women autonomy in matters affecting their own health, deprives them of safe and appropriate medical advice and services, and subjects them to potentially dangerous medical procedures.

Conclusion

For the reasons stated above, amici urge this Court to affirm the court of appeals' declaration that the Missouri statute is unconstitutional. Amici also urge this Court, in order to protect the fundamental constitutional right to be free from government-mandated harm to health, to leave untouched the strict scrutiny standard for reviewing state regulation of abortion.

Dated: New York, New York
March 30, 1989

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APPENDIX A

Individual Descriptions of *Amici Curiae*

The American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including both patients and health professionals such as physicians, nurses, health educators, and family planning specialists.

The Alan Guttmacher Institute (AGI) is an independent, nonprofit corporation for research, policy analysis and public education in the fields of reproductive health, population and broadly related areas of health and social policy. AGI's nonpartisan programs and activities are aimed at promoting public understanding, developing sound public policy and creating workable public and private sector programs that will enhance the ability of all women and men, in freedom and dignity, to exercise their rights and responsibilities with regard to reproduction and family formation.

The American College of Preventive Medicine (ACPM), established in 1954, is the professional organization of physician specialists who practice preventive medicine. ACPM provides leadership in research, professional education, development of public policy and enhancement of standards in that field. Its 2,000 members are involved in public health, aerospace medicine, occupational medicine and general preventive medicine activities. They work in many settings, including medical schools, schools of public health, industry, private and group practice, health departments, government and the armed forces.

California Physicians for Choice (CPC) is an organization of physicians which is dedicated to informing the public that abortion is an option that should not be abandoned and that outlawing or restricting access to abortion would seriously interfere with the rights and duties of physicians to provide patients with the best possible health care.

California Republicans for Choice (CRC) represents over 1,000 registered Republicans in California. CRC works to preserve the rights of individuals to conduct their own lives with a minimum of governmental interference and to ensure that all reproductive options—including contraception, sterilization, and abortion—are legal and available to all.

The City of New York is a municipality which has an interest in protecting the health and safety of all of its residents. In 1970, it was among the first cities to offer legal abortion services in its municipal health facilities. The City is dedicated to the continued provision of safe and legal abortion services as a necessary component in protecting the health of all women, especially poor women.

The Commonwealth of Massachusetts, Department of Public Health, founded one hundred and twenty years ago, is the oldest state department of health in the United States. The Department is mandated to "take cognizance of the interest of life, health, comfort and convenience among the citizens of the Commonwealth."

Joyce C. Lashof is Dean of the School of Public Health, University of California, Berkeley and a physician whose career has been devoted to public health and the delivery of medical care to underserved populations. She has directed a neighborhood health center in a poverty area of Chicago, served as Director of Public Health of the State of Illinois, and was also Deputy Assistant Secretary of Health for that state in 1977-78. In all of these positions she has been involved in policy issues of importance to women's health.

The National Abortion Federation is a professional membership organization of abortion providers representing 300 clinics, doctors' offices, and hospitals throughout the United States and Canada.

The New York State Republican Family Committee is an educational advocacy organization devoted to promoting policies that foster maximum individual liberty and freedom of choice, particularly in matters of health. Founded in 1984, the Committee has over 300 Republican party members with 99 percent residing in New York State. Its membership includes

lawyers, health care professionals, business people, educators, philanthropists, and numerous civic and political leaders.

Gilbert S. Omenn is Dean, and Patricia Wahl Associate Dean, of the School of Public Health and Community Medicine at the University of Washington. The School of Public Health and Community Medicine trains over 450 graduate students in disciplines related to all aspects of public health. The school's research and training in public health primarily focuses on disadvantaged populations.

Professor Allan Rosenfield is Dean of the Columbia University School of Public Health where he is professor of obstetrics and gynecology. Dean Rosenfield has had a long-standing involvement in and commitment to women's health generally, and, more specifically, reproductive health, as well as women's individual rights on reproductive health issues. The school of which he is dean is devoted to disease prevention, health promotion and, more broadly, to the protection of the health of individuals and of populations.

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APPENDIX B

Sources to Figures 1, 2 and 3

Deaths from illegal and legal abortions: *1965-1967*, 2A National Center for Health Statistics, *Vital Statistics of the United States, 1965* § 3 (fetal mortality) (1967), and equivalent volumes for 1966 and 1967. To distribute deaths categorized as "spontaneous or unspecified," it was assumed that the ratio of spontaneous abortion deaths to pregnancy and childbearing deaths (excluding abortion and ectopic pregnancy) was the same as during the years 1968-1972, and the remaining "unspecified" deaths were apportioned proportionately to illegal and legal abortion deaths. *1968-1971*, Tietze, *The Effect of Legalization of Abortion on Population Growth and Public Health*, in C. Tietze, F. Jaffe, E. Weinstock & J. Dryfoss, *Abortion 1974-1975; Need & Services in the United States, Each State & Metropolitan Area* 110-113 (1976). *1972-1982*, Ellerbrock, Atrash, Rhodenhiser, Hogue & Smith, *Abortion Surveillance, 1982-1983*, 36 Morbidity & Mortality Weekly Rep. 11SS-42SS (Feb. 1987). *1983-1985*, Centers for Disease Control, unpublished information. Note: for 1972-1985, 10 deaths from abortion not classified as to legality were included with deaths from illegal abortion.

Deaths from pregnancy and childbearing, excluding deaths from abortion, miscarriage and ectopic pregnancy: National Center for Health Statistics, *Vital Statistics of the United States*, volumes for 1965-1985.

Number of legal abortions: Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63-70 (1987). Figures for the years before 1973 are available from the Centers for Disease Control but were not used because they are incomplete.

Number of live births: National Center for Health Statistics, *Advance Report of Final Natality Statistics, 1985*, 36 Monthly Vital Statistics Rep. 13 (Supp. Jul. 17, 1987).

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
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BRIEF FOR A GROUP OF AMERICAN LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF AUTHORITIES

Cases: PAGE

Abele v. *Markle*, 351 F. Supp. 224 (D. Conn. 1972) ...27 & n

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 14n

Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) .....20n, 25 & n

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 14n, 16n

Carey v. *Population Services International*, 431 U.S. 678 (1977) 7, 13, 14n, 19n

Cleveland Bd. of Education v. *La Fleur*, 414 U.S. 632 (1974) 11

Colautti v. *Franklin*, 439 U.S. 379 (1979) 21n

Crandall v. *State of Nevada*, 6 Wall (73 U.S.) 35 (1868) 14

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 13, 14n, 19n

Engel v. *Vitale*, 370 U.S. 421 (1962) 27n

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 11

Griswold v. *Connecticut*, 381 U.S. 479 (1965).....*passim*

Harper v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) 14n

In re Winship, 397 U.S. 358 (1970) 14n

McCulloch v. *Maryland*, 4 Wheat: (17 U.S.) 316 (1819) 14

Meyer v. *Nebraska*, 262 U.S. 390 (1923)..... 5

Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982) 11

Moore v. *East Cleveland*, 431 U.S. 494 (1977)..... 5, 7, 8, 12, 18

PAGE

NAACP v. *Alabama*, 357 U.S. 449 (1958) 14n

NAACP v. *Alabama*, 377 U.S. 288 (1964) 16n

NAACP v. *Button*, 371 U.S. 415 (1963) 16n

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925).....5, 8, 14n

Plyler v. *Doe*, 457 U.S. 202 (1982)..... 12

Reed v. *Reed*, 404 U.S. 71 (1971)..... 11

Reynolds v. *Sims*, 377 U.S. 533 (1964) 14n

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 14n

Rochin v. *California*, 342 U.S. 165 (1952) 7

Roe v. *Wade*, 410 U.S. 113 (1973) .....*passim*

Runyon v. *McCrary*, 427 U.S. 160 (1976)..... 7

San Antonio Independent School Dist. v. *Rodriguez*, 411 U.S. 1 (1973)..... 12

Schmerber v. *California*, 384 U.S. 757 (1966) 6

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 14n, 15n

Skinner v. *Oklahoma*, 316 U.S. 535 (1942).....11, 18

Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 11, 20

United States v. *Guest*, 383 U.S. 745 (1966)..... 15n

West Virginia Bd. of Education v. *Barnette*, 319 U.S. 624 (1943) 8, 27n

Winston v. *Lee*, 470 U.S. 753, 760 (1985)..... 6, 7

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 8

Wooley v. *Maynard*, 430 U.S. 705 (1977)..... 8

Zablocki v. *Redhail*, 434 U.S. 374 (1978) 14n, 18

PAGE

OTHER AUTHORITIES:

A Children's Defense Budget FY 1989: An Analysis of Our Nation's Investment in Children (1988)..... 29n

ACLU, *30th Annual Report: Security and Freedom: the Great American Challenge* (1951)..... 17n

ACLU, *34th Annual Report: America's Need: A New Birth of Freedom* (1954)..... 17n

ACLU, *How Americans Protest* (1963)..... 17n

Allen, *Talking Liberties: Privacy, Choice, and Social Contract Theory*, 56 U. Cin. L. Rev. 461 (1987)..... 6

C.R. Austin and R.W. Short, *Embryonic and Fetal Development* (1972)..... 25n

Barker and Barker, *Civil Liberties and the Constitution* (4th ed. 1982) 16n

Barnett, *Foreward—The Ninth Amendment and Constitutional Legitimacy*, 64 Chi. — Kent L. Rev. 37 (1988) 14n

J.R. Bickenbach and K.A. Holbrook, *Proliferation of Human Embryonic and Fetal Epidermal Cells in Organ Culture*, 177 Am. J. Anat. 97 (1986)..... 24n

Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 Yale L.J 575 (1949) . 16n

Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928-29) . 13

Coulthard, *Maturation of glomerular filtration in preterm and mature babies*, 11 Early Human Development (1985) 23n

Davis, *Law, Science, and History: Reflections Upon In The Best Interests of the Child*, 86 Mich. L. Rev. 1096 (1988) 8n

PAGE

W. Donohue, *The Politics of the American Civil Liberties Union* (1985) 17

Dudziak, *Desegregation As a Cold War Imperative*, 41 Stan. L. Rev. 68 (1988)..... 16n

ECLC, *The Rape of the First Amendment* (1963)..... 17n

S. Estrich, *Real Rape* (1987) 19n

Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and Law (1988).....23 & n, 24n, 25

Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) 13

C. Fried, *Right and Wrong* (1978) 6n

Gerety, *Redefining Privacy*, 12 Harv. Civ. Rts.—Civ. Lib. L. Rev. 233 (1977)..... 6, 18

R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* (1988) 9, 21n

Grey, *Do We Have An Unwritten Constitution*, 27 Stan. L. Rev. 703 (1975) 13n

Grimes, *Second Trimester Abortions in the United States*, 16 Family Planning Perspectives 260 (1984)... 21n

Hallman, *et al.*, *Exogenous human surfactant for treatment of severe respiratory distress syndrome: a randomized prospective clinical*, 106 J. Pediatry 963 (1985) 23n

Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410 (1974) 6, 13n

Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 Family Planning Perspectives 90 (1985) 21n

PAGE

Heymann & Barzelay, *The Forest and the Trees:* Roe *v.* Wade *and its Critics*, 53 B. U. L. Rev. 765 (1973) ... 8n

Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. Pa. L. Rev. 177 (1988) 26n

Holmes, *Morphological and physiological maturation of the brain in the neonate and young child*, 3 J. Clin. Neurophysiology 207 (1986)..... 24n

H. Hoshi, M. Kan and W.L. McKeehan, *Direct Analysis of Growth Factor Requirements for Isolated Human Fetal Hepatocytes*, 23 In Vitro Cell Developmental Biology (1987)..... 24n

Hunter, "*Time Limits on Abortion*," *Reproductive Laws for the 1990's: A Briefing Handbook* (N. Taub and S. Cohen, eds. 1988) 22n

Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901 (1985) 16n

Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980) 7

Karst, *The Supreme Court, 1976 Term—Foreward: Equal Citizenship Under The Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977) 9n

R. Kluger, *Simple Justice* (1976)..... 15n

Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, 16 Labor History 37 (1975) 15n

Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984).....10, 25n

L. Levy, *Original Intent and the Framers' Constitution* (1988) 13n

PAGE

C. Markmann, *The Noblest Cry: A History of the American Civil Liberties Union* (1965) 17n

E. McDonagh and E. Richards, *Ethnic Relations in the United States* (1953)..... 16n

Mills, *Legacies of the Cold War in the Price of Liberty* (A. Reitman ed. 1968)..... 17n

K. Moore, *The Developing Human* (1982) 23n

Moore and Walsh, *Specific regulation of N-CAM/D2-CAM cell adhesion molecule during skeletal muscle development*, 4 Embo. J. 623 (1980) 24n

W. Murphy, J. Fleming & W. Harris, *American Constitutional Interpretation* (1986)..... 14n

Nsiah-Jefferson, "*Reproduction Laws, Women of Color and Low-Income Women*," *in Reproduction Laws for the 1990's: A Briefing Handbook* (N. Taub and S. Cohen, eds., 1988).....22n, 29n

J.R. Pasqualini and F. Kincl, *Hormones and the Fetus* (1985) 24n

Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 Yale L. J. 638 (1975)..... 8 & n

Regan, *Rewriting* Roe *v.* Wade, 77 Mich. L. Rev. 1569 (1979) .....7 & n, 10 & n, 21n, 26n

Rhoden, *Trimesters and Technology: Revamping* Roe *v.* Wade, 95 Yale L.J. 639 (1986) 21n

D. Richards, *Toleration and the Constitution* (1986) ... 9

Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) ..... 7 & n

L. Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* (1988) 28n, 29n

PAGE

Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987) 13n

R. Sidel, *Women and Children Last: The Plight of Poor Women in Affluent America* (1986).....28n, 29n

Spitz, Lee, Grimes, Schoenbucher and Lavorie, *Third Trimester Induced Abortion in Georgia, 1979 and 1980*, 73 Am. Journal of Public Health 594 (May 1983) 21n

The Report of the President's Committee on Civil Rights, to Secure These Rights (1947) 16n

The Republic of Plato (F. Cornford tr. 1945) 5n

L. Tribe, *American Constitutional Law* (2 ed. 1988) ..6n, 13n

L. Tribe, *Constitutional Choices* (1985)..... 10n

Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330 (1985) 10n

Wilkinson & White, *Constitutional Protection For Personal Lifestyles*, 62 Cornell L. Rev. 563 (1977) 8, 9

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BRIEF FOR A GROUP OF AMERICAN LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Consent of Parties

Appellants and appellees have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

Interest of Amici

This Brief is submitted on behalf of 885 American law professors (*see* Appendix) who believe that the right of a woman to choose whether or not to bear a child, as delineated by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), is an essential component of constitutional liberty and privacy commanding reaffirmation by this Court. To support our belief in the fundamental importance of the right of personal privacy within our constitutional system, and the centrality of reproductive

freedom within that right, this Brief draws upon an extensive body of scholarship produced by numerous law professors—many of whom are among those represented by this Brief—who bring to the issues involved a rich diversity of perspectives.

SUMMARY OF ARGUMENT

The Issues We Address. *Amici* address only the question whether *Roe*'s central holding should be overruled or significantly weakened. We do not address other questions presented by this case concerning the compatibility of various provisions of Missouri's abortion regulations with *Roe*'s central holding as it stands.

Procreative Choice and the Right of Privacy. This Court has recognized the right of personal privacy as a dimension of constitutionally guaranteed liberty. The essence of that right is freedom from governmental control over the diverse choices by which people crucially define their values and shape their lives. Decisions about conceiving and bearing children, and assuming parental responsibilities, lie at the core of this Court's privacy doctrine that prevents the State from imposing fundamental values and patterns of life on its citizens.

Procreative Choice and Equal Citizenship for Women. Reinforcing the conclusion that procreative freedom is an essential element of the constitutional right of personal privacy are the considerations embodied in the concept of equal citizenship. Any curtailment of the rights recognized in *Roe* will have a disparate and devastating impact on women, drastically undermining the equality guaranteed to women by the decisions of this Court. These oppressive consequences will weigh most heavily on the relatively dispossessed and powerless, and disproportionately burden racial minority groups.

Procreative Choice and the Protection of Unenumerated Rights. *Roe* v. *Wade* continued this Court's historic role of enforcing fundamental rights not specifically enumerated in the Constitution. Among such unenumerated rights are the right to travel, freedom of association, the right to vote, the equal protection component of the Fifth Amendment, the right to marry, and the requirement that the State prove criminal guilt beyond a reasonable doubt. These norms achieved recognition as an outgrowth of profound political, economic, and social forces in our history, just as the recognition of rights of reproductive freedom reflects changing social attitudes toward the roles of men and women. For women to achieve the full promise of "equal protection", it is necessary for them to control the child-bearing decision. The rights recognized in *Griswold* v. *Connecticut* and *Roe* v. *Wade* are facets of the movement toward women's equality that have also found expression in the equal protection jurisprudence of this Court.

Laws Restricting Procreative Choice Are Subject to a Test of Strict Scrutiny. This Court has developed the concept of "strict scrutiny" in order to ensure that fundamental constitutional liberties will not be denied to any person by thoughtless or unjustified governmental restrictions. Accordingly, any law restricting the free exercise of the fundamental right recognized in *Roe* v. *Wade* must be justified by a compelling state interest. This requirement demands more than the imposition of one set of moral values respecting an issue marked by widespread differences of conviction. Moreover, in order fully to protect this right, the State must achieve its compelling interest by narrowly tailored means, and must select means that are the least restrictive of the protected right.

The State's objective, as well as its means, must be weighed against the effect on the constitutional right. Any asserted state interest in fetal life or maternal health must be carefully evaluated, not only to establish its substantiality but also to ensure that its furtherance does not effectively obliterate a woman's right to terminate her pregnancy.

No Compelling State Interest Justifies Abortion Restrictions in Early Stages of Pregnancy. This Court, in *Roe* v. *Wade*, recognized that, even at a later stage of pregnancy, any state interest in fetal life must yield to the interest of maternal life or health. In the earlier stages of pregnancy, before the point at which survival outside the woman becomes biologically possi-

ble, there is no state interest sufficiently compelling to force a woman to make her body an involuntary agent of the State.

The viability standard, identified in *Roe* as marking the point where the State's interests in fetal life may arguably justify restrictions on abortion (always subordinate to the pregnant woman's interest in life and health), is on no "collision course with itself." By recognizing the biological realities of the stages of pregnancy, *Roe* continues to provide a workable distinction between an earlier stage of pregnancy at which freedom from state dictation of procreational decisions must prevail without hindrance, and a later stage at which concerns for fetal survival are allowed some scope.

There is an unalterable "biological threshold" during pregnancy that marks the gestational stage at which fetal organ systems become sufficiently developed to allow possible survival after separation from the pregnant woman. Prior to that threshold (twenty-three to twenty-four weeks of pregnancy), vital organs are so immature that a woman must perform the functions these organs might themselves perform outside a womb after the biological threshold has been crossed.

Technological development has enhanced the chances for survival of a fetus after the biological threshold of organ development. But no technological development, either now or in the foreseeable future, can enable the fetus to survive separately from the woman prior to that point.

While some *Amici* believe that the state can never have a compelling interest in the fetus prior to birth, all *Amici* agree that prior to the biological threshold, the State cannot define a compelling interest in the fetus that is distinct from, and paramount to, the rights or interests of the pregnant woman herself. At least during that stage of pregnancy, to base restrictions on a woman's procreational rights upon a premise of fetal personhood unconstitutionally subordinates the fundamental liberties of pregnant women to the moral dictates of a majority, or powerful minority.

States can have valid interests in fostering a general regard for the value of human life. It is, however, evident that such interests cannot constitutionally justify coercive restrictions from the moment of conception on women's fundamental liberties of life-shaping choice, especially considering the under-utilized, non-coercive means available to states for pursuing this interest.

ARGUMENT

I. A WOMAN'S RIGHT TO CHOOSE WHETHER TO TERMINATE A PREGNANCY IS A FUNDAMENTAL RIGHT FIRMLY ROOTED IN CONSTITUTIONAL PRINCIPLES OF LIBERTY, PRIVACY AND EQUALITY HISTORICALLY AFFIRMED BY THIS COURT.

A. The Constitutional Right Of Personal Privacy Protects Against State Domination Over Conscientious And Life-Shaping Decisions, And Has At Its Core Decisions About Child-Bearing And Family Formation.

In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925), this Court affirmed that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . ." The Court was certainly "[b]y the same token" setting constitutional liberty in opposition to state regimentation of adult citizens as well. *Moore* v. *East Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion of Powell, J.). It was simply recurring to the axiomatic constitutionalist presupposition that the people belong to themselves and not the State. As the Court had observed in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), upon which *Pierce* directly relied, *see* 262 U.S. at 402,

> [a]lthough such measures [of civic regimentation as those of Plato and Lycurgus] have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[1]

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1 262 U.S. at 402. *Cf. The Republic of Plato* v 461 at 161 (F. Cornford tr. 1945): "A woman should bear children for the commonwealth

As subsequently elucidated by the decisions of this Court over a span exceeding sixty years, the right of personal privacy has come to represent a certain aspect of constitutional liberty, "namely, the absence of governmental coercion respecting appropriately private affairs." Allen, *Talking Liberties: Privacy, Choice, and Social Contract Theory*, 56 U. Cin. L. Rev. 461, 467 (1987). *See*, Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1411, 1424-25 (1974). The right of personal privacy stands against state domination over matters crucial to self-possession: self-definition in matters of value and conscience, and self-determination regarding ways and walks of life. By its force, government's hand is stayed from the diverse choices by which persons define their values, form and maintain communities of belief and practice, and bring up children whose lives in turn will be their own and not the State's. Accordingly, the Court's privacy doctrine has placed decisions regarding procreation, parenthood, and family formation at the core of those from which a non-totalitarian government must ordinarily be excluded.

The right of personal privacy is the right of self-possession against the State, and the self begins with the body.[2] "[To say] that my body can be used is [to say] that I can be used. . . ." Moreover, "the sense of possession of oneself . . . extends to possession of one's function. And this extends quite naturally to reproduction." C. Fried, *Right and Wrong* 121 n.*, 154 (1978).

In *Schmerber* v. *California*, 384 U.S. 757, 772 (1966), while upholding "minor intrusions into an individual's body under stringently limited conditions," this Court stood ready to act against more substantial and less restricted intrusions because "[t]he integrity of an individual's person is a cherished value of our society". *See e.g.*, *Winston* v. *Lee*, 470 U.S. 753, 760

from her twentieth to her fortieth year; a man should begin to beget them when he has passed 'the racer's prime in swiftness,' and continue till he is fifty-five."

2 See L. Tribe, *American Constitutional Law* 1329-30 (2d ed. 1988); Gerety, *Redefining Privacy*, 12 Harv. Civ. Rts.-Civ. Lib. L. Rev. 233, 265-66 & n.118-19, 269 (1977).

(1985); *Rochin* v. *California*, 342 U.S. 165 (1952). The intrusion upon a woman's body wrought by forcing her to carry a physiologically sustained and consuming pregnancy to term is destructive to self-possession. During pregnancy and childbirth, "[t]he woman's body will be subjected to a continuous regimen of diet, exercise, medical examination, and possibly surgical procedures. Her most elemental biological and psychological impulses will be enlisted . . . . In these ways, anti-abortion laws exert power productively over a woman's body and, through the uses to which her body is put, forcefully reshape and redirect her life."[3]

This Court has repeatedly recognized the practical priority and centrality of the child-*bearing* decision in an anti-authoritarian constitutional doctrine of personal privacy that also safeguards citizen control over child-*rearing*. Therein lies another obvious reason why "[t]he decision whether or not to beget or bear a child" belongs at "the very heart of this cluster of constitutionally protected choices," *Carey* v. *Population Services International*, 431 U.S. 678, 685 (1977); *cf. Runyon* v. *McCrary*, 427 U.S. 160, 178 (1976) (the "government is largely or even entirely precluded from regulating the child-bearing decision"). *See also Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965); *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 640-41 (1980) ("*Griswold* and its successor decisions [protect] men and women—but particularly women—against . . . an unchosen commitment and a caring stained by reluctance, against a compelled identification with the social role of parent.").

Constitutional protection for the people's freedom to choose their own family formations is "deeply rooted" in this nation's "history and tradition." *Moore* v. *East Cleveland*, 431 U.S. 494, 503-5 (1977). That freedom commands respect as an obvious precondition for the ability of people to care for their children and bring them up in accordance with their own, diverse

3 Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 790 (1989); see Regan, *Rewriting* Roe v. Wade, 77 Mich. L. Rev. 1569, 1579-83 (1979).

visions. *See id.* at 504-505.[4] The *Moore* plurality relied on *Roe* and *Griswold* as well as on *Pierce*, *Meyer*, and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), precisely because it would not "close [its] eyes" to the essential ties binding citizens' procreational freedoms, family-formation choices, and child-rearing responsibilities with the tradition of political liberty that informs our Constitution. *Moore*, 431 U.S. at 499-501.[5] That was why Justice Powell saw household formation as a matter which, like the procreational choice protected in *Griswold* and *Roe*, must in " 'a free society' " be left to the citizens themselves.[6] Rights of procreative choice, family formation and parental control of childbearing thus combine in a unified constitutional doctrine of protection for the moral and political agency of citizens against a potentially overbearing State.

In thus protecting citizens against moral and political domination by the State, the right of personal privacy partakes of what many have considered the most fundamental constitutional freedoms of all: the freedoms of conscience and spirit. *See West Virginia Bd. of Education* v. *Barnette*, 319 U.S. 624, 636-37, 642 (1943); *Wooley* v. *Maynard*, 430 U.S. 705 (1977); Wilkinson & White, *Constitutional Protection For Personal*

4 *See also* Davis, *Law, Science, and History: Reflections Upon In The Best Interests of the Child*, 86 Mich. L. Rev. 1096, 1110-20 (1988). In reviewing the history of the adoption of the Thirteenth and Fourteenth Amendments, Professor Davis writes, "Appreciation of the need to protect rights of family is a legacy of the progression from a slaveholding nation to a nation in which citizenship is a human birthright." *Id.* at 1119.

5 See Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. Rev. 765, 773 (1973): "[T]he long line of precedent in this area . . . is entirely principled. For the Court to have declined strict review of state legislation that limits the private right to choose . . . whether to raise a family . . . would have been to leave the most basic substructure of our society [under government control]."

6 *Id.* at 503 n.11 quoting from Professor (now Judge) Louis Pollak: "[I]n due course we will see *Griswold* as a reaffirmation of the Court's continuing obligation to test the justifications offered by the state for state-imposed constraints which significantly hamper those modes of individual fulfillment which are at the heart of a free society." Pollak, *Thomas I. Emerson, Lawyer and Scholar:* Ipse Custodiet Custodes, 84 Yale L. J. 638, 653 (1975).

Lifestyles, 62 Cornell L. Rev. 563, 612-13 (1977). Broad restrictions on abortion "fail [ ] . . . to take seriously the moral independence of women" in the exercise of responsible choice. D. Richards, *Toleration and the Constitution* 268 (1986).[7]

Studies of the process by which women decide whether to have abortions consistently show that most women's choices are deeply conscientious and concerned with relations and obligations to other people.[8] A pregnancy is often a problematic event fraught with dramatic impacts on many lives, actual and potential. These include not only the life of the woman who is pregnant, but the lives of others closely touched by hers: the children she already has or may have; her actual or eventual spouse or companion; others with whom she lives and works; the communities that cherish her productivity and citizenship. Different women, differently circumstanced, will ponder the alternatives in their own, diverse settings of advice, support, relationship, and community—including spouses, family and friends, cultural and religious groups, and medical and professional advisers.

Attempts by the State to standardize these primary human relationships and to usurp their places in the lives of the people are what the right of personal privacy countermands. It is irrational, and incompatible with a decent respect for a pregnant woman's fundamental right of conscientious choice, to suppose that a state legislature's broad prohibition on abortions at any stage of pregnancy can provide a better answer than a responsible and situated woman's own to the questions for multiple human lives, actual and potential, that many pregnancies present. See R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 27, 88-89 (1988).

7 See Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under The Fourteenth Amendment*, 91 Harv. L. Rev. 1, 58 (1977): "[T]o be a person is to respect one's own ability to make responsible choices in controlling one's own destiny, to be an active participant in society rather than an object."

8 *See* Brief *Amicus Curiae* of the National Abortion Rights Action League in Support of Appellees.

B. Government Interference With The Abortion Decision Imposes On Women The Unique And Disparate Burden Of Unwanted Pregnancy, Childbirth And Parenthood, Thereby Depriving Women Of Their Personal Freedom And Opportunity For Full And Equal Participation In American Life.

Although the right of procreative choice is rooted in universal concepts of privacy and freedom, as an operative force in American society this right is most compellingly important to one segment of our population—women. If women are deprived of this right, their personal, economic, and political lives will be altered fundamentally. As Professor Sylvia Law has observed, "Nothing the Supreme Court has ever done has been more concretely important for women [than its decision in *Roe* v. *Wade*]. I would defend this statement by comparing other decisions that possibly come close to [*Roe*] in importance to women, but I cannot think of anything that is arguably a close second." Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 981 & n.96 (1984).

A law forcing a woman to carry an unwanted pregnancy to term effectively constricts the boundaries of personal freedom for women: It is women, not men, whose persons and lives are drastically recast by unwanted pregnancy, childbirth and parenthood. As long as State laws circumscribe a woman's right to decide whether to continue a pregnancy, her ability to participate fully and equally in American society will be subject to a physical condition that she can avoid only by refraining from sexual relations other than those that are intentionally procreative.[9] If it were possible to fashion a law imposing similar limitations on the ability of men to retain full possession of their lives, the denial of equal citizenship by laws banning abortion would be readily apparent.[10]

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9 See Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330, 335-38 (1985); Regan, *Rewriting* Roe v. Wade, 77 Mich. L. Rev. 1569, 1593-95 (1979).

10 See L. Tribe, *Constitutional Choices* 243 (1985).

As this Court has recognized, our nation "has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). The claim that "biology is destiny" has provided the central justification and vehicle for the historic subordination of women. Americans and this Court have come to see that it is not biology, but culture and law, that assign men and women to prescribed roles. When the State denies women access to abortion, it is the State, not biology, that drastically limits women's liberty and equality. Starting with *Reed* v. *Reed*, 404 U.S. 71 (1971), and continuing through *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), to *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), and beyond, this Court has recognized that gender classifications, though once subject only to a minimal standard of reasonableness, require a far higher degree of justification. It is no accident that these developments, clearly based on the concept of equality, occurred contemporaneously with a recognition of the right of procreative choice. It would be paradoxical for women to have an equal right to be administrators of estates (*Reed*, *supra*) and to receive equal remuneration for service in the armed forces (*Frontiero*, *supra*), and not be able to control the decision that most critically affects their abilities to participate in the activities and careers in which their equal treatment has been guaranteed by this Court. That result would fail to keep the promise of constitutional protection of life-shaping choice as fully for women as for men. *See Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

We deal here with laws restricting freedom granted special constitutional protection—specifically, freedoms of procreative choice and family formation. As this Court has repeatedly and consistently held, there is special occasion for unusual concern and heightened scrutiny when such laws selectively oppress groups already burdened by disfavored or insecure status in American life, "lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty" of equal protection of the laws. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *cf. Cleveland Bd. of Education* v. *La Fleur*, 414 U.S. 632 (1974);

Moore v. *East Cleveland*, 431 U.S. 494, 506 (1977) (Brennan, J., concurring). Such heightened concern and scrutiny are required when laws restrict enjoyment of fundamental rights in ways that are specially onerous for those already burdened by disfavored or insecure social position. See *Plyler* v. *Doe*, 457 U.S. 202 (1982).

Abortion laws have rarely been openly defended as a means of enforcing a maternal destiny against the will of women. Both in the past and today, however, abortion has been most publicly controversial during periods when ideas about the proper roles of women in society are in flux or dispute.[11] The offense committed by abortion restrictions against the elementary principle of equality is greatly aggravated by the undeniable fact that it is women whose fundamental liberties such laws uniquely restrict.

Moreover, *Amici* cannot blind themselves as lawyers to what we know as women and men: that restrictions of access to abortion will descend with special harshness and inevitability on poor women—"those without . . . adequate resources" to avoid the restrictions (*Griswold*, *supra*, at 503 (White, J., concurring))—and that in our society it sadly remains the case that women of color are especially likely to be poor. Thus it is poor women and women of color whose lives will be most severely impacted—whose avenues of safe avoidance of unwanted and debilitating pregnancy and childbirth will be most constricted, and whose life choices will be most heartbreakingly curbed—by a return of regimes in which safe abortion services are, in practice, placed beyond reach of some but not all of our people.[12] While this Court has declined to extend to poor persons as a class the same level of protection as that accorded to classifications based on race and gender, *see San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973), the fact that state control over the child-bearing decision will have a particularly onerous impact on poor women who are

11 *See* Brief *Amicus Curiae* of American Historians in Support of Appellees.

12 *See* Brief *Amicus Curiae* of Women of Color in Support of Appellees; Brief *Amicus Curiae* of The American Association of Reproductive Health Professionals in Support of Appellees.

members of historically disadvantaged racial groups gives the pregnancy decision an especially strong claim for constitutional protection under this Court's privacy jurisprudence.

C. The Recognition Of A Woman's Right To Terminate A Pregnancy Is Consistent With This Court's Historic Role Of Recognizing Unenumerated Rights Secured By The Constitution.

Opponents of *Roe* v. *Wade* are wont to criticize the Court's recognition of a right to terminate a pregnancy as a constitutional aberration to be compared only with the Court's protection of certain economic interests in the so-called *Lochner* era. Similar criticism greeted this Court's recognition of the rights of couples and individuals to acquire and use contraceptives (*Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Carey* v. *Population Services International*, 431 U.S. 678, 685-87 (1977)).

In fact, however, even the most cursory perusal of constitutional history indicates that protection of the child-bearing decision in *Roe* involved no departure from this Court's established role. Rather, it was one among many instances of the Court's recognizing constitutional rights that are not expressly named in the text of the Constitution, although they are suggested by our constitutional system as a whole.[13]

13 "In a constitutional system in which limitations on government, administered by the judiciary, are a crucial characteristic, it is surely desirable (and perhaps inevitable) that the limitations be reexamined and renovated in the light of changing philosophies of both public good and individual right. . . . We have come to accept . . . constitutional modernization by the judiciary." Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1427 (1974); *see also* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979). For discussion of the judicial role of expounding unenumerated national ideals of individual liberty, *see, e.g.*, Grey, *Do We Have An Unwritten Constitution?*, 27 Stan. L. Rev. 703, 706 (1975); L. Levy, *Original Intent and the Framers' Constitution* 267 (1988); L. Tribe, *American Constitutional Law* 1307-09 (2d ed. 1988); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 365 (1928-29); Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

A non-exhaustive list of unenumerated rights would include: freedom of association;[14] the equal protection component of the Fifth Amendment's due process clause;[15] the right to travel between the states;[16] the right to vote;[17] the right to a presumption of innocence so that criminal convictions must be based on guilt beyond a reasonable doubt;[18] the right to marry;[19] the right to retain American citizenship until explicitly and voluntarily renouncing it;[20] the right to attend criminal trials;[21] the right to educate one's children in conformity with minimum state standards;[22] and the right to make one's own choice about having children.[23]

Moreover, while the protection of interstate business from burdensome state regulation is not generally considered an unenumerated right, there is no constitutional text, other than a non-exclusive grant of power to Congress, to support a right that has been profoundly important to business interests from the earliest days of the republic. Similarly, Chief Justice Marshall cited no constitutional text for his broad proposition in *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819), that States could not tax the instrumentalities of the federal government.

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14 *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

15 *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

16 *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Crandall* v. *State of Nevada*, 6 Wall. (73 U.S.) 35 (1868).

17 *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

18 *In re Winship*, 397 U.S. 358 (1970).

19 *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

20 *Afroyim* v. *Rusk*, 387 U.S. 253 (1967).

21 *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).

22 *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

23 *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Carey* v. *Population Services International*, 431 U.S. 678 (1977). For sources of the foregoing list, see W. Murphy, J. Fleming & W. Harris, *American Constitutional Interpretation* 1083-84 (1986); Barnett, *Foreword—The Ninth Amendment and Constitutional Legitimacy*, 64 Chi.-Kent L. Rev. 37, 58 (1988).

Thus, the unenumerated rights that are derived from, or have been recognized in, other provisions of the Constitution reach far beyond the right of privacy or the right to terminate a pregnancy. Furthermore, while scholars may disagree over the precise source in constitutional text for many of these myriad unenumerated rights, few would argue that the decisions in which they were recognized, often controversial in their times, were mistaken or that they should be retracted.

The historic recognition of unenumerated rights is not a capricious process that is dependent only on the preferences and ideologies of individual judges at particular moments of our history. To the contrary, unenumerated rights traditionally have reflected powerful historical forces that inevitably influence constitutional interpretation. The right to travel, nowhere specified in the constitutional text,[24] becomes understandable when one considers the ambulatory nature of early American society, in which settled communities were rare, and immigration and the conquering of the frontier were urgent national concerns.

In more recent times the infusion of racial equality values into the Due Process Clause of the Fifth Amendment grew out of changing American perceptions spurred by the experiences of the Great Depression,[25] World War II,[26] and America's role

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24 *See United States* v. *Guest*, 383 U.S. 745, 758 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969).

25 The New Deal Programs of the Roosevelt Administration sought to alleviate the mass poverty and unemployment which inflicted the country during the Great Depression, and many of their administrators believed that programs should not be conducted in a racially discriminatory manner. It would be hypocritical for the programs to maintain previous racial distinctions and thus exclude the neediest group in America. For example, Harold Ickes, Head of the Public Works Administration, decided to eliminate racial classifications and segregation from P.W.A. projects. Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, 16 Labor History 37, 40 (1975); *see also* R. Kluger, *Simple Justice* 159-60, 162, 217-19 (1976).

26 During W.W.II, the United States needed its Black citizens to work in the defense industries and to fight in the armed services. Angered by the

in the post-war world.[27] By 1954 it would have been unthinkable to have a different standard of racial equality for the federal government and the states.[28] Similarly, the articulation of a freedom of association was spurred by the importance of organizational activity in the pursuit of civil liberties and racial equality,[29] and by the reaction to the repressive tactics of the

segregation which existed in those institutions, Black leaders such as A. Phillip Randolph threatened to call Black Americans to strike and to evade the draft if the conditions were not improved. President Roosevelt was forced to provide for such desegregation in order to expand the war effort and to avoid internal political struggles. Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 907 (1985); *see generally* E. McDonagh and E. Richards, *Ethnic Relations in the United States*, 39 (1953).

27 Although many war-era restrictions on racial discrimination by government contractors went the way of war-related contracts, *To Secure These Rights, The Report of the President's Committee on Civil Rights* 57 (1947), the fear of worldwide communism caused the federal government to reinstate many of its anti-discriminatory safeguards. Dudziak, *Desegregation As a Cold War Imperative*, 41 Stan. L. Rev. 68 (1988). The Truman Administration was under great international pressure from both its former allies and the United Nations to deal with the country's internal racial problems. Dudziak, *supra* at 64-66.

28 *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (invalidating racial segregation in public schools of the District of Columbia as violative of due process guaranteed by fifth amendment).

29 "The law of civil liberties . . . has been profoundly affected by the work of private groups organized either to protect the civil liberties of all or to advance the cause of particular minorities." Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 Yale L.J. 574 (1949), describing the activities of the National Association for the Advancement of Colored People (NAACP), the American Civil Liberties Union (ACLU), and the American Jewish Congress. *See NAACP* v. *Button*, 371 U.S. 415 (1963). Similarly, the Court recognized that the First and Fourteenth Amendments protected freedom of association when it overturned Alabama's attempt to compel the NAACP to disclose its membership list. *NAACP* v. *Alabama*, 377 U.S. 288 (1964). The Court perceived that compelled disclosure would chill the petitioners' freedom of association. Barker and Barker, *Civil Liberties and the Constitution* 149 (4th ed. 1982).

McCarthy era.[30] The influence of the modern media and its technology have altered the constitutional standards of the law of defamation and have prompted media access to the processes of government, including trials, that was unheard of several years ago.

This court's decision in *Griswold* v. *Connecticut* is firmly grounded in the history of its period. In the years following World War II, Americans developed a growing awareness of the global dangers inherent in exponential population growth. Many people also began to place higher value on sexual intimacy within marriage. At the same time, medical science developed apparently safer and more effective means of contraception, which, to the extent that they required medical supervision, facilitated state capacity to control people's access to them. Despite factors pressing for free access to contraceptives, in some States an influential minority was able to deny people such access. In *Griswold* the Court, recognizing the constitutionally protected status of the marital relationship, acted to protect private rights to obtain contraceptives.

When the development of unenumerated rights by this Court is viewed in its proper historical perspective, the emergence in the 1960s and 1970s of reproductive freedom as a constitutionally protected right was a predictable outgrowth of a powerful social and intellectual movement that emerged during these years—the movement of women toward full citizenship and participation in all aspects of our society. Strong social and historical currents—the flow of women in massive numbers into the workplace, changes in laws governing family relationships, and the emergence of women as a political force—soon steered the constitutional doctrine of privacy towards lifting the tradi-

30 ACLU [American Civil Liberties Union], *30th Annual Report: Security and Freedom: The Great American Challenge* 10-17 (1951); *see also* ACLU, *34th Annual Report: America's Need: A New Birth of Freedom* 32-37 (1954); *see generally* Mills, *Legacies of the Cold War in the Price of Liberty* 60-62 (A. Reitman ed. 1968); ACLU, *How Americans Protest* 14 (1963); C. Markmann, *The Noblest Cry: A History of the American Civil Liberties Union* 121-131, 176-184, 429-431 (1965); W. Donohue, *The Politics of the American Civil Liberties Union* 162-191 (1985). The ECLC [Emergency Civil Liberties Committee, later changed to National Emergency Civil Liberties Committee], *The Rape of the First Amendment* 4-5 (1963).

tional demand for a woman's singular dedication of her life to child-rearing and the home.

Starting with *Griswold* in 1965, the recognition of unenumerated rights regarding the use of contraceptives, termination of pregnancy, and family formation overlapped with developments in equal protection doctrine in the 1970s, resulting in the rejection of gender-based classifications that would have been upheld a few years earlier. All of the closely-related constitutional developments reflected the same principle: that women were entitled to full and equal participation in American society. Such full and equal participation requires that women be able to decide for themselves whether and when to bear children. The recognition of this right in *Roe*, as an unenumerated right secured by the Constitution, was consistent with two hundred years of constitutional history.

II. LAWS ABRIDGING THE FUNDAMENTAL RIGHT TO ABORTION ARE SUBJECT TO THE SAME RIGOROUS STANDARD OF CONSTITUTIONAL REVIEW AS IS APPLIED TO LAWS RESTRICTING ANY OTHER FUNDAMENTAL RIGHT.

The affirmative considerations of constitutional value and principle underlying the right of personal privacy apply with the fullest possible force to a woman's control over her pregnancy.[31] State imposed restrictions that impact on the woman's abortion choice, or ability to exercise that choice, must be held to the same standards of convincing justification as are required for all abridgements of fundamental rights. *See, e.g.*, *Skinner*, *supra*, at 541; *Griswold*, *supra*, at 485; *id.* at 497 (Goldberg, J., concurring); *id.* at 503-04 (White, J., concurring); *Moore*, *supra*, at 499 (plurality opinion of Powell, J.); *Zablocki*, *supra*, at 388. To deny this is to deny that pregnant women have the same *prima facie* constitutional rights as other Americans.

31 *See Gerety*, *supra*, at 274: "[T]he reasons for invoking privacy in defense of abortion are plain to see. A woman's decision to have or forego an abortion is perhaps more than any other she makes an intimate one, expressive of both her identity and her autonomy."

A pregnant woman's decision to abort a pregnancy is a "decision . . . not to bear a child." In that crucial respect, non-trivial restrictions on access to or provision of abortion services are *identical* with other forms of state interference with procreational choice, not "inherently different" from them. Such restrictions impress women into unwanted child-bearing more directly, and often more coercively, than do contraception restrictions.[32] Logic and principle rebel, therefore, against the suggestion that the accompanying fact of fetal destruction exempts abortion restrictions from intensified scrutiny.[33] That fact may or may not provide a State with a sufficiently weighty and convincing justification for invading the fundamental constitutional rights of pregnant women. But as long as this Court purports to affirm a *principled* doctrine of constitutionally fundamental liberties in which procreational choice occupies a central place, all laws materially restricting abortion must be subject to strict scrutiny.[34]

32 It is specious to suggest that abortion prohibitions do not seriously abridge rights of procreational choice as long as exceptions are allowed for pregnancies resulting from "coercion," because women always have the "options" of "abstinence and contraception." Brief for the United States at 22-23 n.16. First, that suggestion depends on the sex-discriminatory premise that abstention may fairly be exacted or expected of *women*, in particular, as the price of avoiding unwanted child-bearing, in defiance of this Court's repeated teaching that "pregnancy and the birth of an unwanted child" may not reasonably be "prescribed . . . as punishment" for non-procreational sex. *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1972); *Carey* v. *Population Services International*, 431 U.S. 678, 695 (1977) (plurality opinion of Brennan, J.). Second, contraception—obviously—can fail. *See* Brief *Amicus Curiae* of the American Association of Reproductive Health Professionals in Support of Appellees. The United States, in its brief, ignores the discriminatory result of visiting upon women the punishment for such failure when men are at least equally responsible. Finally, State officials cannot possibly, without constitutionally intolerable intrusion into the intimacies of couples, ascertain whether pregnancy-producing sexual encounters (including any attendant laxity in contraceptive practice) are or are not "the result of coercion" vitiating *the woman's* fundamental right of procreational choice. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965); S. Estrich, *Real Rape* (1987).

33 *E.g.*, Brief For the United States at 14.

34 State regulation that *does* have an impact on women's exercise of the right to choose an abortion must be closely tailored to the promotion of com-

III. THIS COURT'S HOLDING IN *ROE* THAT STATES' INTERESTS IN FETAL LIFE CANNOT BE COMPELLING PRIOR TO VIABILITY, AND CANNOT THEREAFTER DEFEAT THE STATES' INTERESTS IN PROTECTING THE HEALTH OR LIFE OF THE PREGNANT WOMAN, MUST BE MAINTAINED.

In *Roe* v. *Wade*, this Court concluded, after a due regard for all the constitutional values and interests at stake, that some distinction is required between an earlier stage of pregnancy when a woman's procreational decision must prevail without hindrance from state dictation, and a later stage when the State may act on its concerns for fetal survival, always subordinate to the life and health interests of the pregnant woman. Finding that a clear line had to be drawn somewhere between "the [lesser] state interest in protecting the freshly fertilized egg and the [greater] state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth," *Thornburgh*, 476 U.S. at 779 (Stevens, J., concurring), the Court identified "viability" as the appropriate point at which to draw that line.

Amici are divided on the question whether, at any point prior to childbirth, it can ever be constitutionally legitimate to regulate on behalf of fetal interests in conflict with those of the pregnant woman. *Amici* do, however, agree that if some line is to be drawn marking a point where such regulation becomes arguably permissible, viability recommends itself straightforwardly as a matter of practical judgment and common sense. When fetuses are known to have developed to the point of

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pelling state interests. More concretely, for example, the Constitution prohibits state regulations demanding that second trimester abortions be performed in the hospital. Such rules "imposed a heavy and unnecessary burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure . . . and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983).

capacity to survive outside the womb, there may be a reason for heightened state concern about their destruction when trying to foster a general social regard for human life.[35] On the other hand, the viability line affords ample time for most women to exercise a considered and informed procreational choice after learning of their pregnancies and relevant attendant conditions.[36] Since 1973, only an extremely small number of abortions have occurred during the third trimester. Indeed, less than 1% of all abortions occur after 21 weeks of pregnancy, and only .01 percent occur after 24 weeks, when the fetus could possibly be viable.[37] The primary reasons for such "late" abortions—the development of a life-threatening condition in the pregnant woman, the detection of a serious fetal deformity or anomaly and, especially with respect to younger women, limited access to pregnancy and abortion information or services

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35 Cf. Rhoden, *Trimesters and Technology: Revamping* Roe *v.* Wade, 95 Yale L.J. 639, 668-70 (1986) ("[T]his dichotomy between late and early abortion . . . is perhaps the closest this society has come to a consensus about the morality of abortion.").

36 See R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 59-62 (1988); Regan, *Rewriting* Roe *v.* Wade, 77 Mich. L. Rev. 1569, 1643 (1979). One advantage of the viability line, contributing to its workability, has been its flexibility. It leaves to each individual doctor, within the privacy of the doctor-patient relationship, the ability to make an individualized determination about when the fetus is viable, a determination that can only be properly made on a case by case basis. *See Colautti* v. *Franklin*, 439 U.S. 379 (1979).

37 *See* Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 Family Planning Perspectives 90, 91 (1985); Spitz, Lee, Grimes, Schoenbucher and Lavorie, *Third Trimester Induced Abortion in Georgia, 1979 and 1980*, 73 Am. Journal of Public Health 594 (May 1983) (abortions after twenty-four weeks may have accounted for only 0.004% of all abortions in Georgia in 1979 and 1980). *See also* Grimes, *Second Trimester Abortions in the United States*, 16 Family Planning Perspectives 260 (1984) (while in 1973 only 63% of all abortions occurred within the first 10 weeks of pregnancy, today 88% of abortions occur in the first 10 weeks).

during the earlier stages of pregnancy—provide compelling justification for, and explain the timing of, the abortion decision.[38]

Moreover, the viability line reflects the biological realities of pregnancy, and thus provides a workable framework for determining when the State's interest in fetal protection is subordinated to pregnant women's constitutional liberties. Before viability, a fetus is biologically an inseparable part of a pregnant woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, hers.

It is not true, as critics of *Roe* have asserted,[39] that technological progress has rendered the viability line inherently unstable and untenable. Viability continues to provide a workable standard for the line-drawing that this Court found necessary, in the exercise of its constitutional responsibilities, to allow some scope to a state interest in fostering a regard for human life in general, while maintaining full protection for the fundamental liberties of pregnant women. Indeed, the viability standard reflects the biological reality that there exists a threshold during pregnancy prior to which a fetus cannot survive separate from a woman; no foreseeable technology could change this threshold, even though technological developments since 1973 have improved the chances of fetal survival outside the womb *after* the threshold has been crossed.

38 *See* Hunter, *"Time Limits on Abortion," Reproductive Laws for the 1990's: A Briefing Handbook* 106, 129 (N. Taub and S. Cohen, eds. 1988) (two main situations that give rise to abortions late in pregnancy are teenage pregnancy, since teenagers face greater impediments in obtaining the procedure than adults, and fetal anomalies, which are detected through amniocentesis possible only after approximately twenty weeks); Nsiah-Jefferson, *"Reproduction Laws, Women of Color, and Low-Income Women," Reproduction Laws for the 1990's: A Briefing Handbook* 23 (N. Taub and S. Cohen, eds. 1988). In some instances, late abortion is required because young women, fearful of adverse societal reaction and parental retribution, ignore their own pregnant conditions and fail to seek appropriate care. Removal of burdens on abortion helps these young women seek it at an earlier stage. Criminalization has the opposite effect.

39 *See, e g.*, Brief for the State of Missouri, at 12-14.

A. There Is An Immutable Threshold Prior To Which A Fetus Cannot Survive Apart From A Pregnant Woman And Thus Is Biologically Inseparable From That Woman.

Certain biological facts of pregnancy are unalterable by technology. One is that only women can be pregnant. Another is that a "threshold" exists prior to which the fetus has no ability to survive outside the womb. The biological threshold marks the gestational age at which fetal organ systems—including the brain, the kidneys and the lungs—become sufficiently developed to maintain the physiological balance minimally required (even with artificial support as necessary) to sustain life outside the womb.[40] The threshold usually occurs at the twenty-third to twenty-fourth week of pregnancy. Prior to that time, the crucial organs are not sufficiently matured to provide the mutually sustaining functions that are prerequisite to extrauterine survival, or viability.

Today, "[n]eonates less than 24 weeks gestational age have close to a 0% survival rate." Moreover, it is well-documented that "no technology exists to bridge the development gap between the three-day embryo culture and the 24th week of gestation." *Fetal Extrauterine Survivability*, Report to the New York State Task Force on Life and Law 3, 10 (1988) (Task Force and its Committee on Fetal Extrauterine Survivability convened in March 1984 by the Governor of the State of New York).[41] It is thus no less true today than it was in 1973 that

40 *Fetal Extrauterine Survivability*, Report to the New York Task Force on Life and the Law (1988). *See also* Coulthard, *Maturation of glomerular filtration in preterm and mature babies*, 11 Early Human Development 281-85 (1985); Hallman, *et al.*, *Exogenous human surfactant for treatment of severe respiratory distress syndrome: a randomized prospective clinical*, 106 J. Pediatry 963 (1985); K. Moore, *The Developing Human* 224 (1982).

41 "The increasing ability over the past decade to save progressively younger neonates is primarily due to the ability to support and assist, at an earlier age, the organs already present in the fetus. *The developmental biology of the fetus, however, has not changed.* After reviewing the development biology of several crucial fetal organs, including the brain, the kidneys, and the lungs, the Committee concluded that a point exists before which the fetal organs are too immature to function, even with the assistance of sophisti-

"before [the occurrence of the fixed biological threshold], the fetal organs, especially the lungs, are not sufficiently developed to permit extrauterine survival even with the most sophisticated technology currently available." *Id.* at 12.

Any speculation about technology capable of shifting the fetal survivability point to before the biological threshold is pure science fiction.[42] Indeed, basic scientific research has not even approached an understanding of the complex developmental process during the period prior to the threshold.[43] An understanding of fetal development during this period would be necessary before such technology could even be contemplated.[44]

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cated medical technology. This point in time is 23-24 weeks of gestation; prior to that time, fetal life cannot be maintained outside the womb." *Fetal Extrauterine Survivability*, *supra*, at 9.

42 "Public knowledge about the new reproductive technologies, particularly in vitro fertilization and embryo transfer, combined with advances in care for very premature newborns, have generated a false assumption that it may soon be possible to save virtually any fetus, regardless of gestational age." *Fetal Extrauterine Survivability*, *supra*, at 1.

43 During the progression of fetal development from the one cell fertilized egg to the point at which the fetus crosses the biological threshold, the cells of the fetus grow in both size and number. These cells begin to differentiate under the concerted control of numerous biological signal substances—including hormones and regulatory molecules—that are either produced by the fetus, the woman's organs, or the placenta. *See* J.R. Pasqualini and F. Kincl, *Hormones and the Fetus* (1985). These processes are not yet understood, and research concerning them has not passed the most basic stages. *See, e.g.*, H. Hoshi, M. Kan and W.L. McKeehan, *Direct Analysis of Growth Factor Requirements for Isolated Human Fetal Hepatocytes*, 23 In Vitro Cell Developmental Biology 723-32 (1987); J.R. Bickenbach and K.A. Holbrook, *Proliferation of Human Embryonic and Fetal Epidermal Cells in Organ Culture*, 177 Am. J. Anat. 97-106 (1986); Moore and Walsh, *Specific regulation of N-CAM/D2-CAM cell adhesion molecule during skeletal muscle development*, 4 Embo. J. 623-30 (1980); Holmes, *Morphological and physiological maturation of the brain in the neonate and young child*, 3 J. Clin. Neurophysiology 207-38 (1986). Indeed, because we do not yet know the exact role pre-threshold survival technology would play, it is not even possible to describe the machines or other devices that would have to be developed—let alone their cost and availability.

44 Nor could such pre-threshold technology create a potential for life outside a womb prior to the threshold point. Throughout pregnancy, a

As far as existing and foreseeable technology is concerned, then, it is not at all the case that "[t]he *Roe* framework . . . is on a collision course with itself." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). What is true is that "the safety of second-trimester abortions has increased dramatically" since 1973, extending the time before which no interest in maternal health can justify restrictions of abortion. *Akron*, 462 U.S. at 435-36. There is, however, no scientific or technological support for the proposition that the "point of viability" is moving "further back toward conception." *Akron*, 462 U.S. at 457 (O'Connor, J., dissenting). Indeed, "[i]n the foreseeable future, it is likely that technological advances in the care of newborns will enhance survival at each gestational age above 24 weeks, but will not lower the threshold for fetal extrauterine survival." *Fetal Extrauterine Survivability*, *supra*, at 12.[45] The test *Roe* enunciated for determining the point where the State's interests may arguably justify material restrictions on abortion, always subject to the pregnant woman's interest in life and health, remains just as tenable and workable a standard today as it was in 1973.

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womb performs all bodily functions for the fetus. However, in the post-threshold period, there is a potential for fetal survival outside a womb because the fetus' organs are sufficiently developed to perform bodily functions. Post-threshold technology, unlike a womb, thus assists the fetus' *own* organs themselves to perform those bodily functions themselves. C.R. Austin and R.U. Short, *Embryonic and Fetal Development* 77 (1972). For example, even in the latter stages of pregnancy, oxygen is provided to the fetus by the placenta: the lungs of the fetus do not themselves "breathe". Yet once outside the womb, that same post-threshold fetus might be assisted by a respirator so that its lungs could start to breathe. In the pre-threshold period, however, there is no similar potential for fetal survival outside a womb because there are no functional fetal organs which would be able to perform bodily functions. At best, a pre-threshold technology, whatever it could be, could only simulate a womb by performing bodily functions for the fetus; such technology could never give the fetus the functional organs necessary to make possible extrauterine survival.

45 The "recent studies" cited by Justice O'Connor in her *Akron* dissent, 462 U.S. at 457 n.5, reach no different conclusion. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023 & n.245 (1984).

B. As Against A Woman's Constitutionally Protected Liberty To Terminate Her Pregnancy, A State May Not Constitutionally Assert That A Fetus Is, From The Moment Of Conception, A Person Having Legal Rights Competitive With Those Of The Woman Who Is Pregnant.

Several submissions in this case urge recognition of fetuses as "persons" bearing legally cognizable interests or rights by virtue of which the directly conflicting rights of a pregnant woman may be qualified or subordinated by state law.[46] There are, however, insuperable constitutional objections to the premise of fetal personhood as a ground for abrogating the fundamental liberties of pregnant women.

First, no compelling state interest in the fetus as a person, or as a "potential life," can exist beginning at conception. Throughout pregnancy, the fetus is physiologically united with the pregnant woman. Prior to the biological threshold, any life potential of the fetus is inextricably dependent on the woman to bring the fetus to a point where independent survival is possible. It is not possible to define an interest in a fetus distinct from the woman from whom it is thus biologically inseparable. To overturn the central holding of *Roe* would be tantamount to ruling that a pregnant woman may constitutionally be required to serve the State by carrying a fetus as a part of herself.[47] To reject *Roe*'s holding is effectively to strip pregnant women of their own constitutionally shielded statuses as persons bearing rights against the State. No comparable coerced agency of the body has ever been demanded of people under our Constitution, much less tolerated when imposed in a form to which only a particular class of persons—women—can possibly ever be exposed.[48] For women whose own decision is not to carry the

46 *See, e.g.*, Brief of Right to Life Advocates, Inc., at 22-26; Brief of the Knights of Columbus at 8-21.

47 "[A] just society cannot commandeer [a] woman in this inchoate interest." Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. Pa. L. Rev. 177, 224 (1988).

48 Cf. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979).

fetus, there is no justification for the type of subordination of body to State that a reversal of *Roe* v. *Wade* would entail.

Second, since a fetus cannot from the moment of conception be held in any objective, biological sense to be a person separate from the pregnant woman herself, to base restrictions of abortion upon a premise of fetal personhood is to subordinate fundamental constitutional liberties to a majoritarian will regarding what must, therefore, be understood as matters of morality and conscience. But, as this Court held in *Roe*, legislative sides-taking on such deeply contested, philosophical and moral questions as those involving the onset, nature, and status of fetal life, cannot possibly justify infringement of fundamental personal liberties, including a woman's right to choose whether she will bear a child. 410 U.S. at 159-62. The root idea of limited, constitutional government is that such essentially contested, divisive, and speculative matters as the moral or metaphysical status of fetuses from the moment of conception are *not* to be mandatorily resolved for us all, at the cost of fundamental liberties of personal self-direction, by "accommodation" among any number of "factions" in a "political process."[49]

It would directly contradict the most basic, anti-authoritarian premise of the constitutional rights of personal privacy and procreational choice to permit specific exercises of those rights to be subordinated to the controversial, moral dictates of a majority or powerful minority. *See Abele* v. *Markle*, 351 F. Supp. 224, 230 (D. Conn. 1972) (Newman, D.J.) ("No decision of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a state interest which is subject to such a variety of personal judgements.")[50]

49 As, for example, the United States would have them resolved. Brief for the United States at 21.

50 "The premise of these decisions [in *Barnett*, *supra*, *Griswold*, *supra*, and *Engel* v. *Vitale*, 370 U.S. 421 (1962)], and of the Bill of Rights itself, is that in the long run, patriotism, religion, and family life will flourish better in an environment of individual freedom if state regimentation of thought is prohibited. The same premise leads to the conclusion that a woman's right to decide whether to have an abortion cannot be completely abridged by a state statute imposing upon her [a state-dictated] uniformity of thought about the nature of a fetus. . . ." *Abele* v. *Markle*, *supra*, 351 F. Supp. at 231.

By rejecting fetal personhood as a legitimate basis for state abrogation of procreational freedom, the Court in *Roe* did not presume to resolve for the country that a person does *not* exist prior to birth.[51] *Roe* rather held that no agency of government—including this Court—is empowered to base an infringement of fundamental freedoms upon its purported resolution *either way* of such a popularly divisive and contested moral question; specifically, that Texas could not "by adopting one theory of life . . . override the rights of the pregnant woman that are at stake." *Roe* at 162.

C. Restricting A Woman's Right To Procreative Choice Is Not A Constitutionally Acceptable Means For Fostering A General Societal Regard For Human Life.

As opposed to asserting an interest in fetal personhood dependent upon one theory of life, a State may seek to justify restrictions on abortions on grounds that it seeks to avoid corrosive effects on society's regard for human life in general.

Amici wholeheartedly endorse the goal of advancing societal regard for human life as a proper and commendable objective for state policy. There are, however, many less restrictive, noncoercive ways of pursuing this goal, which States must use rather than violate the fundamental liberties of pregnant women. States can act more aggressively than has been their past practice to ensure that women do not become pregnant as a consequence of involuntary sexual relations; to make accurate and sensitive contraceptive counseling available to women and girls who would welcome and act upon it;[52] and to enhance

51 As charged, *e.g.*, by Brief for Right to Life Advocates, Inc., at 3.

52 Though major strides towards effective family planning as a national policy were accomplished between 1965 and 1982, resulting in dramatic drops in unwanted pregnancy and infant mortality rates, public support for family planning services has been reduced since 1982. L. Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* 39-40 (1988). Consequences of these cutbacks include the closing of 43 family planning outreach offices and the termination of all family life education services, including those in schools, in Minnesota in 1982; and the virtual elimination of teenage sex education and family planning assistance in Utah in 1984. R. Sidel, *Women and Children Last: The Plight of Poor Women in Affluent America*, 140-41 (1986).

health education and medical care for all women so as to reduce the number of pregnancies that must be terminated for the sake of maternal health or life.[53] Finally, States may encourage decisions in favor of childbirth by providing assurance of adequate support to protect the lives of born children against starvation and malnutrition, exposure and disease, and violence and abuse; and to offset the anticipated financial and emotional burdens of adding children, including those expected to have special needs, to life situations that may already be strained to the limit.

By such means, States may encourage a regard for human life in the particular context of child-bearing by modeling such a regard in their own treatment of women who bear children and of the children they bear. Simply prohibiting abortion, or surrounding it with onerous restrictions, conveys a quite different, and indeed outrageous, message. The message then is that the State accords more value to fetal potential for life than it does to the actual lives of countless women, or even to the actual lives of the children whom the state would have those fetuses become.

53 More than eight hundred thousand pregnant women annually do not receive prenatal care during the first trimester of their pregnancies, and the percentage of women receiving timely prenatal care has dropped since 1980. L. Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* 68-69 (1988). In 1985, the United States had the nineteenth lowest infant mortality rate in the world, placing it behind such less affluent countries as Finland, Spain and Singapore. When considered separately, the black infant mortality rate in the United States was the twenty-eighth lowest worldwide. *A Children's Defense Budget FY 1989: An Analysis of Our Nation's Investment in Children* 63 (1988).

The lack of prenatal and general health care that results from poverty creates serious health problems during pregnancy for many poor women and, disproportionately, women of color. R. Sidel, *Women and Children Last: The Plight of Poor Women in Affluent America* 137 (1986). Nsiah-Jefferson, "*Reproductive Laws, Women of Color and Low-Income Women*", *in Reproductive Laws for the 1990's: A Briefing Handbook* 25-26 (N. Taub and S. Cohen, eds., 1988).

CONCLUSION

Decisions of this Court have recognized that the constitutional right of privacy stands as a barrier against laws that deny individuals the ability to make the most fundamental choices affecting the totality of their values and lives. A woman's freedom of procreative choice occupies a high place in that firmament of precedent, and in this Court's jurisprudence of equality. *Roe* v. *Wade* is solidly based in the Constitution and sets forth a workable standard of adjudication—not at war with itself—accurately reflecting the privacy interests of women and the biological realities of pregnancy. It should be reaffirmed.

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CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—vs.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Lamont v. Postmaster General, 381 U.S. 301 (1965) ... 15

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Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am., 108 S. Ct. 1184 (1988) 22

Maher v. Roe, 432 U.S. 464 (1977) 22, 26

Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending*, No. 88-1279 (1st Cir.) 19

Meese v. Keene, 107 S.Ct. 1862 (1987) 10

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)..... 26

Meyer v. Grant, 108 S.Ct. 1886 (1988) 22

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 16

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)..... 11

New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending*, Nos. 88-6204/06 (2d Cir.)..... 19

New York State Club Ass'n v. New York City, 108 S.Ct. 2225 (1988) 25

Patteson v. Johnson, 787 F.2d 1245 (8th Cir. 1986).... 11

Pickering v. Board of Educ., 391 U.S. 563 (1968) .....*passim*

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 16

Planned Parenthood Ass'n of Utah v. Dandoy, 635 F. Supp. 184 (D. Utah 1986)..... 19

Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), *appeal pending*, No. 88-2251 (10th Cir.)..... 19

PAGE

Poe v. Ullman, 367 U.S. 497 (1961)..... 10

Procunier v. Martinez, 416 U.S. 396 (1974) 15

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891 (1987).....*passim*

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 21, 22

Reproductive Health Servs. v. Webster, 662 F. Supp. 407 (W.D. Mo. 1987), *aff'd*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1988).....5, 7, 15, 23

Ridgway v. Ridgway, 454 U.S. 46 (1981) 19

Roth v. Veteran's Admin. of United States, 856 F.2d 1401 (9th Cir. 1988)..... 11

Schad v. Mt. Ephraim, 452 U.S. 61 (1981)..... 25

Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980)..... 25

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927)... 17

Shelton v. Tucker, 364 U.S. 479 (1960)..... 16

Smith v. Goguen, 415 U.S. 566 (1974).....24, 25

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 16, 17

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 10, 25

Thornhill v. Alabama, 310 U.S. 88 (1940) 25

Townsend v. Swank, 404 U.S. 282 (1971)..... 19

United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) .. 20

United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973)..... 20

PAGE

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 24

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 20

Wieman v. Updegraf, 344 U.S. 183 (1952) 11, 16, 17

Statutes and Regulations:

Mo. Rev. Stat. §§ 188.200(3), 205, 210, 215 (1986) ....*passim*

53 Fed. Reg. 2922-46 (1988) (to be codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10) 19

Other Authorities:

Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981) 12

American College of Obstetricians & Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) . 7, 8

American College of Obstetricians & Gynecologists, Statement of Policy, *Further Ethical Considerations in Induced Abortion*..... 7

American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* (1986) 7

Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916 (1988) 18

Born Unwanted: Developmental Effects of Denied Abortion (H. David *et al.* eds. 1988)..... 12

Cates & Grimes, *Morbidity and Mortality of Abortions in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* (J. Hodgson ed. 1981)... 12

PAGE

Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-80* (1983) 12

T. Emerson, *The System of Freedom of Expression* (1970) 14

High Risk Pregnancy and Delivery (F. Arias ed. 1984) . 12

Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975) 21

Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. Pitt. L. Rev. 137 (1977)..... 8

Miller, *Informed Consent: I*, 244 J. A.M.A. 2100 (1980) 8

Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970) 25

Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960) 24

President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* (1982) 8

S.L. Romney, N.J. Hay, A.B. Little, J.A. Merill, E.J. Quilligan, & R.W. Standler, *Gynecology & Obstetrics* (2d ed. 1981)..... 12

Rose, *Informed Consent: History, Theory, and Practice*, 7 Am. J. of Ontology 82 (1986) 8

Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980) 10, 20

Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982)..... 21

Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L. Rev. 189 (1983) 21

PAGE

Waltz and Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. Rev. 628 (1969)..... 8

M. Yudof, *When Government Speaks* (1983) 10, 18, 20

INTEREST OF AMICI*

The American Civil Liberties Union (ACLU) is a nationwide non-partisan, membership organization dedicated to defending the principles embodied in the Bill of Rights. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with government action—whether administrative, legislative, or judicial—that restricts the free flow of information contemplated by the First Amendment. In addition, the ACLU established a Reproductive Freedom Project in 1974 interested in protecting a woman's fundamental right to privacy and reproductive freedom. The ACLU believes that full and unbiased information about the abortion option is critical to reproductive choice and that attempts to censor and manipulate the doctor-patient dialogue in an effort to promote childbirth over abortion violate the First Amendment.

The National Education Association (NEA) is a nationwide employee organization with a current membership of some 1.9 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has state affiliate organizations in each of the 50 states, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of educational employees, including their First Amendment right of free speech. Because the Court is being asked in this case to decide, *inter alia*, issues of importance to the exercise of free speech by public employees, NEA has an interest in the outcome.

People for the American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's heritage of tolerance and pluralism, People for the

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* The parties have consented to the submission of this brief in letters on file with this Court.

American Way now has 275,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

The Newspaper Guild is a labor union representing some 40,000 employees of newspapers, magazines, wire services, and related enterprises in the United States, Canada, and Puerto Rico. It has been actively involved in protecting the First Amendment rights of its members and all Americans.

The National Writers Union (NWU) is a five-year-old organization dedicated to improving wages and working conditions for freelance writers as well as fighting for free speech issues that have an impact on NWU's members. As representative of 2,500 writers nationwide, some of whom work for publicly-funded agencies, the NWU views with deep concern any attempt, by legislation or other means, to restrict free speech or to control the flow of information.

The Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens. Since 1968 the Fresno College Foundation has been dedicated to the preservation of a free and open society through the support of free inquiry and the free expression of ideas.

INTRODUCTORY STATEMENT

Missouri's prohibition on the use of public funds to "encourage or counsel a woman to have an abortion not necessary to save her life," Mo. Rev. Stat. § 188.205 (1986); *see also id.* § 188.210, can be viewed from several perspectives. From Missouri's perspective, the question is whether a state must tolerate speech by publicly subsidized health care professionals that is contrary to an avowed state policy favoring childbirth over abortion. Not surprisingly, Missouri calls this a "public subsidy" case. From the perspective of a publicly-funded doctor or counselor, however, the question is whether the state may politicize the doctor-patient dialogue by forcing a health care professional to truncate and distort information and advice to patients in order to advance state policy. Health care professionals such as the public employee plaintiffs herein call this an "employee free speech" case.

It would, however, be simplistic to decide this case by a process of categorization. The significant First Amendment issues posed by Missouri's statutory scheme cannot be answered by labeling the case a "subsidy" or "employee free speech" case. Under either rubric, the fundamental question before the Court is whether the communication at issue—medically relevant speech between a health care professional and a patient—is of sufficient public import to warrant significant First Amendment protection from viewpoint-based censorship designed to promote state policy. If it is—and *amici* do not believe that anyone would argue to the contrary—Missouri's statutory scheme must fall, whether analyzed by this Court as a violation of the public employee's right to free speech, *see* Point I *infra*, or as an invidious manipulation of a subsidy to suppress disfavored ideas, *see* Point II *infra*.

Viewed as a public employee speech case, the ban must fall because it is an unprecedented attempt to limit the ability of government-funded health care professionals—doctors, social workers, nurses—to speak their minds openly and honestly on matters of public concern in the performance of their public functions.

Viewed as a public subsidy case, Missouri's scheme must fall as an attempt to impose viewpoint-based censorship rules upon an entire workforce. While Missouri may fund willing speakers to advance its policies, it may not turn all persons receiving public funds into unwilling exponents of state policy by requiring them, whatever their function, to present only one side of a medical issue of transcendant importance to the low-income women who depend almost entirely on government-funded personnel for information and advice.

There is yet a third perspective from which to view the Missouri statutory scheme—the perspective of a patient seeking medical advice and counsel from a publicly subsidized doctor. Missouri's concerns about subsidizing speech with which it disagrees, and even the health care professional's interest in performing the essence of the medical function, pale into relative insignificance before the low-income patient's urgent need for medical advice and information that is free of a political litmus test. The invasion of the patient's right to know is the ultimate casualty of the Missouri scheme.

By imposing a statutory gag on a doctor's speech to a pregnant patient regarding the medical advisability or availability of abortion, Missouri has gone far beyond the legitimate regulation of speech by public employees or others it subsidizes. It has attempted to politicize the practice of medicine in violation of the deepest ethical precepts of the medical profession. It is as if Missouri had informed publicly funded Legal Aid lawyers that they were free to discuss criminal law with their clients, but were forbidden to counsel or encourage them to bring motions to suppress.

While *amici* agree that government may—indeed, should—influence the job-related speech of certain public officials during the performance of their official duties, Missouri's attempt to manipulate the flow of advice from a public health professional to a patient concerning abortion is a flagrant violation of the First Amendment rights of both the public health professional and the patient. When the state "buys" the services of a public health doctor, it does not "buy" the doctor's medical integrity. When a patient consults a public health professional, she has a right to expect more than a government shill.

STATEMENT OF FACTS

Mo. Rev. Stat. § 188.205 prohibits any state-subsidized health professional from "encouraging or counseling a woman to have an abortion not necessary to save her life."[1] The statute prohibits a physician receiving public funds from "encouraging or counseling" an abortion, even when continuation of a pregnancy would jeopardize a patient's health.[2] Only when an abortion is "necessary to save the woman's life" may a physician or counselor advise a woman of the full range of pregnancy treatment options and recommend that she consider an abortion. Mo. Rev. Stat. § 188.205.[3]

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1 Mo. Rev. Stat. § 188.205 (1986) states:

> It shall be unlawful for any public funds to be expended for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life.

The statute broadly defines "public funds" to include:

> . . . any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Mo. Rev. Stat. § 188.200(3).

2 The drafters of the Missouri statute consciously omitted the phrase "or health" from each of the statutory provisions. *See* Mo. Rev. Stat. §§ 188.205, 210, 215.

Various doctors testified during trial that abortion may be medically indicated "where there are gross fetal anomalies . . . , or where maternal health may be compromised by cardiac disease, recurrent cerebral vascular accidents (CVAS or strokes), diabetic retinopathy (which threatens blindness) and renal disorders." Abortions may also be indicated in the presence of diabetes, cancer, or early amniotic sac rupture. *Reproductive Health Servs. v. Webster*, 662 F. Supp. 407, 427 n.52 (W.D. Mo. 1987), *aff'd*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1988) (citing trial testimony of Drs. Maulik, Pearman and Hern at Trial Transcript 1-44 to 1-52, 1-129 and 1-131, 2-25 to 2-27).

3 While the State argues in its brief that the statute does not restrict the provision of mere information about abortion, Brief for Appel-

A related provision makes clear that Missouri intends, through its statutory scheme, to prohibit its own employees—including doctors, nurses, counselors, and social workers—from speaking non-pejoratively about abortion within the scope of their employment, even when necessary to preserve a patient's health. Mo. Rev. Stat. § 188.210; *see also id.* § 188.215 (prohibiting the use of a "public facility" for "encouraging or counseling" abortion).[4]

Under Missouri's statutory scheme, a health care professional employed in a Missouri state hospital, or subsidized by the State, must violate the deepest ethical precepts of her profession by withholding counseling from a pregnant patient on the availability or medical advisability of an abortion. These precepts, established by the American College of Obstetricians and Gynecologists ("ACOG") and previously relied upon by this Court, *see, e.g.*, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429 n.11, 437 n.26, 449 n.40, 450 n.43 (1983), state that, "[i]n the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy." ACOG, *Standards for Obstetric-Gynecologic Services* 57 (1985).[5]

Further, as Missouri itself recognizes in its creation of a statutory exception for abortions necessary to save a woman's life, a doctor is not merely a passive repository of raw data. Doctors, in the everyday exercise of their professional responsibilities, routinely advise patients on the pros and cons, risks and benefits of alternative courses of treatment.[6] Indeed, the American Medical Association ("AMA") itself requires physicians "to present the medical facts accurately to the patient or to the individual responsible for his care *and to make recommendations* for management in accordance with good medical practice." AMA, *Current Opinions of the Council on Ethical and Judicial Affairs* § 8.07 (1986) (emphasis added). Health care

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lants at 42 [hereinafter "Mo. Br."], the Eighth Circuit correctly rejected this argument on the ground that "the scope of the . . . ban appears literally to be much broader than the interpretation offered by the state." *See* Point III *infra*.

4 Mo. Rev. Stat. § 188.210 states:

> . . . It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is [sic] a public employee within the scope of his employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Mo. Rev. Stat. § 188.215 states:

> It shall be unlawful for any public facility to be used . . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Missouri's decision to appeal only one of the three provisions struck down by the Eighth Circuit, Mo. Rev. Stat. § 188.205, quoted *supra* note 1, is an attempt to shift the Court's attention to the generalized ban on the use of public funds. The State thereby seeks to obscure the fact that, as applied to doctors and nurses in the Missouri public health system, a ban on the use of "public funds" to counsel about abortion is indistinguishable from a ban on the speech of doctors who, like the named plaintiffs herein, are employed and therefore paid by the State of Missouri. To the extent that a doctor is paid with "public funds," she is as bound by Mo. Rev. Stat. § 188.205 as by § 188.210. In fact, Missouri's abandonment of Mo. Rev. Stat. § 188.210 in favor of Mo. Rev. Stat. § 188.205 appears to be nothing more than a strategic ploy designed to facilitate the simplistic labeling of this case as a "subsidy" case, instead of one involving the free speech of public employees and others.

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5 "Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled. Appropriately balanced counseling, combined with the available and accessible facilities, provides the minimum base for the opportunity to make a truly informed choice." ACOG, Statement of Policy, *Further Ethical Considerations in Induced Abortion*, ¶ 4; *see also*, American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* § 8.07 (1986).

6 Drs. Maulik and Pearman testified that ethical obligations compelled them to counsel women about abortion and make recommendations based on their medical opinion. They stated that a prohibition on this would be "devastating" to medical practice. *Reproductive Health Servs.*, 662 F. Supp. at 427 n.53 (citing trial testimony of Drs. Maulik and Pearman at 1-44 and 1-52, 1-129 and 1-131).

providers who fail to adhere to these principles risk professional censure or civil liability.[7]

SUMMARY OF ARGUMENT

Missouri's prohibition against the use of public funds to "encourage or counsel" abortion violates the First Amendment for three reasons. First, § 188.205's restriction on the use of public funds operates primarily to restrict the speech of public employees in the State of Missouri. While the State has attempted to escape the constitutional implications of this fact by not appealing the ruling of the Eighth Circuit as to § 188.210, it cannot do so. Named plaintiff doctors in this case work as public employees and Missouri's prohibition on the use of public funds to counsel about abortion restricts their freedom of speech in the course of their public employment.[8] Public employees retain First Amendment rights to speak free from government coercion, even on the job and about matters related

7 *See, e.g.*, President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 76 (1982) ("a physician is obliged to mention all alternative treatments, including those he or she does not provide or favor, so long as they are supported by respectable medical opinion"). *See also* Rose, *Informed Consent: History, Theory, and Practice*, 7 Am. J. of Ontology 82 (1986); Miller, *Informed Consent: I*, 244 J. A.M.A. 2100 (1980); Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. Pitt. L. Rev. 137 (1977); Waltz and Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. Rev. 628 (1969).

As this Court has made clear, "[i]t remains primarily the responsibility of the physician [or other health care worker under the physician's supervision] to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Akron*, 462 U.S. at 443. Missouri has itself recognized that such information must include the "foreseeable risks [if any] and possible alternatives" of a proposed course. *See, e.g., Kinser v. Elkadi*, 674 S.W.2d 226, 232 (Mo. Ct. App. 1984). For a pregnant woman, these alternatives include childbirth, adoption, and abortion. ACOG, *Standards for Obstetric-Gynecologic Services* 57 (1985).

8 If this were not the case, there would be no case or controversy. *See* Brief of Appellee at _____.

to their official function. When speech by a government employee on a matter of public concern does not inhibit the performance of her duties, and particularly when it is necessary to the performance of those duties, it is protected by the First Amendment.

Second, the statutory provision challenged here creates an impermissible distinction on the basis of viewpoint. Under the provision, recipients of public funds are free to counsel against abortion, but are prohibited from speaking non-pejoratively about abortion. Legislative efforts to suppress one viewpoint so as to promote another are subject to the strictest First Amendment scrutiny. The mandatory omission of medical information and advice about abortion compels physicians, whose salaries Missouri has chosen to subsidize, to act as instruments of state policy in violation of their medical judgment and their First Amendment rights. A provision that permits the dissemination of only skewed medical advice to a reliant audience must be invalidated.

Finally, the challenged provision is unconstitutionally vague and overbroad. It is vague because the statute's terms fail clearly to distinguish speech which is prohibited from that which is permitted. It is overbroad because it sweeps within its ambit even informational speech about abortion by physicians and others employed by the State. The State's effort in its brief to clarify and limit the scope of the law serves only to reinforce the conclusion that the statute is impermissibly vague.

Missouri has profferred no compelling state interest to justify its restrictions on constitutionally protected speech, and it has chosen means that sweep broadly over First Amendment freedoms.

ARGUMENT

All parties agree that if a state statute sought, through the imposition of criminal sanctions, to prevent a private doctor from counseling a patient about the advisability or availability of a lawful course of treatment, the statute would violate the First Amendment. *See Bigelow v. Virginia*, 421 U.S. 809 (1975); *See also In re Primus*, 436 U.S. 412 (1978).[9] *See also Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) ("The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion").[10]

Missouri argues, however, that when public health professionals are paid with public funds, the State may advance its policy of favoring childbirth over abortion by dictating the content of the medical information and advice that funded doctors and nurses are permitted to give their patients. While it is, of course, true that government may generally speak in favor of its policy choices,[11] the breathtaking assertion of plenary state power over speech by state-funded professionals asserted by Missouri herein, were it to be taken seriously, would threaten the integrity of our public health, legal aid, and state university systems.

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9 Indeed where the constitutionally protected right to choose abortion is concerned, this Court has struck down any attempt to invade or "straight-jacket" the doctor-patient dialogue under the Fourteenth Amendment. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986); *Akron*, 462 U.S. at 443-45.

10 The dissent was from a standing decision not bearing on the First Amendment. *Poe*, 367 U.S. at 510. (Douglas, J., dissenting).

11 *See, e.g., Meese v. Keene*, 107 S.Ct. 1862 (1987); *see generally*, M. Yudof, *When Government Speaks* (1983); Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980).

I. MISSOURI'S STATUTE LIMITS THE ABILITY OF HEALTH PROFESSIONALS EMPLOYED BY THE STATE TO SPEAK FREELY AND TRUTHFULLY TO THEIR PATIENTS ABOUT MATTERS OF MEDICAL IMPORTANCE AND THEREFORE VIOLATES THE FIRST AMENDMENT.

This Court has consistently recognized that the First Amendment grants significant protection to public employees. *E.g., Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *cf. Wieman v. Updegraf*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring) (academic freedom of state university professors protected). This protection extends to speech occurring on the job[12] and to speech expressed by an employee in a private conversation. *E.g., Rankin*, 107 S. Ct. at 2899; *Givhan*, 439 U.S. at 413-16.

Missouri attempts to sidestep the plain import of these cases by assuming that all speech is fungible in determining the range of permissible governmental censorship.[13] Government's power

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12 Lower courts consistently apply the analysis of *Pickering* to speech occurring on the job or in the course of employment. *See Patteson v. Johnson*, 787 F.2d 1245 (8th Cir. 1986) (Deputy State Auditor's negative testimony before state senate committee concerning audit is protected speech); *Roth v. Veteran's Admin. of United States*, 856 F.2d 1401 (9th Cir. 1988) (hired "trouble shooters' " allegations of misuse of public funds and inefficient operation of hospital are protected speech); *Greenberg v. Knetko*, 811 F.2d 1057 (7th Cir. 1987) (citations and unauthorized actions taken by social worker in Department of Children and Family Services to protect physical and mental health of children are protected speech).

13 The State also argues that the speech prohibited by the statutory provision in question is not of "public concern." *See* Mo. Br. at 38-39. While reasonable people may differ over whether a trivial and tasteless

to interfere with public employee speech is not, however, monolithic. It varies depending upon the nature of the speech and the interests at stake. While a state would undoubtedly have the power to prevent its employees from engaging, while on the job, in racially or sexually insulting speech directed to the public, *Rankin*, 107 S. Ct. at 2903 (Scalia, J., dissenting), at a minimum, it lacks the power to conform the medical counseling of its doctors; the scholarship of its university professors; or the legal advice of its public defenders to the shifting sands of "state policy."

Under existing doctrine, the free speech protection available to a given expression by a public employee is a function of three factors: (1) the employee's interest in engaging in the expression in question; (2) the hearer's interest in receiving the information

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remark by a public employee to a boyfriend about an attempt to assassinate President Reagan is worthy of constitutional protection, *Rankin*, 107 S. Ct. 2891, it cannot be seriously contested that medically relevant speech between a doctor and patient is of "public concern" under the First Amendment.

The "content, form, and context" of such speech is of critical public concern. *See Connick*, 461 U.S. at 147-48. The freedom of a doctor to advise a patient within the scope of professional judgment and to provide medical care to low-income women consistent with prevailing standards is of paramount public concern. Further, the public interest in availability of information about abortion is evident. The public health consequences of denying women this information are increased maternal morbidity and mortality due to delayed abortion, unwanted parenthood, and increased morbidity and mortality due to health-endangering pregnancy and childbirth. Cates & Grimes, *Morbidity and Mortality of Abortions in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* (J. Hodgson ed. 1981); Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-1980* (1983); Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 16 (1981); *Born Unwanted: Developmental Effects of Denied Abortion* (H. David *et al.* eds. 1988); *High Risk Pregnancy and Delivery* (F. Arias ed. 1984); S.L. Romney, N.J. Hay, A.B. Little, J.A. Merill, E.J. Quilligan, & R.W. Standler, *Gynecology & Obstetrics* 703-95 (2d ed. 1981). *See also Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988). Finally, that speech occurs in a private conversation is no barrier to a finding that it concerns a subject of public importance. *Givhan*, 439 U.S. at 413.

in question; and (3) the relationship between the speech in question and the employee's public function.[14] Where, as here, a public health professional has an extraordinarily powerful interest in self-expression; a patient has a critical need for the information; and counseling is at the core of the doctor's public function, the First Amendment forbids Missouri from censoring the speech in the name of fidelity to its policies.

In both *Pickering* and *Givhan*, these factors pointed strongly toward protection of the speech in question. The public teacher in *Pickering* believed that the budgetary decisions of the school administration were making it impossible for him to fulfill his responsibilities to his students. The teacher in *Givhan* believed that the policies of her school were frustrating its desegregation. Both the speakers and the listeners had significant interests in the communication of these messages, and the speech was intimately connected with the teachers' public functions. Not surprisingly, in both cases this Court unanimously invalidated the dismissals of the teachers for their protected speech.[15]

In *Rankin*, by contrast, the three factors were significantly weaker. The public employee's interest in expressing a hope for the successful assassination of the President was problematic. Viewing the speech in the context of a conversation addressing

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14 When speech of public concern occurs on the job, this Court has looked as well to the governmental employer's "interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, in short, to the government employer's "legitimate purpose in 'promot[ing] efficiency and *integrity* in the discharge of official duties . . . .' " *Id.* at 150-151 (emphasis added) (citation omitted). *See also Pickering*, 391 U.S. at 570-73. Because there is no meritorious argument that the speech prohibited by Missouri would disrupt employee relations in the workplace or interfere with a state health care institution's ability to fulfill its public function, *amici* focus on the question whether the speech at issue is consistent or at odds with the "integrity of the discharge" of a publicly employed physician's duties.

15 Justice Rehnquist wrote for a unanimous Court in *Givhan*; Justice Marshall, for a unanimous Court in *Pickering*. Justice White concurred in *Pickering* only insofar as the teacher's speech was truthful. 391 U.S. at 583 (White, J., concurring in part and dissenting in part).

the policies of the Reagan Administration, however, a majority of the Court discerned cognizable speaker and hearer interests. Moreover, while the speech in question bore no relationship to the employee's function, it did not appear to have inhibited the performance of this function. Given the relative weakness of the three factors, *Rankin* was a close case. Nevertheless, a majority found the speech protected.[16]

Measured against the speech protected in *Pickering*, *Givhan*, and *Rankin*, the public health professional's speech at issue here merits vigorous First Amendment protection. The doctor who is subject to Missouri's restriction on speech has an even greater interest in self-expression than did the teachers in *Pickering* and *Givhan*. Under the Missouri statutory scheme, a publicly employed doctor may not advise any patient about the availability of the abortion option. Confronted by a patient whose health would be imperilled by the continuation of a pregnancy, the physician is caught in a particularly vicious bind. On the one hand, canons of medical ethics may compel the doctor, on penalty of professional censure or loss of licensure, to speak in favor of abortion as a medical option of choice, *see* ethical standards discussed in Statement of Facts *supra*; on the other hand, Missouri's statutory scheme forbids the doctor from "encouraging or counseling" the patient to have an abortion not necessary to save her life. The net result is a statutorily compelled violation of the single most important tenet of a doctor's professional code.

The history of the First Amendment has been, in significant part, an attempt to shield speakers of conscience from state imposed restrictions on deeply felt self-expression. *See generally*, T. Emerson, *The System of Freedom of Expression* at Ch. 2. (1970). There can hardly be a more compelling candidate for

16 In *Connick*, 461 U.S. 138, the Court upheld the dismissal of a public employee, finding none of the speech-protective interests present. The Court found that the employee's speech did not implicate issues of public importance, thus minimizing the speaker and hearer interests; and did interfere with the performance of her public function, thus maximizing the government's interest.

such protection than a public health professional faced with a statutorily mandated violation of her oath to heal the sick and to provide accurate and complete information to all patients.

Similarly, the hearer's interest in this case dwarfs the interests found sufficient in *Pickering* and *Givhan*, to say nothing of *Rankin*.[17] A patient in the Missouri public hospital system generally cannot afford private medical care. She is dependent on the medical advice she receives from publicly funded health professionals to enable her to make an informed and autonomous choice whether to continue a pregnancy or to undergo an abortion. Her interest in receiving truthful advice from public health professionals cannot be overstated, especially since the choice at issue is itself constitutionally protected. Yet, the Missouri statutory scheme attempts to skew the nature of the medical advice that she will receive, in the name of advancing a state policy favoring childbirth over abortion. In effect, Missouri attempts to use medical censorship as a device to manipulate the behavior of poor women in favor of childbirth. Such a regime makes a mockery of the patient's constitutionally protected right to choose freely whether or not to bear a child.[18]

Finally, the speech at issue in this case is even closer to the employee's core public function than was the speech in *Pickering* or *Givhan*. In those cases, the speech at issue bore a substantial relationship to the public responsibilities of the teachers. In this case, the speech at issue goes to the very essence of the health professional's public function. Indeed, the prohibited speech is inextricable from the function which publicly employed physicians are hired to perform. When the state hires

17 The Supreme Court has repeatedly recognized that the right to speak includes the right to receive information. *See Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Board of Educ. v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion).

18 On this basis, the Eighth Circuit held:

> "We can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision."

Reproductive Health Servs., 851 F.2d at 1080

a doctor, it necessarily engages her to provide sound medical care consistent with ethical and common law standards. The essence of that task is the giving of truthful and complete medical advice. Censorship of that advice in the name of "state policy" is totally inconsistent with the employee's public function.

Thus, whether measured by the intensity of the public health professional's interest in self-expression; the urgency of the patient's interest in receiving uncensored advice; or the incompatibility of censorship of medical advice with the health professional's public function, Missouri's attempt at turning health professionals into creatures of "state policy" cannot withstand First Amendment scrutiny.

While public employee speech cases provide a helpful framework within which to consider Missouri's attempt at censoring the medical advice of its public health professionals, the nature of the speech at issue here suggests an even more analogous line of authority—this Court's attempt to preserve academic freedom within the nation's publicly funded universities.[19] In a historic series of cases, the Court has recognized that the First Amendment limits the power of the state to interfere with the on-the-job speech of publicly funded university educators. *E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring); *Wieman v. Updegraf*, 344 U.S. 183, 195-97 (1952) (Frankfurter, J., concurring). *See also Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The Court's academic freedom cases reflect the collision of two principles—the power of the state to influence the speech of publicly funded educators through the selection of curriculum and general pedagogic policy, on the one hand; and the importance of intellectual freedom, critical inquiry, and open-

19 University professors, like physicians, have the highest interest in maintaining freedom of expression within the scope and in the course of performing their essential functions.

mindedness to the success of the educational mission on the other. *See Board of Educ. v. Pico*, 457 U.S. at 876-82 (Blackmun, J., concurring). But the state's interest in directing pedagogic policy fades in the university context because, as the Court has recognized, the free interplay of ideas is at the heart of higher education in a democracy.[20]

As Justice Frankfurter recognized in his concurrence in *Sweezy*, the state's power to regulate job-related, publicly funded speech, broad as it is, cannot destroy the freedom of a public educator to carry out the essence of his public function in a state university—the teaching of open minds. 354 U.S. at 261-63. Similarly, Missouri's power to regulate the speech of its public employees cannot destroy the freedom of a public health professional to carry out the essence of her public function—the provision of accurate and complete medical advice. Indeed, as strong as Justice Frankfurter's case for "academic freedom" may have been, the First Amendment argument in favor of "medical freedom" is even stronger.

Before in our nation's history, dedicated ideologues sought to use the public purse to prevent publicly-funded employees from fulfilling a professional duty to speak their minds. The targets were not public health professionals caught between their ethics and a ban on counseling abortion, but public school teachers caught between their duty to teach and a ban on espousing Darwinian theories of evolution in the classroom. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927); *Epperson v. Arkansas*, 393 U.S. 97; *Edwards v. Aguillard*, 107 S.Ct. 2573. These cases upheld the freedom of teachers in the classroom. As the Court noted in *Epperson*, "[o]ur Courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." 393

20 *See, e.g.*, *Pico*, 457 U.S. at 920 (Rehnquist, J., dissenting) ("the government as educator is subject to fewer [constitutional] strictures when operating an elementary and secondary school system than when operating an institution of higher learning"); *Wieman*, 344 U.S. at 196-97 (Frankfurter, J., concurring).

U.S. at 104; *id.* at 115-16 (Stewart J., concurring) (based explicitly on academic freedom grounds).

If well-meaning zealots were not permitted to prevent public school teachers from educating students about the origins of human life, surely those who have succeeded in enacting the statutory gag challenged in this case cannot be permitted to prevent physicians from providing pregnant patients with encouragement and counseling about abortion.

II. MISSOURI'S ATTEMPT TO IMPOSE VIEWPOINT-BASED SPEECH RESTRICTIONS CONCERNING ABORTION ON HEALTH CARE PROFESSIONALS RECEIVING PUBLIC FUNDS VIOLATES THE FIRST AMENDMENT.

In a world where literally millions of Americans depend upon government-funded programs to provide them with critical guidance in areas as diverse as medical care, law, and higher education, the prospect of state manipulation of the free flow of information and advice from government-funded professionals to individual hearers in the name of advancing "state policy" poses an intolerable threat to First Amendment values.[21] One of the ultimate purposes of the First Amendment is the protection of the individual's capacity for informed and autonomous choice.[22] That capacity is seriously undermined when the state is permitted to censor the flow of publicly funded professional information and advice. Under such a regime, hearers are given the illusion of autonomous choice; but the reality of control rests with the state.

This case raises the question whether the state may compel subsidized health professionals to omit information about one

21 *See* Yudof, *supra* note 11, at 157; *see also* Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916, 1931-37 (1988).

22 *See Cohen v. California*, 403 U.S. 15, 24 (1971) ("putting the decision as to what views shall be voiced into the hands of each of us . . . [reflects] the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

side of a controversial health care decision in attempting to insure that the choices of individuals comport with government policy.[23] In seeking to couch the issue before the Court as a mere decision not to provide "public funds" for counseling or encouragement about abortion, Missouri has raised the First Amendment stakes. Instead of a relatively narrow statutory provision like Mo. Rev. Stat. § 188.210, which applied to a designated category of public employees, the flat ban imposed by § 188.205 on certain abortion-related speech by persons receiving "public funds" casts a larger net of censorship.[24] It appears to apply to every public employee, in every context; as well as to every private person receiving funds from the State.[25]

While willing government officials may speak in favor of one side of a controversial issue without automatically incurring an

23 This question is more sharply presented in three cases currently pending in three United States Courts of Appeals. *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending*, Nos. 88-6204/06 (2d Cir.); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending*, No. 88-1279 (1st Cir.). In these cases, the meaning and effect of the challenged federal regulations are undisputed: all non-pejorative speech about and referral for abortion are prohibited and physicians are simultaneously compelled to refer all pregnant patients for prenatal care. *See* 53 Fed. Reg. 2922-46 (1988) (to be codified at 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10).

24 If the state lacks the power to censor the speech of public employees who are paid entirely by the state, *see* Point I *supra*, it necessarily lacks the power to censor private physicians whom it only partially subsidizes.

25 Mo. Rev. Stat. § 188.200(3), quoted *supra* note 1, broadly defines "public funds" as those "received or controlled" by the State and, notwithstanding the Supremacy Clause of the United States Constitution, expressly purports to regulate federal funds as well. States may not, however, attach conditions to the disbursement of federal funds that exclude recipients who would otherwise be eligible under the federal enabling legislation and regulations. *See Townsend v. Swank*, 404 U.S. 282, 291 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968); *Planned Parenthood Ass'n of Utah v. Dandoy*, 635 F. Supp. 184, 189-90 (D. Utah 1986); *see also Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

obligation to subsidize their opponents;[26] and while public employees may be subjected to non-discriminatory rules requiring them to refrain from certain political activity that conflicts with their public function,[27] the government may not, consistently with the First Amendment, engage in viewpoint discrimination designed to force every subsidized individual or entity to present only one side of a controversial issue to the public. Under our Constitution the state lacks the power to turn its workforce into a propaganda machine that parrots the party line. *See generally*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Cammarano v. United States*, 358 U.S. 498 (1959).

For these reasons, the Supreme Court has consistently invalidated the uneven allocation of subsidies based on the viewpoint or content of the funded expression. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court invalidated a ban on editorializing in stations receiving federal grants for public broadcasting because the ban was intended "to limit discussion of controversial topics and thus to shape the agenda for public debate." *Id.* at 384.[28] Similarly, in *Arkansas Writers' Project v. Ragland*, 107 S.Ct. 1722 (1987), the Court declared unconstitutional an Arkansas statute that taxed certain newspapers and magazines while exempting others: "official scrutiny

26 Government officials need not subsidize the opposition every time the government speaks, but the First Amendment precludes the government from taking unfair advantage of its incumbency to advance its own positions. Thus, for example, government funds may not be used to pay for campaign activities. *See generally*, Yudof, *supra* note 11; Shiffrin, *supra* note 11. *See Block v. Meese*, 793 F.2d 1303, 1312-14 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986).

27 *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

28 Significantly, the four Justices who dissented in *FCC* did so because they viewed the editorializing ban as viewpoint neutral, not because they believed the government could condition a benefit on a viewpoint-discriminatory limit on speech. *Id.* at 407 (Rehnquist, J., dissenting) ("In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent").

of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment." *Id.* at 1728. *See also id.* at 1731 (Scalia, J., dissenting) ("a more stringent, prophylactic rule is appropriate . . . when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (" '[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas' ") (citation omitted); *cf. Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 811-813 (1985) (plurality opinion) (remanding for determination whether exclusion of certain speech from a nonpublic forum was "in reality a facade for viewpoint discrimination"). Thus, while the State is free to speak in favor of childbirth, Missouri is not free to impose a viewpoint-based restriction on subsidized speech simply to advance this policy.[29]

Unlike most "government speech" cases, where the effect of the government's speech in favor of its policies is to increase the amount of information available to the public, Missouri asserts the power to prevent public health professionals from providing truthful advice to patients solely because the advice is contrary to government policy. Thus, Missouri seeks to advance its poli-

29 *See also Gay & Lesbian Law Students Ass'n v. Gohn*, 850 F.2d 361, 366-68 (8th Cir. 1988) (public university may not withhold funding from student group because it "dislikes their ideas"); *Bullfrog Films v. Wick*, 847 F.2d 502, 509-10 & n.11 (9th Cir. 1988) (USIA may not deny films certification for exemption from import duties because of content of films or viewpoints expressed in them); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980) (IRS may not deny tax exemptions under standards so imprecise that they risk viewpoint- or content-based discrimination in allocation of benefits); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815-16 (D.D.C. 1986) (Library of Congress may not stop subsidized production of braille editions of *Playboy* because of its sexual content). *See generally*, Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L. Rev. 189 (1983).

cies in this case by selectively induced ignorance. *But see Griswold v. Connecticut*, 381 U.S. 479, 482 (1985) ("The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

Missouri's assertion of the unchecked power to censor the medical advice of its public health doctors flows from a fundamental misconception. The State incorrectly assumes that because government is under no constitutional obligation to fund a particular medical procedure,[30] or to subsidize a given political activity,[31] it is free to prevent its medical employees from delivering truthful professional "counseling" about the advisability of engaging in the activity or procedure privately. Mo. Br. at 38-40. However, the power to refrain from subsidizing an activity does not translate into the power to ban truthful

30 *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). In these cases, this Court held that the government need not reimburse the medical costs of certain abortions. The government's power to subsidize some medical procedures but not others does not mean, however, that government may discriminate in funding on the basis of a health care professional's viewpoint or speech about abortion. Free speech, particularly when exercised in furtherance of a constitutional right, is independently protected under the First Amendment. *Cf. Meyer v. Grant*, 108 S.Ct. 1886, 1893-94 (1988) (state power to limit gambling does not permit state to limit advocacy of legalization of gambling).

31 *Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 108 S.Ct. 1184 (1988). In *Lyng* this Court upheld an amendment to the Food Stamp Act withholding benefits from the households of some striking workers. Although the denial of benefits may indirectly have coerced some workers to shun expressive activities, the amendment did not itself fund expression in a viewpoint-discriminatory manner. Had Congress established a special information bureau for the purpose of informing the public about the availability of welfare benefits, but required that strikers seeking information from the bureau not be told about the availability of food stamps or other benefits for which they would be eligible, then *Lyng* might bear upon this case. Further, unlike *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this case does not involve a viewpoint-neutral decision to subsidize one category of private speaker, but not another. Rather, it is an unconstitutional attempt to dictate to subsidized health care professionals which views are permissible to express and which are forbidden. *Id.* at 548.

public employee speech about it when, as here, the speech is necessary to permit a hearer to make an informed choice about whether to engage in the activity with private funds.[32] When Missouri decides not to subsidize an activity, it makes a choice about the allocation of finite resources. When, however, Missouri attempts to prevent public health professionals from speaking truthfully about the medical advisability of an abortion, the State is no longer engaged in allocating its own resources; it is attempting to manipulate the private behavior of its citizens by controlling the flow of information to them. Such a regime is wholly antithetical to the postulates of a free society.

III. MO. REV. STAT. § 188.205 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Missouri suggests that the challenged provision does not forbid the dissemination of "information" about abortion, but withholds funding only from speech "affirmatively advocating" that a woman have an abortion. Mo. Br. at 42.[33] The statutory language does not, however, articulate any such intelligible distinction between abortion advocacy and other kinds of information or dialogue about abortion. Instead, it refers broadly to "counseling" which, in the context of delivery of health care, is susceptible to a wide range of interpretations. It could mean, for example: informing a woman that abortion is one legal and medically feasible option in her case; helping an individual to clarify her own responses to the abortion option;

32 *Cf. FCC v. League of Women Voters*, 468 U.S. at 400 (government cannot dispense benefits in a way that inhibits party's use of its own funds to exercise fundamental right).

33 Missouri's claim that the statute merely assures neutrality on the issue of abortion would be more credible if the statute forbade the taking of a negative position on abortion as well as a positive one. Instead, Missouri has enacted a classic viewpoint-based speech restriction. *See* Point II *supra*. Further, the manifest impossibility of determining the point at which the permissible delivery of "information" about an abortion shades into impermissible "counseling or encouraging" abortion is what led the Eighth Circuit to hold the statute unconstitutionally vague. *Reproductive Health Servs.*, 851 F.2d at 1078.

providing the information that a woman seeking abortion would need in order to give her informed consent to the procedure; answering a woman's questions about different abortion procedures; or explaining to a woman why abortion would pose fewer risks than childbirth in her case. The State's effort in its brief to confine the statute's broad language cannot compensate for the absence of a clarifying construction by the Missouri courts, which are uniquely empowered to articulate saving constructions of vague state laws. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

Statutory provisions such as § 188.205, which do not clearly distinguish permissible from forbidden speech, violate the due process and free speech rights of those to whom they apply. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). *See generally*, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).[34] This constitutional requirement of clarity in statutory drafting serves three related functions. First, it is designed to give fair notice of prohibited conduct. *E.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A statute that places a doctor's job on the line on the basis of what she says in the course of treatment cannot use terms so vague that she cannot discern in advance what speech is forbidden. The related concern that unclear statutory drafting causes people to steer wide of prohibited conduct is especially problematic when the statute touches speech, as does § 188.205. Undue self-censorship is constitutionally unacceptable. *E.g., City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2144 (1988); *Kolender*, 461 U.S. at 358; *Baggett*, 377 U.S. at 372. Finally, the vagueness doctrine is designed to place precise restrictions on the ability of enforcement officials to use the law to harass persons with whom they disagree. *E.g., City of Lakewood*, 108 S.Ct. at 2144; *Smith v. Goguen*, 415 U.S. at 575; *Kolender*, 461 U.S. at 358. In the emotionally charged atmosphere of the debate over abortion, *see Thornburgh v. ACOG*, 476 U.S. at 771-72, this third prong of the vagueness doctrine is of particular significance. The Eighth Circuit was, thus, clearly correct when it invalidated Missouri's statutory scheme on vagueness grounds.[35]

Even if § 188.205 were capable of an occasional constitutional application, the provision is facially invalid because it is substantially overbroad. The unconstitutional operation of the Missouri statutory scheme to silence publicly employed health professionals, *see* Point I *supra*, will constitute the bulk of the statute's applications. The "substantial overbreadth" test enunciated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *New York State Club Ass'n v. New York City*, 108 S.Ct. 2225 (1988), is, therefore, clearly satisfied. Moreover, even if the statute on its face distinguished between non-directive, psychotherapeutic, or informational counseling and affirmative medical advice, it would still reach protected speech. A doctor cannot be reduced to a passive repository of "information." Encouragement and directive advice in favor of medically indicated treatments are an integral part of the doctor's art. The statute is thus overbroad in this respect as well. *See generally*, *Houston v. Hill*, 107 S.Ct. 2502 (1987); *Board of Airport Comm'rs v. Jews for Jesus*, 107 S.Ct. 2568 (1987); *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940). *See generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

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34 The Missouri statute is not exempt from a vagueness challenge because it imposes civil, not criminal, penalties. The same standard applies when First Amendment rights are implicated. Civil statutes that infringe on an employee's right to free speech have been held unconstitutionally vague. *See Keyishian v. Board of Regents*, 385 U.S. 589; *Baggett*, 377 U.S. 360; *Cramp v. Board of Educ.*, 368 U.S. 278 (1961). *See also Griacco v. Pennsylvania*, 382 U.S. 399 (1966); *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925).

35 The vagueness of the statute has been exacerbated by Missouri's decision not to appeal § 188.210 thereby rendering the intended scope of § 188.205 unclear. As noted *supra*, if Missouri no longer intends to restrict the speech of public employees who would otherwise have been subject to the provisions of § 188.210, no case or controversy remains herein. *See* Brief of Appellee at _____.

IV. MISSOURI'S STATUTE SERVES NO COMPELLING STATE INTEREST NOR IS IT NARROWLY TAILORED.

Because the Missouri statutory scheme infringes upon cherished First Amendment guarantees, it can be justified only if it is narrowly tailored to serve a compelling state interest. *Ragland*, 107 S.Ct. at 1728.

The State advances one primary purpose in support of the statute: the desire "not to expend public funds . . . for the purpose of performing abortion services, including encouraging or counseling a woman to have an abortion . . . ." Mo. Br. at 38. This interest falls far short of "compelling."

While the government's "value judgment favoring childbirth over abortion" may be sufficient "under the less demanding test of rationality that applies in the absence of . . . the impingement of a fundamental right," *Maher*, 432 U.S. at 474, 478; *see also McRae*, 448 U.S. at 324, this interest is insufficient where, as here, First Amendment rights are violated. Insofar as Missouri sought to censor non-pejorative speech about abortion, this interest fails even a "rationality" test. A governmental "desire to suppress a particular point of view" is never "reasonable." *Cornelius*, 473 U.S. at 811-13 (plurality opinion); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Nor has the State chosen narrow means. As shown *supra*, Point III, the terms "encouraging or counseling" are susceptible to myriad interpretations, and the prohibition on counseling and encouragement except when "necessary to save [the woman's] life," § 188.205, makes the ban applicable in nearly every medical setting. The State might have drafted a restriction reaching only speech inherently inconsistent with the physician's function, or it might have withheld funds only for the performance of abortions without restricting speech at all. *Cf. McRae*, 448 U.S. 297; *Maher*, 432 U.S. 464. Instead, it chose means that sweep with unconstitutional breadth over protected freedoms.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the United States Court of Appeals for the Eighth Circuit holding Missouri's law unconstitutional under the First Amendment.

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March 30, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CANADIAN WOMEN'S ORGANIZATIONS, *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Constitutions and Statutes:

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Criminal Code, R.S.C. 1970, c. C-34 ..... *passim*

United States Constitution, Amendment XIV 5

Other Authorities:

Canada Department of Justice, *Report of the Committee on the Operation of the Abortion Law* (Badgley Report), Ottawa: Minister of Supply and Services, 1977 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, et al.,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CANADIAN WOMEN'S ORGANIZATIONS, *AMICI CURIAE* IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

The Canadian Abortion Rights Action League (CARAL) is a national pro-choice organization of 17,000 individuals and 100 groups whose aims are to keep abortion decriminalized and to improve access to contraception and abortion. CARAL regards the right to safe, legal abortion to be a fundamental human right.

The ONTARIO COALITION FOR ABORTION CLINICS (OCAC) is an independent volunteer organization representing individuals and groups in the province of Ontario. OCAC believes that access to abortion is essential to women's equality.

The NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN (NAC) is the largest women's organization in Canada representing approximately 600 non-governmental associations from all regions of the country. NAC's priority is to unite women and women's organizations from across Canada in the struggle for equality. NAC supports access to abortion because reproductive choice is necessary for women's liberty and equality.

The NATIONAL ASSOCIATION OF WOMEN AND THE LAW (NAWL) is a Canadian non-profit organization of lawyers and law students dedicated to improving the legal status of women in Canada and to providing public education. NAWL believes that freedom of choice on abortion is a fundamental human right, and that those opposing reproductive choice threaten the freedom of Canadian women.

SUMMARY OF ARGUMENT

The purpose of this brief is to support the appellees, the Reproductive Health Services et al., and to argue that recent developments in Canadian law support the position that *Roe v. Wade*, 410 U.S. 113 (1973) should not be reconsidered. In January, 1988 the Supreme Court of Canada struck down the Canadian abortion law in *R v. Morgentaler*, [1988] 1 S.C.R. 30 as violating women's rights under the *Canadian Charter of Rights and Freedoms*. We believe the *Morgentaler* decision is of relevance to the present appeal because it is the judgment of the highest Court of a country that is not only proximate geographically to the United States but which has political, religious, social and legal traditions closer to the traditions of the United States than those of any other country. In our view, the majority judgments in *Morgentaler* recognize the importance for women of access to abortion and constitute an independent affirmation of the principles articulated in *Roe v. Wade*. Reversing *Roe v. Wade* would represent, in our opinion, a regressive development in American law.

In the *Morgentaler* decision the Supreme Court of Canada held that abortion laws which expose pregnant women to unnecessary physical and emotional risk, *at a minimum* violate women's interests in bodily integrity. Two of the judgments for the majority result may also be read as indicating that laws which wrest control over the decision to have an abortion from the pregnant woman and which allow the decision to be made on criteria totally unrelated to the woman's "priorities and aspirations" infringe women's rights to liberty and personal autonomy.

We seek to present to the Court the constitutionally protected interests of women in respect of access to abortion recognized by the Supreme Court of Canada in the *Morgentaler* decision. Although the Supreme Court of Canada did not need to consider abortion in the context of women's right to equality, we also seek to argue that the ability to decide to terminate a pregnancy is essential if women are to be full and equal participants in society.

ARGUMENT

I. THE *MORGENTALER* DECISION HOLDS THAT LAWS CURTAILING ABORTION AFFECT A WOMAN'S CONSTITUTIONAL RIGHTS

By a majority of five judges, a seven member panel of the Supreme Court of Canada struck down the abortion provisions of the *Criminal Code* of Canada. The Chief Justice, Justice Beetz, and Justice Wilson, wrote separate reasons for holding s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 contravened the *Canadian Charter of Rights and Freedoms*. All three judges agreed that s. 251 violated a woman's constitutional right to "security of the person". Two of the judges also held that s. 251 violated a woman's constitutionally protected personal autonomy. To explain the significance of these findings, it is helpful to briefly review both the impugned abortion law and the constitutional framework in which the law was declared unconstitutional.

A. Section 251 of the *Criminal Code* of Canada

Section 251 of the *Criminal Code* constituted the abortion law of Canada. The provision was composed of six subsections. The first two of these made abortion a criminal offence both for the medical personnel performing the procedure and for the pregnant woman. The remaining four subsections created an exception to the offence where an abortion was performed under specified conditions. Abortions were exempt from criminal liability when: (1) they were performed in a hospital that had been approved by the provincial Minister of Health or accredited by the Canadian Council on Hospital Accreditation; and (2) a hospital "therapeutic abortion committee" composed of no fewer than three doctors had certified in writing that the continuation of pregnancy would or would be likely to endanger the life or health of the woman.

The requirement of prior authorization by a therapeutic abortion committee had three significant implications. First, removing the power to decide to terminate a pregnancy from the pregnant woman and placing it in the hands of a committee of no fewer than three doctors abrogated the right of a woman to make fundamental decisions regarding her body. Second, the requirement created acute problems of differential access to abortion. According to the Badgley Report on the operation of the abortion law commissioned by the Department of Justice and quoted by the Court in *Morgentaler*, over one half of the non-military hospitals in Canada were ineligible to establish therapeutic abortion committees and an additional twenty percent simply chose not to establish them. Third, the mechanics of convening a therapeutic abortion committee combined with the problem of access delayed the performance of abortions thereby increasing the health risks associated with the procedure and the psychological stress endured by the pregnant woman.

B. The Constitutional Framework

Section 251 was challenged under the *Canadian Charter of Rights and Freedoms*, a constitutional document which, like the

American *Bill of Rights*, entrenches rights and freedoms. For the purposes of analyzing *Morgentaler* two differences between the documents are relevant: (1) the approach to interpretation under the *Charter*; and (2) the substantive right implicated in abortion legislation.

One of the distinctive features of the *Charter* as compared with the *Bill of Rights* is the presence of a provision allowing specific infringements of rights to be justified and therefore upheld. Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This provision permits explicit consideration of the government's objectives in enacting the challenged legislation and allows the courts to balance the interests of the government against the interests of the individual. Declaring a law unconstitutional is a twofold process: the Court first determines whether there has been a violation of a substantive *Charter* right and, *if a right has been violated*, the Court continues to consider whether the violation may be justified under s. 1.

Although counsel for Morgentaler argued that s. 251 violated a number of *Charter* rights, including the right to equality, the Supreme Court restricted its analysis to the right to "life, liberty and security of the person" found in s. 7. Section 7 reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This provision most closely resembles the fourteenth amendment of the American Constitution with one notable difference: s. 7 does not protect property but instead specifically guarantees "security of the person". Canadian courts have interpreted this right to encompass a right to physical integrity and, at least in the area of criminal law, a right to be free from psychological stress created by the state. As Chief Justice Dickson explained in *Morgentaler*:

> [t]he case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal context, constitute a breach of security of the person. (at p. 56).

The right of security of the person is similar to aspects of the right to bodily integrity and to liberty in the American Constitution.

II. THE *MORGENTALER* DECISION RECOGNIZES THAT ABORTION LAWS WHICH INCREASE RISK TO WOMEN'S PHYSICIAL OR EMOTIONAL HEALTH VIOLATE THE CONSTITUTIONAL RIGHT TO BODILY INTEGRITY

Each of the three judges who wrote for the majority followed a different path to reach the conclusion that s. 251 contravened s. 7 of the *Charter of Rights and Freedoms*. Of the three, the course charted by Justice Beetz is the narrowest and should be viewed as a minimum articulation of women's constitutional claim to access to abortion. Justice Beetz was content to strike down s. 251 as a violation of the right to security of the person solely on the basis of the increased health risks to pregnant women caused by the operation of the provision. He held that the abortion provision violated s. 7 as it placed the life or health of women attempting to comply with the requirements of s. 251 in jeopardy through an administrative structure made up of unnecessary rules. Although Justice Beetz was of the view that the government objective he identified as underlying the legislation, protection of the foetus, was valid, the infringement could not be justified under s. 1 of the *Charter* because the means chosen to meet the objective were not carefully constructed. As the procedural aspects of the legislation provided sufficient grounds for deciding the case, Justice Beetz did not consider whether any additional interests were at stake. He was careful to point out that his reasons did not include any consideration of a right to abortion founded in liberty or personal autonomy and that on a liberty challenge, some of the narrow precepts of his reasoning "would need to be reevaluated" (at p. 112).

Chief Justice Dickson was also of the opinion that the health risks caused by s. 251 infringed the right to security of the person. He saw this infringement as secondary to the initial violation of security of the person resulting from placing the decision to terminate a pregnancy beyond the pregnant woman's control. Referring to this first violation the Chief Justice stated, (at p. 57):

> Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional and glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

Justice Wilson also viewed the threat to bodily integrity posed by s. 251 as infringing the right to security of the person, but like the Chief Justice, felt that there was a more fundamental basis for finding s. 251 in contravention of s. 7 of the *Charter of Rights and Freedoms*. Hers is the strongest statement of the relationship between the ability to decide to terminate a pregnancy and the right to bodily integrity (at pp. 173-174):

> I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual . . . as the Chief Justice and Beetz J. point out, the present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is

> not, in my view, just a matter of interfering with her right to liberty in the sense . . . of her right to personal autonomy in decision-making, *it is a direct interference with her physical "person" as well. She is truly being treated as a means—a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person?*
>
> [emphasis added]

Read together, the three judgments of the majority indicate that, *at a minimum*, abortion laws which create unnecessary delay for women seeking the procedure and which expose women to avoidable physical and emotional risk violate the right to bodily integrity. Abortion laws that in any way potentially endanger the life or health of a pregnant women will not withstand scrutiny under s. 7 of the *Charter*.

III. THE *MORGENTALER* DECISION RECOGNIZES THAT THE POWER TO DECIDE TO TERMINATE A PREGNANCY FALLS WITHIN A CONSTITUTIONALLY PROTECTED RIGHT TO PERSONAL AUTONOMY

Chief Justice Dickson and Justice Wilson both recognized that s. 251 of the *Criminal Code* violated a broader right to personal autonomy. Although the Chief Justice characterized this interest as relating to the right to security of the person and Justice Wilson viewed it as part of a right to liberty, both held that s. 251 contravened women's s. 7 rights by preventing women from making fundamental decisions affecting their bodies.

Chief Justice Dickson described this interest in personal autonomy as the ability of a woman to make decisions about her body in accordance with her own goals and aspirations (at pp. 56-57):

> At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her *unless she meets criteria entirely unrelated to her own priorities and aspirations.* Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. *Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.*
>
> [emphasis added]

The Chief Justice exhibited in this passage a concern for a woman's control over her reproductive capacity that goes far beyond the procedural mechanics of the particular abortion legislation at issue in the case.

Justice Wilson expressed the same concern as a liberty interest. As was the case with the right to bodily integrity, Justice Wilson's statement of the interests involved is the more forceful. Justice Wilson began by examining the content of the right to liberty, holding that liberty includes the power to make significant personal decisions (at p. 166):

> . . . an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty.

Using this definition of liberty, Justice Wilson next considered whether the decision to have an abortion fell within the ambit of the s. 7 liberty guarantee (at pp. 171-172):

> The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. *I have no doubt that it does. This decision is one that will have profound psychological, eco-*

nomic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female pysche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. *The more recent struggle for women's rights has been a struggle to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.*

[emphasis added]

Justice Wilson had no difficulty concluding that s. 251 of the *Criminal Code* violated the right to liberty by depriving a woman of control of her body (at p. 172):

> Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to *decide* for herself whether or not to terminate her pregnancy does s. 251 of

> the *Criminal Code* violate this right? Clearly it does. *The purpose of the section is to take the decision away from the woman and to give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations".* The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. *Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.*
>
> [emphasis added]

Chief Justice Dickson and Justice Wilson both recognized that the right of a woman to decide to terminate a pregnancy in accordance with her personal goals is an essential component of women's constitutionally protected autonomy. Any abortion law which places the decision to have an abortion beyond a woman's control—by usurping the power to make the decision, by placing obstacles in her path or by denying access to abortion all together—would violate a woman's s. 7 rights under the *Charter of Rights and Freedoms.*

IV. THE *MORGENTALER* DECISION RECOGNIZES THAT WHILE SOME LIMITATION ON WOMEN'S RIGHTS TO ABORTION MAY BE JUSTIFIED, LIMITATIONS MUST BE CAREFULLY PRESCRIBED

Having found that the abortion legislation violated women's rights under s. 7 of the *Charter*, the three judges in the majority considered whether the violations could be justified under s. 1. Although the justification of laws infringing the *Charter* may seem unusual to an American jurist, rights violations may be justified in Canada because the rights guaranteed in the *Charter* are not absolute. Section 1 is an explicit statement that the *Charter* protects rights "subject only to reasonable limits pre-

scribed by law as can be demonstrably justified in a free and democratic society." If the state has a sufficiently important objective and can establish that the legislative means it has enacted are proportional to this goal, legislation violating a substantive *Charter* right will not be declared unconstitutional. The courts have imposed a very exacting standard of scrutiny on legislation violating *Charter* rights requiring laws: (1) to be rationally related to the objective; (2) to impair the right as little as possible; and (3) to have a proportionality between the *effects* of the legislative means and the objective; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Justice Beetz and Justice Wilson identified protection of the foetus as the objective of s. 251 of the *Criminal Code*. Chief Justice Dickson was of the opinion that the objective underlying the provision was to balance the competing interests of the pregnant woman and the foetus. All three justices agreed that the state interest in the foetus was a sufficiently important objective to warrant *some* restriction on women's rights. The judges were also unanimously of the view that s. 251 constituted too severe an infringement on women's rights to be justified under s. 1 of the *Charter*.

Because the judges held that s. 251 could not be sustained under s. 1 of the *Charter*, the Court was not compelled to address the precise point at which limitations on a woman's rights to security of the person and to liberty would be constitutionally acceptable. True to the Canadian approach to constitutional interpretation, the judges did not go beyond what was absolutely necessary to resolve the issues before the Court. The failure of the Supreme Court of Canada to demarcate the point at which women's rights may be infringed by the state interest in the foetus should not be interpreted as a rejection of the trimester approach in *Roe v. Wade*.

Four important principles emerge from the Court's analysis under s. 1. First, the state interest in the foetus *can not justify laws completely prohibiting abortion*. Justice Beetz makes the point several times during the course of his judgment that however one determines the scope of the state interest in the foetus,

Parliament could never be justified in criminalizing abortion all together. Second, an abortion law *any more restrictive* of women's rights than s. 251 will be unconstitutional. This principle follows, of course, from rules of *stare decisis*. Third, *abortion laws may not place women's life or health into jeopardy*. Any law which, like s. 251, endangers the life or health of pregnant women will not be sustained under s. 1. Finally, both Justice Wilson and Justice Beetz indicated that *the state interest in the foetus becomes greater as pregnancy continues*. Although she refrained from mandating the exact point at which the state interest in the foetus will justify some restriction on women's rights, Justice Wilson made the following suggestion (at p. 183):

> . . . both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestational process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. *In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. The precise point in the development of the foetus at which the state's interest becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.*
>
> [emphasis added]

These four principles constitute a declaration that access to safe abortion on terms that do not threaten a woman's life or her physical and emotional health is protected by the constitutional rights of liberty and security of the person. They reveal a recognition of the importance of reproduction, and control over reproduction, to women's lives, and a concern for women consonant with that expressed in *Roe v. Wade*.

V. REVERSING *ROE V. WADE* WOULD BE A REGRESSIVE DEVELOPMENT IN AMERICAN LAW

The *Morgentaler* decision is authority for the proposition that fundamental constitutional rights encompass a woman's decision to choose an abortion. In the Canadian context, whether this right is articulated in terms of security of the person or liberty its essence is the protection of individual autonomy and bodily integrity. In the United States, both these interests are firmly accepted aspects of the liberty guarantee of the fourteenth amendment.

The decision of the Supreme Court of Canada in *Morgentaler* constitutes an independent affirmation of the principles underlying *Roe v. Wade*. Both decisions recognize a constitutionally protected right of women to terminate a pregnancy. Both decisions also acknowledge that this right may be limited by the state to protect the foetus, but that limitations must be carefully tailored to protect the rights of women.

VI. ACCESS TO ABORTION IS NECESSARY FOR WOMEN'S EQUALITY

The right of a woman to control her reproductive capacity is essential if women are to live as full and equal participants in society. When women cannot determine the situations in which they bear children, women are deprived of equality.

Women often do not control the conditions under which they become pregnant. Because of lack of information, social pressure, and sexual force many women find themselves faced with unplanned pregnancies at a time when for a variety of reasons they are unable to bring a pregnancy to term. As long as contraceptive devices fail, are risky or are unavailable, there will be many women who in the course of living their lives will be confronted by the reality of an unplanned pregnancy. There will be teenage girls, without the skills to provide for a child, who want to finish growing up. There will be single women who cannot carry the emotional, financial and social burdens of being single mothers. There will be married women pregnant either too soon, too late or too often. There will be families already struggling to survive in the face of overwhelming social and economic problems.

Women have traditionally been allocated primary responsibility for the raising of children. Social custom, pressure, economic circumstances and lack of adequate day care (public and private) have meant that women's lives are often severely limited once they bear children. Men as a group are not comparably disempowered by their reproductive capacities and are not generally required by society to spend their lives caring for children to the virtual preclusion of other life pursuits.

The uniqueness of women's reproductive situation does not justify disadvantaging and hence unequal treatment by law. Laws cannot alter the inherent reproductive capacities of men and women, but they can and do prescribe the social and legal consequences which attach to them. Biology may dictate that only women can become pregnant, but legislators have a full range of options on how to treat pregnant women.

Women, like men, should be able to assert control over their reproductive capacities, to claim equal opportunity to plan their lives, and to participate fully in the public domain. The fact that it is women, not men, whose bodies do the major reproductive work for society should not mean that women participate in society as less than equal. Control over reproduction, including abortion, is an essential aspect of women's equality.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm *Roe v. Wade*.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In The
Supreme Court of the United States
OCTOBER TERM, 1988

WEBSTER, ET. AL.

APPELLANTS

VS.

REPRODUCTIVE HEALTH SERVICES, ET. AL.

APPELLEES

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF FOR ORGANIZATIONS AND NAMED WOMEN AS AMICUS CURIAE SUPPORTING APPELLEE.

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ORGANIZATION FOR WOMEN
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LEGAL LITERATURE AND COMMENTARY

Best, F.L. Jr., *Transfers of Body Parts under the Uniform Anatomical Gift Act,* REAL PROPERTY, PROBATE AND TRUST JOURNAL, 15TH n4 806-836, Wint. 1980 6

Clark, The Law of Domestic Relations (1968) 13
Curran, *A Problem of Consent: Kidney Transplantation,* 34 N.Y.U.L. REV. 891 (1959) 6

Pages

The New Thirteenth Amendment: A Preliminary Analysis, 82 HARV. L. REV. 1264 (1969) 11

Richards, *Medical-Legal Problems of Organ Transplantation,* 21 HASTINGS L. J. 77 (1969) 6

Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation,* 15 U.C.L.A. L. REV. 357 (1965) 6

The Failure to Rescue: A Comparative Study, 52 COLUM. L. REV. 631 (1952) 7

MEDICAL LITERATURE AND COMMENTARY

Berkow, R., and Fletcher, A.J., The Merck Manual of Diagnosis and Therapy, 15th Ed., 1987. 16, 17, 21, 24, 25

Chaudhuri, *Correlation of Toxemia with Anemia of Pregnancy,* 106 AM. J. OST. & GYNEC. 255 (Jan. 15, 1970) 15

Cherry, S.H., et. al., ROVINSKY AND GUTTMACHER'S MEDICAL AND GYNOCOLOGIC COMPLICATIONS OF PREGNANCY, 3RD ED., 1985 ..... 15, 16, 19, 23, 25

Hatcher, R.A., M.D., et. al., CONTRACEPTIVE TECHNOLOGY, 1988-89, 14TH REV. ED..... 12

Hern, *Is Pregnancy Really Normal?,* 3 FAMILY PLANNING PERSPECTIVES 7 (JAN. 1971) 20, 21, 25

Hopkins, J., Marcus, M., Campbell, S.B., *Postpartum Depression: A Critical Review,* 95 PSYCHOLOGICAL BULLETIN 3, 1984 22

Kinsey, Pomeroy and Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) 13

Macy and Huncher, *An Evaluation of Maternal Nitrogen and Mineral Needs During Embryonic and Infant Development,* 27 AM. J. OBST. & GYNEC. 878 (1934) 20

No. 88-605

In The

Supreme Court of the United States

OCTOBER TERM, 1988

WEBSTER, ET. AL.

APPELLANTS

VS.

REPRODUCTIVE HEALTH SERVICES, ET. AL.

APPELLEES

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF FOR ORGANIZATIONS AND NAMED WOMEN AS AMICUS CURIAE SUPPORTING APPELLEE.

CALIFORNIA NATIONAL
ORGANIZATION FOR WOMEN
SAN JOSE--SOUTH BAY CHAPTER
NATIONAL ORGANIZATION FOR WOMEN
CALIFORNIA ALLIANCE CONCERNED
WITH SCHOOL AGE PARENTS
LYNNETTE PERKES
CHERIEL JENSEN
PATRICIA SANDERS
SUZANNE JENSEN
GENEVIEVE PERKES
PAMELA HARTER

ROBIN YEAMANS
1475 SARATOGA AVENUE, #140
SAN JOSE, CALIFORNIA
Attorney for Amici Curiae

The attorneys for Appellee and Appellant have consented to the filing of this Amicus Brief on behalf of organizations and individuals listed below:

THE CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN represents 26,000 members in 50 Chapters throughout the State of California. Because the decision to become a parent deeply impacts the economic, medical, and emotional health of women, CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN believes that each woman must remain the final arbitrator of when and whether to become a parent.

THE SAN JOSE-SOUTH BAY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN is located in the San Francisco Bay Area, California. It was founded in 1970 and consists of approximately 500 members dedicated to active work in bringing women into the mainstream of society and affirming a belief in the basic human right to autonomy over one's body.

CALIFORNIA ALLIANCE CONCERNED WITH SCHOOL AGE PARENTS works to assure that teenagers can make informed choices regarding reproductive health services.

LYNNETTE PERKES believes a decision to allow restricted abortion would expose herself, her husband and her children to the consequences of increased population growth at a time when population pressures threaten the land, water and atmosphere of the earth which all must share. A decision which restricts access to abortion would

expose her daughter to the same risky accidental pregnancies she faced with two contraceptive failures and to the same unequal treatment in the working world which she faced in the past when women were denied access to education, training and job opportunities because they were constantly at risk of accidental pregnancy.

The concern of CHERIEL JENSEN stems from her commitment to the quality of life for her children and all children. Children must be created only where they have unqualified love and optimum conditions for their growth and development. She expects her government to respect the intellect of women, as they are indeed smart enough to choose the right time for child bearing. She asserts that being human requires active participation to shape the future, more than simple biological imperative.

PATRICIA SANDERS, a Licensed Vocational Nurse, is concerned that no person should repeat her experience of having four children before the age of 22 with the subsequent loss of education and ability to earn a living. She has seen her children go without many things commonly expected and feels great pain at her inability to provide for them. She is concerned that if abortion is restricted the decision as to whether or not an abortion is necessary will be made by someone who inherently cannot and does not know the situation and resources of the person who must bear that child.

The concern of SUZANNE JENSEN stems from her desire to be able to pursue a course of study and a life's work confident in the knowledge that something will come of it

and that childbearing will not continually interrupt or alter its course.

The concern of GENEVIEVE PERKES stems from concern that the states not restrict or deny access to abortion because that could deny her the right to make personal health, morality and reproductive decisions.

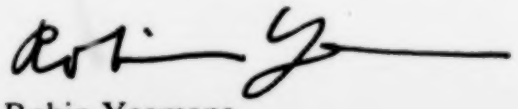
The concern of PAMELA HARTER is the welfare of her entire family when considering the potential impact of a pregnancy and bringing a child into the world. Inadequate birth control options, ie., an allergy to spermicide, previous pelvic inflammatory disease from an IUD--limit her to a barrier method and its attendant high risk of unwanted pregnancy. She must be able to be in control of her life and not be controlled by her reproductive processes.

The organizations and individuals urge upon the court the position that laws restricting or regulating abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime and without the justification of serving any current national public need, and are indeed antithetical to current public need.

Amici believe this Brief raises aspects of constitutional issues before this Court hitherto unexplored by the parties, and that the expressions herein will be of assistance to the Court in the decisions of importance now before it.

For these reasons, we respectfully request leave to file the within Brief Amici Curiae.

Respectfully submitted,



Robin Yeamans
Attorney for Amici

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OPINIONS BELOW.

The opinions have been stated in Appellee's Brief and are not repeated herein.

JURISDICTION.

The jurisdiction has been stated in Appellee's Briefs and is not repeated herein.

SUMMARY OF ARGUMENT.

This *Amicus Brief* will address itself to two issues in this case and their interaction. We believe the Missouri Statutes under review on appeal, would confer upon the conceptus not only the rights of a person but also rights vastly in excess of those which any live born person has over another person: the right to live inside that person's body, the right to compel the use of that person's labor, body substances and internal organs, and the right to subject that person to pain, suffering and physical injury. We believe these statutes violate the Thirteenth Amendment, by imposing involuntary servitude without due conviction for a crime and the Fourteenth Amendment by depriving the pregnant woman of rights and protections which all others enjoy.

The Solicitor General has requested the court to reconsider *Roe. V. Wade* at the same time. We believe that the interaction of these two appeals, if granted, would have a severe impact on the constitutional rights and the lives of all women.

ARGUMENT: THE MISSOURI STATUTES VIOLATE THE THIRTEENTH AMENDMENT GUARANTEE OF FREEDOM FROM INVOLUNTARY SERVITUDE

I. THIS COURT HAS AFFIRMED THE PROMISE OF FREEDOM FOR WOMEN. MISSOURI STATUTES AND THE CHALLENGE TO *ROE V. WADE* PLACE FREEDOM IN JEOPARDY.

Missouri Revised Statutes §§1.205.1(1) and (2) and the request of the Solicitor General to overrule *Roe v. Wade (410 U.S. 113)* in his Brief For the United States as Amicus Curiae threaten the fundamental rights recognized by this Court in *Roe v. Wade*. The states would be unrestrained in their attempts to prohibit abortion, and thus to deprive women of their right to choose the timing and numbers of births.

Missouri Statutes §§ 1.205.1(1) and (2), declare fetal rights and thus attempt to grant to the conceptus[1] a right no person has, that is the right to inhabit the body of another unwilling person.

Amici request this Court to consider the impact that validation of these requests would have on the lives of women. Amici request the court consider the effect such a validation would have on relationships of women to their families and of women to the larger community.

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1 The term "conceptus" is used herein because it is the only term which means entire contents of the uterus at all stages of pregnancy. Medically the term "embryo" refers to the organism from conception through the first three months and "fetus" refers to the organism from the end of the first three prenatal months until birth.

II. THE STATE CANNOT ATTEMPT TO BALANCE THE RIGHTS OF THE UNBORN WITH THE RIGHTS OF PERSONS.

The Missouri Revised Statutes §§1.205.1(1), (2), (3) and §1.205.2 declare:

> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.

1. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

The Missouri Statutes here at issue confer upon the unborn embryo and fetus all the rights, privileges and immunities available to persons, residents and citizens of the State; and require all Missouri laws to be construed accordingly.

These statutes and the request to overturn *Roe v. Wade* go well beyond that, however, and award the conceptus rights which no person has.

III. THE STATE CANNOT COMPEL THE SERVICE OF ONE PERSON FOR THE BENEFIT OF ANOTHER.

Even if the position were accepted, *arguendo*, that a conceptus is a "person" or "potential person," such recognition would not provide the state with a compelling interest to justify encroachment upon the pregnant woman's possession and control of her person.

If the pregnant woman and the conceptus she carries within her body come before the law as equal "persons," and the woman desires an abortion, may the state legitimately intervene to prevent or deter the abortion?

At the present state of medical knowledge the conceptus cannot survive without the contribution of the bodily force of a single female individual. Yet the laws regulating or deterring abortion, unlike all other laws in respect of persons, compel this pregnant woman to breathe, process food and donate blood and other substances from her own body.

The law does not give a person in need of blood the right to receive blood from an unwilling donor; the conclusiveness of the law on this subject being so clearly recognized that it is difficult even to imagine testing such a principle in the courts. There is no legal duty of the parent to contribute blood from his/her body for the donation to the living child even if required to keep a child alive. Living children cannot command any substance from their parents bodies. Although breastfed babies are healthier and more resistant to disease, mothers are not compelled to breast-feed their babies.

The law does not give a person in need of the donation of a kidney, bone marrow or skin graft the right to use another person's body parts. *The Uniform Anatomical Gift Act* or statutes with similar provisions, are now enacted in all 50 states and Washington D.C.[2] These Statutes recognize that body parts are contributed only by the voluntary act of the donor. These statutes are termed anatomical "gift" acts indicating that lawmakers did not intend to authorize forcible contributions of body parts from one individual to another.

Rather than protecting the interests of potential donees, the state zealously safeguards the rights of the potential organ donors. Legislators, courts and commentators, recognizing that there is no obligation, either legally or morally, for one person to supply another, even a close relative who may be dying, with a healthy organ, turn their attention to the issue of informed consent of the potential donor to make sure that he is acting free from any psychological coercion.[3]

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2 Best, F. L. Jr., *Transfers of Body Parts under the Uniform Anatomical Gift Act*, REAL PROPERTY, PROBATE AND TRUST JOURNAL, 15 n4 806-836, Wint, 1980. Statutes based on the Uniform Anatomical Gift Act have been adopted by all 50 states. 806.

3 See *Bonner v. Moran*, 126 F2d 121 (D.C. Cir. 1941); Curran, *A Problem of Consent: Kidney Transplantation*, 34 N.Y.U. L. REV. 891 (1959); Richards, *Medical-Legal Problems of Organ Transplantation*, 21 HASTINGS L. J. 77 (1960); Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 U.C.L.A. L. REV. 357 (1968). These authors note that the law permits kidney donation only from adult persons fully informed of the risks and consequences; that the use of prisoners as organ donors has been discontinued on the grounds of possible abuse; that kidney transplantations from living donors are illegal in France because of the fear of moral or psychological coercion. That donors with only one remaining kidney run the risk of shortening their lives should they be afflicted with kidney disease; and conclude by questioning the propriety of allowing any donor to take such risk. Where the life of the kidney donor may be placed in jeopardy by his donation, or where the consent of a minor is involved, courts use extreme care to be sure that knowing and voluntary consent precede the donation.

As a general rule the law has traditionally been reluctant to impose liability on a person who has failed to rescue or aid one in peril as such liability would be an unwarranted limitation on personal freedom. *The Failure to Rescue: A Comparative Study*, 52 COLUMBIA L. REV. 631, 632 (1952). A person is not required to jeopardize his own safety to rescue another placed in danger by emergency circumstances. *London v. Atlanta Transit Company* (1965) 91 Ga. App. 753, 87 S. E. 2d 103, 106. This rule has a long history in case law.[4]

While it may be argued that the continuation of pregnancy is a non-active course and therefore lacking in comparison with cases relating to "no duty to act," once conception has taken place there is no non-active course open to the pregnant woman. To abort takes action; to carry and sustain the fetus for nine months, and then to bear it takes far more action. Even if the life support services the woman's body performs for the fetus are largely automatic and non-voluntary, they are not non-services or non-actions. They are, according to medical experts, arduous, tiring and obstructive of other work. The contractions of childbirth are literally "labor." They are the most strenuous work of which a human body is capable.

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4 *Toadvine v. Cincinnati, N.O. & T.R. Ry* (E.D. Ky 1937), 20 F. Supp. 226; *Allen v. Hixson*, 111 Ga. 460, 36 S.E. 810 (1900); *Hurley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901); *Gilbert v. Gwin-McCollum Funeral Home*, 268 Ala. 372, 106 So. 2d 646 (1958); *O'Keefe v. W. J. Barry Company*, 311 Mass. 517, 42 N.E. 2d 267 (1942); *Osterlind v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928).

Only those laws restricting or deterring abortion compel the contribution of one individual's organs, blood, breath and life support system for another entity, either fully or partially formed. Unless the law recognizes the conceptus as more valuable to the state or more worthy of the state's intervention than other potential donees of body organs or unless the state finds the freedom and integrity of pregnant women to be less valuable than that of other potential donors, the state cannot compel the pregnant woman to provide bodily service to a conceptus.

Whenever one person requires an organ donation, or pint of blood, or even the temporary use of the other person's lung power for artificial respiration, the potential donor's right to refuse is not measured by the degree of interest the state may take in the life of the potential recipient. Rather, it is measured against the potential donor's right in his/her own bodily integrity.

If a pregnant woman, as potential donor, and a conceptus, as potential donee, were to come before the law as equal "persons," one could not command the servitude of the other; and so the potential donor would retain her sovereignty over her body and her right to refuse. It follows that a conceptus, a potential person, can have no greater right over a potential donor, the pregnant woman. Unless the state has some other compelling interest in forcing the donation of the pregnant woman's body to the service of a conceptus, the state cannot legitimately intervene to prevent the pregnant woman from

withholding her life force from a conceptus or from protecting herself from the damage it would do her body and her life.

IV. UNDER THE THIRTEENTH AMENDMENT A WOMAN HAS THE RIGHT TO FREEDOM FROM INVOLUNTARY PREGNANCY AND CHILDBEARING IN THE ABSENCE OF DUE CONVICTION FOR A CRIME.

A. Scope and Application of the Thirteenth Amendment.

The Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Amendment, by its very language, prohibits both slavery *and* involuntary servitude, and requires due conviction of a crime as a condition precedent to all forms of involuntary servitude.

It is not limited to black slavery. From the outset, the Amendment has been interpreted to apply to all persons without regard to race or class, and to guarantee universal freedom in the United States. *Civil Rights Cases of 1883*, 109 U.S. 3. "[F]or the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude should not exist in any part of the United States." *(Id.* at 20)

This Court had defined involuntary servitude as "a condition of enforced compulsory service of one to another." *Hodges v. United States,* 203 U.S. 1, 1906; and has found the Amendment prohibits many forms of compulsory labor, i.e., involuntary servitude of all kinds:

Laws compelling personal service for repayment of a debt or other obligation are null and void as violative of the Thirteenth Amendment *Bailey v. Alabama,* 219 U.S. 219 (1910); *Clyatt v. United States,* 197 U.S. 207 (1905); *Pollack v. Williams,* 322 U.S. 4 (1944).

Statutes imposing criminal penalties on laborers who fail to perform work necessary to pay off advance wages from an employer, are void as violative of the Thirteenth Amendment, the undoubted aim of the Amendment being, " not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." *Pollock v. Williams,* supra. at 17.

In this Court's earliest cases on involuntary servitude the court interpreted the Amendment to do more than prohibit slavery. In the first cases on the Amendment, *supra,* the court interpreted the Amendment as establishing two principles: (1) the prohibition of all forms of slavery, and (2) a guarantee of universal freedom to all persons. The Cases found that just as the opposite of "slavery" is freedom, so this Amendment, by abolishing the conditions of slavery and involuntary servitude, established "freedom" throughout the United States by implication. This Court construed the Amendment as "establishing and decreeing universal civil and political

freedom throughout the United States." (*Civil Rights Cases of 1883, 109 U.S.* at 20).

The Thirteenth Amendment, as revived by this court with new force in *Jones v. Mayer,* 392 U.S. 409 (1968), reconsidered the early interpretation of the Amendment as set forth in *The Civil Rights Cases of 1893.* The court recognized within the Thirteenth Amendment the "promise of freedom," turning the focus again from what the Amendment prohibits to what it guarantees, a broader principle of freedom from compulsory service of one person to another. (Note, *The New Thirteenth Amendment: A Preliminary Analysis,* 82 HARVARD L. REV. 1264, 1307 [1969].

B. Involuntary Pregnancy.

Amici ask this Court to consider the lack of options open to the pregnant woman at the time of onset of her pregnancy.

1. Contraceptive failure.

Advances in contraceptive technology led to premature optimism that at last fertility could be controlled with safety and effectiveness, however it has become increasingly clear that no method is without risk. Any act of intercourse between a fertile man and woman still constitutes some risk of conception, no matter what contraceptives are used. Three women in four using the oral contraceptive "pill," will have one unplanned pregnancy over their 25 year reproductively susceptible years. An average woman using the intrauterine device (IUD) will have 1.5 unplanned pregnancies during her

25 reproductively susceptible years.[5] Even implants and sterilization have failure rates. One woman in ten using one of these methods become pregnant over 25 reproductively susceptible years.[6] The condom results in 3 failures and the diaphragm (with spermicidal cream or jelly) results in 4.5 failures per average woman over her 25-year reproductive life span. Other methods are far less reliable.[7]

"More than half of all pregnancies are reported to be unplanned: about one-quarter are terminated by abortion."[8] The magnitude of the problem of unplanned and unwanted pregnancy affects practically everyone for much of their adult lives. This problem is of enormous magnitude, affecting most women, their lives and families in substantial ways.

Under the present state of contraceptive failure, a woman does not have the option of remaining free of pregnancy by making careful use of contraceptives. She is at some risk in using the most effective methods of contraception available. One woman in 2,520 using the pill and one woman in 4,000 using the IUD over 25 years will die as a result.[9]

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5 Hatcher, R.A., M.D., et. al., CONTRACEPTIVE TECHNOLOGY, 1988-89, 14TH. REV. ED, 151. *Typical* failure rates are: the pill, 3 percent; intrauterine device 6 percent. Each woman has 25 reproductively susceptible years. Multiply 25 years times device failure rate per 100 women years.

6 Id., 151.

7 *Id.*,157. Typical failure rates for the diaphragm = 18 per 100 woman years (4.5 per fertile woman lifetime); the condom = 12 per 100 woman years (3.0 per fertile woman lifetime); withdrawal = 18 per woman years (4.5 per fertile woman lifetime); rhythm = 20 per 100 woman years (5.0 per fertile woman lifetime).

8 Ory, M.D., Forrest, J.D., et. al., MAKING CHOICES, EVALUATING THE HEALTH RISKS AND BENEFITS OF BIRTH CONTROL METHODS, 1983.

9 *Id.*, 157.

2. Limitations on the right to refuse.

The average married American woman expects to bear two children,[10] yet coitus takes place between a couple married during the woman's reproductive years (age 18 to 43) an average of 2,535 times.[11] The frequency of coitus reported is average behavior between married couples. If the woman wishes to remain free of pregnancy for a time or once her desired family size is reached, her only sure method of remaining so free is complete abstinence from sexual intercourse. If she embarks on such a course, will the law uphold her decision?

If a married woman attempts to practice abstinence, the laws of most states treat her behavior as a denial of the marital right of the husband. Some jurisdictions construe refusal of sexual relations as desertion and thus ground for divorce. In some other jurisdictions desertion is held to occur upon cessation of sexual relations notwithstanding that the spouses continue to take meals together, converse and in other ways behave as husband and wife.[12] In some other states in which

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10 United States Department of Commerce, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, FERTILITY OF AMERICAN WOMEN: JUNE 1982, 1 Series P-20, No. 387 (April,1984) The lifetime births expected among American married women in June 1982 was 2.158.

11 This figure is derived from data provided in the Kinsey Report, SEXUAL BEHAVIOR OF THE HUMAN MALE, showing average marital coitus taking place with a frequency of 2.6 times per week when the male is age 20, and 1.3 times per week when the male is forty-five. As the figures show a straight line decline, the average weekly frequency rate is 1.95. Thus 1.95 times per week times 52 weeks per year times 25 fertile years = 2,535 acts of coitus per married woman's fertile lifetime. Kinsey, Pomeroy, and Martin, SEXUAL BEHAVIOR OF THE HUMAN MALE, at 255, data from Fig. 49 (1948).

12 Clark, THE LAW OF DOMESTIC RELATIONS, (1968) 336.

cruelty is a ground, such refusa! constitutes cruelty, giving the husband cause for divorce. In states now recognizing "no-fault" divorce, or dissolution of marriage, the husband no longer needs to plead or prove specific grounds; his dissatisfaction is thus acceptable as sufficient cause for dissolving the marriage.

Under most state laws, a married woman has two choices: she can attempt to refuse to fulfill the sexual obligations of the marriage and thus risk termination of her marriage; or she can participate in normal marital relations and risk unwanted pregnancy. With a choice of either alternative, she risks the consequence of a legally imposed penalty if Missouri Statutes are upheld and other states follow suit or *Roe v. Wade* is reversed for a *woman is then left with no non-punishable alternative course of action.*

C. Pregnancy as a State of Physical Servitude.

1. Pregnancy is work.

If the conceptus could be brought from conception to term outside the uterus, those who supplied its environment, its nutrients, hormones, oxygen and waste disposal would be recognized as having performed work. In natural pregnancy this work takes place inside the woman's body, largely out of sight and without specific willful action, never-the-less it remains arduous and demanding work and labor in every respect. It differs from the hypothetical case described above, however because in addition to the actual work and very real

labor, the physical effects are always to the detriment of a woman's body.

We ask the court to consider this work and the costs, in deciding whether the state may refuse abortion and thus require one individual, the woman, to perform this work solely for a future individual against her will and without pay.

2. Demands on the heart and lungs.

Pregnancy presses a woman's entire body into the task of serving the conceptus. "The physical and functional alteration of pregnancy involve all the body systems . .".[13] A pregnant woman's blood volume and cardiac output increase 40 to 50 percent[14] and there is a 15 to 20 percent increase in her heart rate [15] Her lungs respire 45 percent more air in an attempt to obtain the needed oxygen but oxygen absorption is less than normal despite the extra effort of her crowded lungs.[16] Dyspnea (difficult breathing) and hyperventilation begin in midterm and increase as the expanding uterus compresses and displaces her lungs.[17] To breathe, many women find it necessary to sleep sitting up late in pregnancy. Sleep disturbance is common, amplified by the need for frequent urination caused by the increased kidney output especially

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13 Hern, W., *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 7 (January, 1971).

14 McClure, B., et. al., ANTINATAL CARE, London, 1970, 217.

15 Cherry, S.H., et al., ROVINSKY AND GUTTMACHER'S MEDICAL AND GYNECOLOGIC COMPLICATIONS OF PREGNANCY, 3rd Ed., 1985, 88.

16 Taylor, 199: Chaudhuri, *Correlation of Toxemia with Anemia of Pregnancy*, 106 AM J. OBST. & GYNEC., 255-258 (Jan. 15, 1970).

17 Cherry, S.H., *Supra*, 88.

when lying in a supine position.[18] Sleep disturbance accounts, in part, for the chronic fatigue characteristic of the third trimester. Thus, the work of gestation continues around the clock. Though frequent daily rest is generally advised,[19] few women today can afford such luxury. *Fifty six percent of married women with husbands present are employed, as are 52.6 percent of married women with children one year and under.*[20] Because of necessary income, paid work must continue for many pregnant women and the work of maintaining a family and household continues despite the debilitating effects of pregnancy.

3. Demands on the reproductive organs.

The process of giving birth is appropriately called labor. In a first birth, labor averages 12-17 hours, but may persist much longer. The contractions of childbirth are acknowledged to be the most strenuous work of which the human body is capable. According to Robert A. Wilson M.D., obstetrician and gynecologist, "The pressure exerted in this act of birth is at least 80 pounds per square inch. A truly astonishing feat of muscular strength"[21] This force is great enough to tear the woman's flesh. In almost all cases, physicians attempt to forestall tearing into the rectal sphincter and subsequent

18 Berkow, R. and Fletcher,A.J. , THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, 15th Ed., 1987, 1747.

19 McClure Brown, *supra*, 39.

20 U.S. Department of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES, 1988, 373.

21 Wilson, Robert A., M.D. FEMININE FOREVER.

incontinence of feces by incision into the perineum (episiotomy).[22]

The historic term "labor pain" is also apt. The pain of labor is ischemic pain, which occurs when the demands on a muscle exceed its oxygen supply, the same kind of pain as that in a heart attack. Most women report labor to be the most severely painful experience of their lives. Attempts to alleviate it are generally not employed until after the most painful part of labor, the end of the first stage, has passed because they tend to stop the contractions.[23]

In America today, about 20 percent of births are by caesarian section.[24] Caesarian section is major abdominal surgery with many attendant risks, including a significant risk of bladder injury, usually through tearing or accidental incision, and increased incidence of thrombosis and infection.[25]

There is no other incidence in free countries, in which one individual can be forced to undergo trauma comparable to major surgery for the benefit of another.

4. Demands on the musculoskeletal system.

The expected weight gain in pregnancy is 25 to 30 pounds.[26] Thus late in pregnancy, a woman must transport a load equal to about one fifth of her total body weight, everywhere she goes. Walking becomes slow and difficult, and

22 Berkow, R. et. al.,*supra*, 1758..

23 *Id.*, 1787.

24 Berkow, et. al. *supra*, 1787.

25 Cherry, et .al., *supra*, 179.

26 Berkow,, et. al. *supra*, 1750.

often painful as the ligaments in the pelvic joints loosen and she must try to stabilize the joints by muscular action.

The weight causes pressure on the cervical spine with wide ranging effects including numbness and proprioceptive acuity reduction in the hands.[27] This combined with progesterone induced loss of smooth muscle tone and relaxation of the ligaments may impair the function of the hands.

5. Demand on the circulatory system.

Enlargement of the uterus within the abdominal wall displaces and compresses the abdominal organs. Resulting pressure combined with hormone induced elastic tissue fragility leads to varicose veins in about 40 percent of pregnant women. Damage may occur in veins in the legs, the vulva or the rectum. Varicosities often appear to regress after delivery, but the damaged *valves* in the veins do not recover causing varicosities to extend and increase in subsequent pregnancies and with age. Leg vein stripping is often only a temporary solution as damage tends to move into unstripped areas. It almost impossible to repair varicosities in the vulva.[28]

Women with varicose veins may be required to wear elastic tights the rest of their lives. The pregnant woman is advised to avoid prolonged standing or sitting[29] but since most jobs women do require prolonged standing or sitting this

27 Taylor, *supra*, 70, 216.

28 Wong, R.C., and Ellis, C.N., *Physiologic Skin Changes in Pregnancy*, JOURNAL OF THE AMERICAN ACADEMY OF DERMATOLOGY, Vol. 10, No. 6, June 1984, 933-935.

29 Wong, R.C., et. al., *supra*, 935.

advise can be followed only by women who can afford to lose months of employment.

Pulmonary embolism and deep vein thrombosis are 5.5 times as likely during pregnancy and the postpartum period as in a normal nonpregnant state[30] and account for between 7 and 15 percent of maternal deaths. Amniotic fluid embolus (entry of placental fluid into the pregnant woman's blood) is almost always fatal and is reported to account for up to 38 percent of maternal deaths.[31]

6. Impacts on the urinary tract.

The output of the kidneys is increased by up to 50 percent. The weight of the uterus, coupled with the same progesterone-induced muscle relaxation impedes the flow of urine, allowing bacteria to and ascend and become established in the kidneys. Bladder infections occur in 6 to 7 percent of pregnant women, and these in turn can lead to kidney infections.[32]

Severe damage to the woman's lower urinary tract due to prolonged labor has become rare in the United States due to the increase in caesarean births. Surgical bladder injury is now more frequent. The most common type of injury associated with prolonged labor is "a slough of the entire urethra and bladder neck with resultant fistula formation. Repair of these lesions is especially difficult, especially if

30 Cherry, et. al. *supra*, p.137.

31 Sachs, B.P., and D. Acker, M.D, CLINICAL OBSTETRICS: A PUBLIC HEALTH PERSPECTIVE, PSG Pub.,17. Also see Cherry, et. al. *supra*, 88.

32 Hern, *supra*, 8.

continence is to be retained."[33] Bladder control may be permanently lost.[34] "More than 100 different surgical procedures have been recommended to control involuntary loss of urine, attesting to the ineffectiveness of any one."[35]

7. Transfer of the woman's body substance to the conceptus.

Because the conceptus uses almost twice as much calcium as the pregnant woman can assimilate from dietary and administered calcium, she must supply the extra calcium from her own body stores, mostly from her long bones. In young women who have not attained full skeletal growth, permanent bone deformation results.[36] In women over the age of thirty-five, the body is no longer able to deposit new calcium into the bones as required, so calcium loss is permanent, thus late pregnancy hastens the onset and increases the severity of osteoporosis.

Total loss of a woman's iron stores during pregnancy, and delivery is measured at 680 mg.[37] Thus anemia of pregnancy is high. During repeat pregnancies a woman has no iron reserve to fall back on and profound iron deficiencies will rapidly develop.[38] Efforts to correct this condition often fail

33 Marchant D.J., *Clinical Evaluation of Urinary Incontinence and Abnormal Anatomy and Pathophysiology*, CLINICAL OBSTETRICS AND GYNECOLOGY, VOL. 27 No. 2. June, 1984, 435.

34 Hern, *supra*, 8.

35 Marchant, *supra*, 435.

36 Hern, W. *supra*.

37 Taylor, *supra*, See also Stevens, M. B., CLINICAL NUTRITION, 1979, 134.

38 McClure Browne, *supra*, 258.

because she may not be able to tolerate or absorb iron supplements.[39]

8. Impacts on the brain.

The marked increase in thyroid function typical in pregnancy frequently produces the same emotional instability associated with hyperthyroidism.[40] Increased levels of progesterone also lead to irritability, lassitude, severe emotional tension, nervousness, inability to concentrate and inability to sleep.[41]

Post-partum depression affects as many as 20 percent of women in the year following childbirth. Post-partum depression (as distinct from the "maternity blues," a brief episode which affects 80 percent of women shortly after childbirth), is comparable to a major or minor clinical depression: "[The patient] withdraws from social interaction, has difficulty concentrating, and experiences a distressing inability to respond emotionally. . . Performance and productivity are impaired, reflecting the patient's underlying vacillation and lack of drive Psychomotor retardation, manifest as slowing of movement or speech, is a significant central feature."[42] Ten percent of women remain affected after more than a year. Suspicion as to the cause of this extremely prevalent disease centers on observed decrease in levels of certain neurotransmitters, shown to be associated with mood disorders, during

39 Taylor, *supra*, 255-258.

40 Berkow, et. al. *supra*, 1748.

41 Hern , 8: Taylor, 73.

42 McClure Browne, *supra*, 164.

pregnancy and the postpartum period. Since stress is shown to be associated with the development of depression, the role played by the stress of pregnancy is under investigation.[43]

In times of stress and pain, the body secretes and releases into the bloodstream chemicals almost identical to morphine, valium and other psychoactive drugs. A number of these endogenous opiates build up in the pregnant woman's body in response to the stress of pregnancy, peaking at the time of labor and then abruptly falling. The exact effect of months spent under heavy doses of these endogenous opiates and their sudden withdrawal is not known, however, they appear to have a similar effect on cognitive function as other opiates.[44]

9. Impacts on the alimentary canal.

"Pregnancy with its attendant physical, hormonal, and physiologic alterations, significantly affects the gut at many levels. It displaces stomach, small intestine, colon, and biliary tree; it impairs appropriate functioning of the lower easophageal sphincter; it decreases gastric acidity; it is associated with changes in the selective absorption mechanisms of small intestine and colon and probably in pancreatic secretion as well. As a result, history and physical examination of the gravid patient may be misleading and

43 Hopkins, J., Marcus, M., Campbell, S.B., *Postpartum Depression: A Critical Review*, 95 PSYCHOLOGICAL BULLETIN 3, 1984, 498-515.

44 Rauramo, I., *Release of Beta Endorphins in Response to Physical Exercise in Non-pregnant Women and Pregnant Women*, 65 ACTA, OBST. GYNEC. (1986), 609-615, Scandanavia. Also see Newnham, J.P., et. al., *Endogenous Opiod Peptides in Pregnancy*, 90 BRITISH J. OF OBST. & GYNEC. June, 1983, 535-538.

laboratory data . . of little clinical use. The presence of the fetus may restrain the clinician from pursuing a thorough diagnostic evaluation . . . Even if correct diagnosis is made, concerns for progression of pregnancy and fetal development may limit the employment of the entire available therapeutic [arsenal]."[45]

Nausea and vomiting affect over half of all pregnant women. These symptoms, which vary in severity in direct proportion to the increased levels of estrogen produced by the placenta, are most severe in but not necessarily confined to morning hours. They subside after 14 weeks in most women, but not all. In 10 per cent, they last twenty weeks or longer, and in some they persist throughout the entire term.[46] In the past pernicious vomiting--vomiting which continues throughout pregnancy--was one of the most common reasons for abortion to save the life of the pregnant woman, severe cases causing death from starvation and dehydration. Today, the woman's life can almost always be saved through hospitalization and intravenous feeding, but physicians hesitate to prescribe any drugs for nausea since the thalidamide tragedy.[47]

Heartburn commonly accompanies nausea of pregnancy, and often returns during the third trimester due to impaired functioning of the esophageal sphincter, caused by pressure on the stomach exerted by the conceptus. Compression and progesterone-induced loss of muscle tone lead to constipation,

45 Cherry, et. al., *supra*, 196.

46 *Id.*, 196.

47 McClure Browne, et. al., *supra*, 157.

often compounded by the iron required to relieve anemia,[48] and this in turn leads to hemorrhoids.

10. Impacts on the skin.

Most pregnant women experience skin alteration including; striae gravida--lines on the belly, thighs and breasts where the elastic tissues of the skin has ruptured, excessive hair growth on the face, and hair loss on the scalp, hyperpigmentation--brown patches on the face and elsewhere, spider veins--patches of tiny, broken veins. These changes partially recede after childbirth. Jaundice is also common and gingivitis--inflammation and swelling of the gums--is almost universal.[49] Several rare, but extremely serious and sometimes fatal diseases associated only with pregnancy include prurigo gestatonis, impetigo herpetiforas, and papular dermatitis of pregnancy.[50]

11. Impacts on the endocrine system.

Pregnancy alters the function of most endocrine glands. Thyroid function frequently increases, causing symptoms of hyperthyroidism, including emotional instability, tachycardia, palpitations, perspiration, and enlarged thyroid gland.[51]

At least 40 per cent of pregnant women develop symptomatic edema, distorting the face, hands, ankles and feet due to elevated levels of progesterone. Increased progesterone levels also lead to increased blood pressure, relaxation of the

48 Id.,163.
49 Wong, Ellis, *supra, 938.*
50 McClure Browne, et. al., *supra,* 295.
51 Berkow, et. al. *supra,* 1748.

body's smooth muscle tissue, weight gain, and a variety of adverse symptoms.[52] Increased adrenal hormone levels may also contribute to edema.

Glucose metabolism is modified increasing the need for insulin, causing patients with prediabetis to frequently develop more overt forms of the disease.[53]

12. Impacts on the immune system.

Pregnant women show an increased vulnerability to infection by a wide variety of bacterial, fungal, protozoan and viral diseases. It has recently been discovered that the fetus generates suppressor cells which defend it from rejection by the woman's immune system and, in the process, suppress her immune system's ability to fight off other invaders.[54]

13. Delayed impacts

With such a wide array of symptoms, why are mortality rates not higher? They may be much higher than reported. Deaths after 42 days following delivery are not counted as maternal deaths. In Georgia, 27 percent of pregnancy related deaths occurred after 42 days in 1974-75. Epidemiological studies depend on vital statistics abstracted from death certificates. A large number of maternal deaths are not diagnosed as such. Even maternal deaths diagnosed may not be reported. Only five states have space on death certificates to report recent pregnancy, and no states routinely cross link for maternal deaths. Such a linkage captured 27 percent more

52 Hern, *supra,* 7; Taylor, *supra,* 73.
53 Berkow, et. al., *supra,* 1748.
54 Cherry, et. al. *supra,* 2.

maternal deaths within the 42 days of delivery and 33 percent additional deaths within the first year (Georgia 1975-76).[55]

14. Summary.

Pregnancy is often called a healthy state. Virtually every one of its usual symptoms, however, is detrimental to the woman's body. Many of the physical damages it causes persist for life. There is no doubt a similar list of symptoms, if applied in any other circumstances, would be considered an illness. A caesarean section is as extreme an invasion of the body as can be imagined and normal delivery, which can be a lengthy and more painful physical trauma, usually results in a wound. Certainly, a trauma of this magnitude, if it were imposed on any other person would be considered an injury. In no other situation may the state *compel* such an injury.

V. THE STATE HAS NOT SHOWN A COMPELLING INTEREST FOR SUBORDINATING THE RIGHTS OF A WOMAN TO A CONCEPTUS.

A. The Necessity of Showing a Compelling State Interest.

The Thirteenth Amendment guarantees to every person those fundamental rights which are "the essence of civil freedom." *(Jones v. Mayer, supra; The Civil Rights Cases, supra.* In *Union Pacific Railway Company v. Botsford,* 141 U.S. 250, 251 (1891), this court recognized:

55 Sachs, B.P., et. al., *supra,* 5-7.

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

It is clear that in order to justify the regulation of an individual's fundamental rights of personal liberty, the state must show "a subordinating interest which is compelling." *Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).*

The state's regulation must be "necessary . . . to the accomplishment of a permissible state policy." *(McLaughlin v. Florida,* 379 U.S. 184, 196 [1964]; *NAACP v. Button,* 371 U.S. 415, 438 [1963]; *Sherbert v. Verner,* 374 U.S. 398, 403 [1963]), and must be narrowly drawn to express only the limited state interests at stake." *Roe v. Wade,* 410 U.S. 113, 155 and not of "unlimited and indiscriminate sweep." *Shelton v. Tucker,* 364 U.S. 479 (1960). See also *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940); *McCann v. Babbitz,* 310 F. Supp. 293 (E.D. Wis. 1970), (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam)

The same standard is used for state regulation impinging on individual rights to choose an abortion (*Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 759 [1986], *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416, 420, 426-43, [1983]) as is applied to any regulation that impinges on fundamental rights, *Roe v. Wade,* 410 U.S. 113 at 155-6.

B. Areas of Exception Permitting the Imposition of Involuntary Servitude.

The law has recognized limited exceptions to the Thirteenth Amendment, but such exceptions have been based on the state's compelling interest in serving the common public need.

These exceptions have taken place only in areas of common need; and even then with safeguards for private interests. *Arver v. United States (Selective Draft Law Cases,)* 245 U.S. 366 (1918); *United States v. Lumsden,* 449 F.2d 154 (9th Cir. 1971). However, the draftee is not pressed into service if his physical condition is below medical standards determined by physicians. *(Selective Service Act of 1967,* 50 U.S.C.A. app. Sec. 454 [a]): Moreover, the draftee is paid for his services (*Id.* Sec. 454 [e]); and is further reimbursed by way of veterans' benefits (38 U.S.C. Sec 101, *et seq.*).

The compulsory commitment of mentally ill individuals who may be harmful to themselves or to society if allowed to remain at large is an exception to the Thirteenth Amendment, but only if commitment procedures contain sufficient procedural safeguards and if the activities required of the individuals are for therapeutic purposes. *Johnson v. Henne,* 355 F.2d 129 (1966). But the involuntary committed mental patient retains a right of autonomy over his body, a right to refuse medical treatment. *Rennie v. Klien,* 653 F2d 836 (3d Cir. 1981) *vacated on remand,* 720 F.2d 266 (3d Cir. 1983) reaffirm a constitutional right to refuse drugs.

Jury duty is another exception to involuntary servitude, as such service is for the protection of liberty of the citizen.

Crews v. Lundquist, 361 Ill. 193, 197 N.E. 768 (1935). There are safeguards as well. The citizen called for jury duty is excused if personal duties override.

This right has been extended even to the refusal of life-sustaining medical treatment. In *re. Conroy,* 486 A.2d 1209-1229 (1985) where the court stated that refusal was 'a very personal right to control one's own life."

Payment and reporting of taxes is not regarded as involuntary servitude because the service is for support of the general welfare and not for another individual. *Beltran v. Cohen,* 303 F.Supp. 889 (N.D. Cal. 1969)

Child support payments are applied in most states, with care not to impose an undue burden on the non-custodial parent. This parent is, in most divorce cases, the father, whose well-being the courts consider so carefully that, on the average, his standard of living rises after divorce (reported in one study to be 43 percent) while that of the mother and children declines (by 73 percent).[56] If a man's circumstances change due to illness or disability, or even job loss, the courts will adjust his payments. No man is required by law to work at a particular job to pay child support. No man has been required to undergo pain or damage to his own body to support a child.

C. The Nature of the States Interest in the Abortion Conflict.

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56 Weitzman, L.J., 1987.

Today, this country's population has moved far beyond its needed growth, and current government policy is to encourage population control. The state has no compelling need for unwanted births.

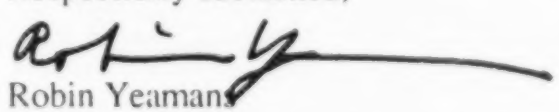
Women have been able to step into the main stream of society because they have been enabled by this court to control their reproduction. This court has not ignored fundamental rights of women.

At this time this court is being asked to confer rights on a conceptus that no person has, and in doing so strip women of their rights recently affirmed under the Fourteenth Amendment. We submit that such an action would not only violate the Fourteenth Amendment but it would violate the Thirteenth Amendment's promise of freedom.

VI. CONCLUSION.

We respectfully request this Court to recognize that anti-abortion laws, such as the Missouri Statutes, which force an unwillingly pregnant woman to continue pregnancy to term are a form of involuntary servitude without due conviction for a crime and without the justification of serving any public need, in violation of the Thirteenth Amendment as well as the Fourteenth Amendment.

Respectfully submitted,



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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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Bigelow v. Virginia, 421 U.S. 809, 821-22 (1975) . . . 17

Commonwealth of Massachusetts v. Bowen, 679 F. Supp. 137 (D.C. Mass. 1988), appeal pending, No.88-1279 (1st Cir.) . . . . . 16 n. 25, 17, 18

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 20

DKT Memorial Fund v. AID, 630 F. Supp. 238 (D.D.C. 1986), reversed and remanded, 810 F.2d 1236 (D.C. Cir. 1987) . . . . . 19-20 n. 28

DKT Memorial Fund v. AID, 691 F. Supp. 394 (D.D.C. 1988), appeal pending, Nos. 88-5243 and 88-5266 (D.C. Cir.) . . . . . 19, 20, 21 n. 29

Harris v. McRae, 448 U.S. 297 (1980) 17

Maher v. Roe, 432 U.S. 464 (1977) 17

NAACP v. Alabama, 377 U.S. 288 (1964) 20

Perry v. Sindermann, 408 U.S. 593 (1972) 17

Planned Parenthood Federation of America v. Bowen, 670 F. Supp. 538 (S.D.N.Y. 1987), reversed and remanded, 838 F.2d 649 (2d Cir. 1988) . . . . . 20 n. 28

Planned Parenthood Federation of America v. Bowen, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.) . . . . . 16 n. 25, 17, 18, 19

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 15

Speiser v. Randall, 357 U.S. 513 (1958) 15

State of New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988), appeal pending, No. 88-6204 (2d Cir.) . . . . . 16 n. 25

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 15

Constitutional Provisions:

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Public Health Services Act of 1970, Title X, 42 U.S.C.A. § 300 *et seq.* (West 1982) 16
42 U.S.C.A. § 300a-6. (West 1982) 17

RSMo. § 188.200(3) (1986) . . . . . 14 n. 22

RSMo. § 188.205 (1986) 14

Title X Regulations, 53 Fed. Reg. 2922 (February 2, 1988) 17-19

Other Authorities:

The Alan Guttmacher Institute, *Organized Family Planning Services in the United States, 1981-1983* (December 1984) 18

C. Bartone, "The Value in Wastes," 7 *Decade Watch*, No. 3, at 1 (United Nations Development Programme, September 1988) 10

L. Brown, et al., *State of the World 1988-89, A Worldwatch Institute Report on Progress Toward a Sustainable Society* (1989) . . . . . 6 n. 11, 7, 8, 9

S. Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U. J.Int'l L. & Pol. 35 (1987) 20, 21

M. Chamle, S. Eisman, J.D. Forrest, M.T. Orr, A. Torres, "Factors Affecting Adolescents' Use of Fami-

ly Planning Clinics," 14 *Family Planning Perspectives* 126 (1982) 18

Council on Environmental Quality and U.S. Department of State, II *The Global 2000 Report to the President*, The Technical Report (1980) . . . . 6 & n. 10

Council on Environmental Quality and U.S. Department of State, *Global Future: Time to Act, Report to the President on Global Resources, Environment and Population* (1981) . . . . . *passim*

A.H. Ehrlich and P.R. Ehrlich, "Population, Plenty, and Poverty," 174 *National Geographic*, No. 6, at 914 (December 1988) 6

J.D. Forrest, "Unintended Pregnancy Among American Women," 19 *Family Planning Perspectives*, No. 2, at 76 (1987) . . . . . 18 n. 27

The Greenhouse Effect and Global Climate Change, Part 2, Hearing Before the Senate Committee on Energy and Natural Resources, 100th Cong., 1st Sess. (1988) . . . . . 11 n. 16

S.K. Henshaw, J.D. Forrest, and J. VanVort, "Abortion Services in the United States, 1984 and 1985," 19 *Family Planning Perspectives*, No. 2, at 63 (1987) . . . . . 4 n. 8

N.Y. Times, Feb. 27, 1989, at A16, col. 4 20

N.Y. Times, March 18, 1989, at 1, col. 2 10

H. Otterstetter and A. Flores, "Water, Source of Life," *World Health* 11 (World Health Organization, October 1987) 9

W. Petersen, *Population* (1969) 3

Population Crisis Committee, *Access to Birth Control: A World Assessment*, Population Briefing Paper No. 19 (October 1987) . . . . . 4 n. 6

R. Repetto, "Population, Resources, Environment: An Uncertain Future," 42 *Population Bulletin*, No.2 (1987) . . . . . 3 n. 2, 7, 8

S.J. Segal, *Contraceptive Innovations: Needs & Opportunities*, Presented at 1989 Conference on Demographic & Programmatic Consequences of Contraceptive Innovations, Sponsored by the Committee on Population of the Nat'l Academy of Sciences . . . . . 4 n. 4

J.D. Underwood, "Managing Hazardous Wastes is Not Enough," 11 *Industry and Environment*, No. 1, at 29 (U.N. Environment Programme, March 1988) . . . . . 7 n. 12

United Nations, *Population Bulletin of the United Nations*, No. 14 (1983) . . . . . 5 n. 9

United Nations, *The Prospects of World Urbanization; Revised as of 1984-1985* (1987) . . . . . 9 & n. 15

United Nations Environment Programme, *General Assessment of Progress in the Implementation of the Plan of Action to Combat Desertification* (1984) . . . . . 8 n. 14

United Nations Environment Programme, *The Ozone Layer* (1987) . . . . . 12 & n. 19

U.S. Bureau of the Census, *Current Population Reports*, series P- 25, Nos. 952 and 1006 . . . . . 4 n. 7

U.S. Bureau of the Census, *Historical Abstract of the U.S.: Colonial Times to 1970* (1975) 3

U.S. Department of Agriculture, Economic Research Service, "The Magnitude and Costs of Groundwater Contamination from Agricultural Chemicals," *Agricultural Economic Report*, No. 576 (October 1987) . . . . . 7 n. 13, 8

U.S. Department of Energy, *Energy and Air Quality* (December 1981) . . . . . 11 & n. 17

U.S. Department of State, *The World's Tropical Forests: A Policy, Strategy and Program for the U.S., Report to the President by a U.S. Interagency Task Force* (May 1980) . . . . . 12 & n. 20, 13

U.S. Environmental Protection Agency, Office of Policy, Planning and Evaluation, *Greenhouse Effect, Sea Level Rise and Coastal Wetlands* (1988) . . . . . 11 n. 18

Washington Post, November 28, 1988, at A1, col. 1 10

World Bank, *Poverty & Human Development* (1980) 8

World Commission on Environment and Development, *Our Common Future* (1987) . . . . . 14 n. 21

World Resources Institute, Int'l Institute for Environment and Development, in collaboration with U.N. Environment Programme, *World Resources 1988-89* (1988) . . . . . 4 n. 5, 6, 8, 10, 11

21 *Zero Population Growth Reporter*, No. 1 (February 1989) 7

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INTEREST OF *AMICI CURIAE*

Amici are national and international nonprofit organizations that are concerned with promoting responsible use of the earth's resources, and with the interrelationship of population growth and the environment. They are interested in this case primarily because of the potential detrimental impact on family planning programs both here and abroad of the provision of the Missouri statute at issue that prohibits "encouraging or counseling a woman to have an abortion not necessary to save her life." A description of each *amicus* appears in the Appendix. Letters of consent to the filing of this brief from all parties have been submitted to the Court.

SUMMARY OF ARGUMENT

The environment is now under severe strain. High temperatures and severe drought in the summer of 1988 focused the nation's attention on global warming. New reports about skin cancer made depletion of the ozone layer a subject of public concern. We read daily about drought, famine, toxic wastes, and air and water pollution.

Studies by the United Nations, federal agencies and private organizations show that a major factor underlying environmental problems is the world's rapidly increasing population. While it took 130 years, from 1800 to 1930, for the earth's population to grow from one billion to two billion, it took only thirteen years, from 1974 to 1987, for the population to grow from four billion to five billion.

In the United States and the other developed countries, increases in population mean a highly disproportionate increase in the consumption of resources and the production of waste. In the developing countries, where the population is exploding, the productivity of arable land is being ruined by overuse, and forests needed to maintain the ecological balance are rapidly disappearing.

Enabling women to plan the size of their families is crucial not only to individual women, as others will stress before this Court, but also to the preservation of the global environment. Protecting a woman's fundamental right to choose, without coercion, whether or not to have an abortion, and her right to have access to information about abortion are essential. Regardless of one's personal views, the fact remains that if abortion were not an option, the strains on the environment would be even greater because the population would be increasing substantially faster. In 1986, the world's population increased by about 82 million and approximately 54 million abortions were performed.

The decision in this case could have worldwide ramifications, because the United States seeks to impose restrictions on dissemination of information about abortion in federally funded family planning programs both here and in developing countries. In

developing countries, these restrictions have already had a detrimental impact on all aspects of family planning and women's health.

To avoid these adverse effects and promote voluntary efforts to address the problems resulting from population growth, a clear message should be sent that content-based censorship of speech about abortion cannot be tolerated under our Constitution, and the decision below should be affirmed.

ARGUMENT

I. THE WORLD'S RAPIDLY INCREASING POPULATION IS CONSUMING THE EARTH'S RESOURCES AND DESTROYING THE ENVIRONMENT

The world's population is now increasing at an astonishing rate. At the beginning of the nineteenth century, there were one billion people. It took 130 years to reach two billion, but only 30 years — to 1960 — to reach three billion.[1] Four billion was reached more than twice as fast — by 1974 — and, in 1987, only 13 years later, the five billion line was crossed.[2]

Population growth in the United States has also been dramatic. It is believed that there were about one million native Americans north of Mexico in 1492. W. Peterson, *Population 359* (1969). In 1790, three centuries later, about 3.9 million people were counted in the first census. U.S. Bureau of the Census, *Historical Abstract of the U.S.: Colonial Times to 1970,* Table A-1-5 (1975). The increase of three million people that took three hundred years is now achieved in less than two years in the United States.

Slowing the rate of population growth both in the United States and throughout the world is essential for the protection of

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[1] This is due to the fact that more people reproducing at about the same rate results in exponential population growth.

[2] R. Repetto, "Population, Resources, Environment: An Uncertain Future," 42 *Population Bulletin*, No.2, at 10 (July 1987).

the environment. As stated in a report to the President by the Council on Environmental Quality and the Department of State:

> There is a great need throughout the world for more people to be aware of the nature of the current population trends and their economic, political, environment and resource implications. . . . [T]he United States should take action to insure that population issues are at the forefront of the world's agenda. [3]

One population issue with broad implications is abortion, for the abortions now being voluntarily sought by women throughout the world have a substantial demographic impact. In many countries, particularly developing countries, contraceptives are difficult or sometimes impossible to obtain. Even if they are available, thirty million pregnancies per year result from contraceptive failure. [4] In 1986, when the world's population grew by about 82 million, [5] approximately 54 million abortions were performed: about 28 million in developing countries (including China), and about 26 million in the developed world. [6] In the United States, which is growing by about 2.2 million each year, [7] 1.6 million women had abortions in 1985. [8]

Moreover, the rate of population growth will make an enormous difference to the state of the world in the next century,

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[3] Council on Environmental Quality and U.S. Department of State, *Global Future: Time to Act, Report to the President on Global Resources, Environment and Population* 11-12 (January 1981) (hereinafter *Global Future*).

[4] S.J. Segal, *Contraceptive Innovations: Needs & Opportunities*, Presented at 1989 Conference on Demographic & Programmatic Consequences of Contraceptive Innovations, Sponsored by the Committee on Population of the Nat'l Academy of Sciences.

[5] World Resources Institute, Int'l Institute for Environment and Development, in collaboration with U.N. Environment Programme, *World Resources 1988-89* 246 (1988) (hereinafter *World Resources*).

[6] Population Crisis Committee, *Access to Birth Control: A World Assessment*, Population Briefing Paper No. 19 (October 1987).

[7] U.S. Bureau of the Census, *Current Population Reports*, series P-25, Nos. 952 and 1006.

[8] S.K. Henshaw, J.D. Forrest, & J. VanVort, "Abortion Services in the United States 1984 and 1985," 19 *Family Planning Perspectives*, No. 2, at 63, 64 (1987).

determining whether 14 billion or 8 billion people will have to be fed and housed:

- if replacement-level fertility is reached in 2010, global population will stabilize at 7.7 billion by 2060;
- if this rate is reached in 2035, population will stabilize at 10.2 billion by 2095;
- if, however, the rate is reached only in 2065, global population in 2100 would be 14.2 billion. [9]

In view of these facts, it must be recognized that if population growth is realistically to be slowed, it is essential that women have full access to information about all their reproductive options, including abortion.

The environmental degradation that is now occurring is an early warning sign of the possibly devastating impact of continued rapid population growth:

> Severe stresses on the earth's resources and environment are apparent. With the persistence of human poverty and misery, the staggering growth of human population, and ever increasing human demands, the possibilities of further stress and permanent damage to the planet's resource base are very real.

Global Future, supra note 3, at ix. Unless population growth can be controlled, efforts to improve living conditions will be seriously undercut:

> explosive population growth . . . is severely hampering development by overwhelming all attempts to educate, house, and employ the population. In addition, attempts by growing numbers of people to wrest a living from the land is undermining the very soil, water, and forest resources on which long-term stability and improvements in the standard of living depend.

Id. at 2. The nature of the stresses which are appearing and the often self-defeating efforts of increasing numbers of people to feed themselves will be discussed below.

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[9] United Nations, *Population Bulletin of the United Nations*, No. 14 (1983).

A. Consumption of Resources in Developed Countries is Polluting the Environment

Although the population growth rate in the United States is much lower than that in developing nations, the birth of a baby in this country has been estimated to impose more than a hundred times the stress on the world's resources and environment than a baby born in a developing nation. A.H. Ehrlich and P.R. Ehrlich, "Population, Plenty, and Poverty," 174 *National Geographic* 914, 917 (December 1988). In 1975, the population of the United States was 214 million.[10] In 1989, it will exceed 246 million, an increase of nearly 15 percent. *World Resources, supra* note 5, at 246. Because we have the highest per capita energy consumption in the world, this population growth greatly accelerates global environmental degradation. *Global 2000*, The Technical Report, *supra* note 10, at 347.

With only 6 percent of the world's population, the United States uses about 30 percent of the fossil fuel energy consumed worldwide. *Global Future, supra* note 3, at 61. Automobiles, major contributors to air pollution, are overwhelmingly concentrated in the United States and other advanced industrial societies. These societies account for only 16 percent of the world's population but 81 percent of the world's cars. [11]

The burning of coal and oil to generate electricity in the industrial nations emits sulfur and nitrogen oxides that are the major cause of another destructive by-product, acid rain. These emissions "will increase at an unprecedented rate in response to rapid world population growth and to wider application of sophisticated technologies." *Global Future, supra* note 3, at 142.

In addition to the fossil fuels we burn, hazardous chemicals used to produce products in demand in this country present a serious threat to the environment. Chemical production in the

[10] Council on Environmental Quality and U.S. Department of State, II *The Global 2000 Report to the President*, The Technical Report, 16 (1980) (hereinafter *Global 2000*, The Technical Report).

[11] L. Brown, et al., *State of the World 1989, A Worldwatch Institute Report on Progress Toward a Sustainable Society* 100 (1989).

United States has skyrocketed in forty years from 20 to over 220 billion pounds a year, and about 600 million pounds of this ends up as hazardous wastes. [12]

Americans now each produce more than 3.5 pounds of garbage per day, up from 2.5 pounds in 1960. 21 *Zero Population Growth Reporter,* No.1, at 1 (February 1989). Last year, we produced 160 million tons of waste, more per capita than any country in the world. *Id.* Disposing of this garbage is an increasingly costly national problem and attempts to deal with it are frustrated by population growth.

Farmland in the United States also faces serious problems related to population growth, including soil erosion, water shortages, and conversion to other uses. In 1986, the Department of Agriculture reported that one quarter of our irrigated cropland was being watered by pulling down groundwater tables. Brown, *supra* note 11, at 50. However, groundwater supplies are limited and, particularly near the rapidly growing cities of the arid Southwest, farmers must compete with urban residents and industrial users for the limited supply.

In addition to causing competition with farmers for water, population increases and economic growth are forcing the conversion of farmlands to other uses. Recently, the United States has been losing about three million acres of rural land each year, one million of this prime farmland, because of the spread of housing developments, highways, shopping malls and parking lots. *Global Future, supra* note 3, at xii.

As farmland is lost and population increases, more chemicals are applied to the land to increase its productivity. Since 1964, agricultural use of pesticides in the United States has nearly tripled. [13] Pesticides have already caused contamination problems

[12] J. D. Underwood, "Managing Hazardous Wastes is Not Enough,"11 *Industry and Environment*, No. 1, at 29, 29-30 (U.N. Environment Programme, March 1988).

[13] U.S.Department of Agriculture, Economic Research Service, "The Magnitude and Costs of Groundwater Contamination from Agricultural Chemicals," *Agricultural Economic Report,* No. 576, at 2 (October 1987) (hereinafter "Groundwater Contamination").

in groundwater in forty states. *World Resources, supra* note 5, at 135. Similarly, use of nitrogenous fertilizers in the United States, a major source of groundwater pollution, increased four-fold between 1960 and 1980. "Groundwater Contamination," *supra* note 13, at 2. Fifty-four million Americans are estimated to get their drinking water from groundwater sources that are potentially contaminated by pesticides, fertilizers or both. *Id.* at 17.

B. Destruction of Resources In Developing Countries Is Occurring at an Alarming Rate

In 1978, the World Bank estimated that 780 million people outside China and the centrally planned economies lived in "absolute poverty, barely able to survive." World Bank, *Poverty & Human Development* (1980). By 1987, with increases in population and a decrease in per capita grain production, this number probably exceeded *one billion*. Repetto, *supra* note 2, at 12; Brown, *supra* note 11, at 55. This situation is not likely to improve if rapid population growth continues, because throughout the world, "[f]armers can overplow and overpump with impressive results in the short run, but for many the short run is drawing to a close." Brown, *supra* note 11, at 12.

In many areas, food production is falling because of "desertification," which is severe degradation of the productivity of the land resulting from excessive human pressures. Particularly in developing countries, the expanding population is forced to overuse natural resources for subsistence, cutting trees for fuelwood, overgrazing, growing crops on unstable hillsides and plowing lands too dry to protect from winds. [14]

Desertification alters the hydrologic cycle, because when the land is bare more rainfall runs off and less water is recycled back into the atmosphere to create new rainfall. Thus, desertification

[14] Over 60 percent of the world's rangelands and at least 80 percent of African, Asian, and Middle Eastern rangelands have been affected by desertification. Repetto, *supra* note 2, at 19-20. Worldwide, about 35 percent of the earth's land surface, with an estimated population of 850 million, is at risk of becoming desertified. United Nations Environment Programme, *General Assessment of Progress in the Implementation of the Plan of Action to Combat Desertification*, (1984).

exacerbated the 1984 drought in the African Sahel that put 150 million people in twenty-four countries on the brink of starvation. Brown, *supra* note 11, at 62. In addition, the rapid runoff after a hard rain intensifies downstream flooding, with sometimes tragic results. *Id.* at 31-32.

Unfortunately, irrigation is not a solution to the problem of desertification. Irrigation uses vast amounts of already scarce water and has resulted in damage to about half of the irrigated lands from salinization, alkalinization and waterlogging. *Global Future, supra* note 3, at 120.

Overpopulation and desertification are taking their toll. In 1988, the United Nation's World Food Council reported that "earlier progress in fighting hunger, malnutrition and poverty has come to a halt or is being reversed in many parts of the world." Brown, *supra* note 11, at 14, quoting the World Food Council.

C. Rapidly Growing Urban Areas are Becoming Increasingly Unhealthy

As the productivity of rural land is exhausted by the increased demands of a growing population, more and more people are moving to the cities, where they face an array of serious health and environmental problems. In 1985, there were twelve urban "agglomerations" of 10 million or more inhabitants. [15] By the year 2000, if present trends continue, the number of urban areas with similarly huge populations will rise to twenty-three. *Id.*

Rapid population growth cannot help but further aggravate the already precarious condition of health, water, and sanitation services in urban areas. It is estimated that 40 percent of the world's urban population either totally lacks access to drinking water and sanitation services or relies on rudimentary facilities that are dangerous to health. H. Otterstetter and A. Flores, "Water, Source of Life," *World Health* 11 (World Health Organization, October 1987).

More people also produce more waste: "Rapid urbanization and industrialization of the developing world has resulted in the

[15] United Nations, *The Prospects of World Urbanization; Revised as of 1984-1985*, at 5 (1987).

generation of urban wastes in quantities that defy the capacity of municipalities to manage them and of the environment to assimilate them." C. Bartone, "The Value in Wastes," 7 *Decade Watch*, No.3, at 1 (United Nations Development Programme, September 1988).

As the urban population grows, more and more people live in areas where air quality is below acceptable health levels. In southern California, which has the highest pollution levels in the United States, "[d]rastic restrictions on everyday activities to reduce air pollution" were recently announced. N.Y. Times, March 18, 1989, at 8, col. 2.

Air pollution is already causing health problems in Mexico City, which has 20 million people, 35,000 industries and an estimated three million motor vehicles. Washington Post, November 28, 1988, at A1, A14. Headaches, drowsiness, burning eyes, and dizziness from year-round smog are common, and the number of respiratory illnesses doubled between 1982 and 1986. *Id.* Even more alarming, air pollution has caused lead levels in the blood of newborn babies to come within the range where mental development is slowed, so that 20 percent of the population may be expected to be mentally retarded. *Id.*

D. Society is Threatened by Global Warming and Depletion of the Ozone Layer

In addition to causing unhealthy air, chemicals and gases released into the atmosphere in increasing quantities as populations increase are upsetting the atmospheric balance. The resulting depletion of the ozone layer and global warming (also known as the "greenhouse effect") seriously threaten the earth's ecosystems.

Global warming is caused primarily by carbon dioxide (CO_2) emissions. CO_2 traps heat radiated from the earth, preventing it from escaping to the upper atmosphere. Between 1950 and 1986, CO_2 emissions resulting from human activity *more than tripled*. *World Resources, supra* note 5, at 170. This increase is attributable primarily to the burning of wood and fossil fuels, which releases stored carbon. The burning of wood also means that the trees are no longer there to absorb the CO_2 from the atmosphere. Atmospheric levels of CO_2 have already increased substantially since 1960, [16] and are expected to increase by 20 percent by 2005 due to "world-wide increases in population which will increase energy use and speed deforestation, limiting the control of CO_2 by natural processes." [17]

The United States is a major user of the fossil fuels that cause global warming, leading the world in oil consumption. *World Resources, supra* note 5, at 110. "Approximately one third of all global man-made CO_2 is emitted in the United States." *Energy and Air Quality, supra* note 17, at 25. Our responsibility for global warming and the threat it poses to agricultural production and the habitability of coastal areas was recognized by Congress in enacting the Global Climate Protection Act of 1987, 15 U.S.C.A. § 2901(2) (West. Supp. 1988):

> By early in the next century, an increase in Earth temperature could —
>
> (A) so alter global weather patterns as to have an effect on existing agricultural production and on the habitability of large portions of the Earth; and
>
> (B) cause thermal expansion of the oceans and partial melting of the polar ice caps and glaciers, resulting in rising sea levels. [18]

Emissions of other gases are causing the depletion of the ozone layer found 20-25 kilometers above the earth. This layer prevents lethal ultraviolet radiation from reaching the earth's

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[16] *See The Greenhouse Effect and Global Climate Change, Part 2*, Hearing Before the Senate Committee on Energy and Natural Resources, 100th Cong., 1st Sess. at 33 (1988) (statement of Senator Max Baucus).

[17] U.S. Department of Energy, *Energy and Air Quality* 25 (December 1981) (hereinafter *Energy and Air Quality*).

[18] EPA estimates that by the year 2100, if current development and management trends continue, rising sea levels will destroy the majority of U.S. coastal wetlands, which are areas of extremely high biological productivity. U.S. Environmental Protection Agency, Office of Policy, Planning and Evaluation, *Greenhouse Effect, Sea Level Rise and Coastal Wetlands* 31 (July 1988). Research suggests that during the last interglacial period, which was *just one or two degrees warmer than today*, the West Antarctic Ice Sheet completely disappeared and sea level was about twenty feet above its present level. *Id.* at 3.

surface. Breakdown of ozone is accelerated by chlorofluorocarbons (CFCs) used commercially in aerosol propellants, refrigerants, solvents and foam blowing agents, and by other chemicals released into the atmosphere by automobiles, power plants, industrial processes and commercial products. [19] As more people demand more cars, refrigerators, and air conditioners, more long-lived CFCs will be released into the atmosphere.

Loss of ozone will have wide-ranging harmful effects. As the ozone concentration decreases, ultraviolet radiation will cause increased eye disease and skin cancer, and growth of plants and aquatic organisms could be adversely affected. *The Ozone Layer, supra* note 19, at 6.

E. Tropical Rainforests Are Being Destroyed Because of Population Growth

Just as the importance of tropical rainforests in preventing global warming by absorbing CO_2 is becoming widely recognized, the growing world population is contributing to an increased rate of destruction of these forests. Unless action is taken, much of the world's tropical forests will be scattered and highly degraded remnants by the first quarter of the 21st century. *Global Future, supra* note 3, at 66. Recently cleared forest areas not only no longer absorb CO_2, they also are prone to rapid erosion and nutrient depletion.

In addition, the tropical forests contain the world's greatest diversity of life, with probably over three million species of plants and animals. [20] This diversity is an invaluable resource that may be permanently lost. Over one-third of all pharmaceuticals were originally derived from plants and numerous little-known or undiscovered plant species are sure to have important uses as crops, medicines, or other products. *Tropical Forests, supra* note 20, at 36.

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[19] United Nations Environment Programme, *The Ozone Layer* 4 (1987) (hereinafter *The Ozone Layer*).

[20] U. S. Department of State, *The World's Tropical Forests: A Policy, Strategy and Program for the U.S., Report to the President by a U.S. Interagency Task Force* 12 (May 1980) (hereinafter *Tropical Forests*).

Destruction of forests results from population growth in both developing and developed countries. Eighty percent of the wood cut in the tropics is used for fuel, mainly household cooking. *Id.* at 12. The rest is exported, much of it to the United States. In addition to the valuable hardwoods which are sought, "the demand for beef by the United States and other nations is clearly creating pressures to convert forests to pastures in many parts of Central and South America." *Id.* at 19. Because domestic production cannot keep up with increasing demand, our beef imports from Latin America and the number of large American companies involved in cattle ranching in Latin American countries are rising. *Id.* at 19-20.

Thus, the environment is being threatened on all sides. The developed nations are consuming the earth's resources and polluting the air and water with the by-products of an industrialized society. The developing nations are destroying their farmland and their forests in a desperate effort to keep up with population growth and provide the exports sought by the United States and other countries.

II. WOMEN NEED ACCESS TO FULL AND UNCENSORED INFORMATION ABOUT THEIR REPRODUCTIVE CHOICES TO SLOW POPULATION GROWTH AND LIMIT DAMAGE TO THE ENVIRONMENT

The decision in *Webster* will have an impact on the environmental problems discussed above both as a matter of demographics and of human rights. As shown, a constant factor underlying the degradation of the environment is the world's exploding population. If abortion were not an option, the population would be increasing even faster. In addition, allowing women to exercise control over their reproductive lives is essential for the development of the world in a manner which promotes human dignity and is environmentally sound:

> Giving people the means to choose the size of their families is not just a method of keeping population in balance with resources; it is a way of assuring — especially for women — the basic human right of self-deter-

> mination. The extent to which facilities for exercising such choices are made available is itself a measure of a nation's development. In the same way, enhancing human potential not only promotes development but helps to ensure the right of all to a full and dignified life.[21]

The withdrawal of a woman's fundamental right to choose to have an abortion, urged by the State of Missouri and the United States, will not only set back family planning in this country, it will also discourage efforts in other countries, particularly developing countries that may view the United States as a model, to improve women's and children's health and help to control development and population growth by legalizing abortion.

The free flow of information about all methods of controlling family size, including abortion, is particularly important to *amici.* Accordingly, this brief will focus on one aspect of *Webster,* the provision of the Missouri statute which makes it "unlawful for any public funds to be expended for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life." RSMo. § 188.205 (1986). [22] Reversing the Eighth Circuit and upholding Missouri's efforts to restrict the flow of information will not only encourage other states to impose similar bars, it will also signal this Court's endorsement of restrictions now being litigated which have been imposed on free speech by the federal government in administering family planning programs both throughout the United States and abroad.

The State of Missouri makes the remarkable claim that Section 188.205 does not forbid speech, and that First Amendment rights are not involved in this case. Brief at 38-40. However, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas,

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[21] World Commission on Environment and Development, *Our Common Future* 96 (1987).

[22] "Public funds" are broadly defined to include: "any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, [and] gifts or grants from any source, public or private. . . ." RSMo. § 188.200(3) (1986).

its subject matter, or its content." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). That is exactly what the State is doing here. It seeks to prohibit a physician or other health professional from speaking freely to a pregnant patient, based on the content of the speech. The State also seeks to infringe upon the right of the patient to receive certain information, based on the content of the information. [23]

Along with the First Amendment, the court below also properly found that the ban on "encouraging and counseling" implicates a woman's Fourteenth Amendment right "to knowingly and intelligently choose an abortion after consulting a physician." J.S. App. A67. [24] The prohibition was held to be unconstitutionally vague because "the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." J.S. App. A68-69.

Testimony presented in the district court shows that the vagueness of the Missouri statute has already had the "chilling effect" on the exercise of constitutional rights that the vagueness doctrine is intended to preclude. "The Court has long recognized that ambiguous meanings cause citizens to '" steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n. 6 (1982), quoting *Baggett* v. *Bullitt,* 377 U.S. 360, 372 (1964), quoting *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). For example, the Executive Director of a public hospital in Kansas City instructed all staff and resident physicians that:

> all personnel. . . MUST discontinue all abortion related activity not necessary to save the life of the mother. Since this, of course, includes counseling about abortions and referring patients for abortions to other facilities, there is no alternative but to respond to inquiries about abortion to the effect that Missouri Law

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[23] *Amici* here will leave it to appellees and to other *amici* to fully rebut the State's specious and dangerous argument that no First Amendment rights are threatened by Section 188.205.

[24] A full discussion of the Fourteenth Amendment issues will also be left to others.

> prohibits [the hospital] from performing abortions and further prohibits counseling, referring or any other activity whatsoever relating to abortion not necessary to save the life of the mother. Any other comment relative to abortion is prohibited.

J.S. App. A44 n.49. Therefore, the reversal of the court below would seriously interfere with women's access to information about abortion, resulting in more unwanted births and greater increases in population.

A. Access to Reproductive Information Throughout the United States Could be Restricted if the Decision Below is Reversed

While the number of births affected by the Missouri law at issue will not in itself have a significant impact on the environmental problems discussed above, the decision in this case will affect the outcome of pending challenges to federal regulations and policies restricting the flow of information about abortion throughout the United States and developing nations. These widespread restrictions are likely to have a significant impact not only on individuals and families, but also on population growth and the environment. With regard to the United States, cases involving the issue of whether regulations recently promulgated under Title X of the Public Health Services Act of 1970, 42 U.S.C. A. § 300 *et seq.* (West 1982), violate the First Amendment and the right to choose to have an abortion are now pending before three courts of appeals. [25] *See* Brief for the United States as *Amicus Curiae* Supporting Appellants at 2.

Title X is designed to establish a comprehensive program in the United States to combat the problem of access to family planning services for women with low incomes. Section 1008 of

[25] The Title X regulations have been held to violate both congressional intent and the Constitution in *Planned Parenthood Federation of America* v. *Bowen*, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.) and *Commonwealth of Massachusetts* v. *Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal pending, No. 88-1279 (1st Cir.), but were upheld in *State of New York* v. *Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), appeal pending, No. 88-6204 (2d Cir.).

this Title provides: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C.A. § 300a-6 (West 1982). Until recently, Section 1008 was interpreted to allow the full dissemination of information, including information on "pregnancy termination." *See Planned Parenthood Federation of America* v. *Bowen,* 680 F. Supp. 1465, 1470 (D. Colo. 1988). However, regulations promulgated by the Department of Health and Human Services on February 2, 1988, 53 Fed. Reg. 2922, explicitly prohibit a Title X funded clinic from providing any information to women about abortion, including abortion referrals, even if a woman requests such information.[26]

In *Planned Parenthood Federation,* the district court in Colorado found that the regulations "constitute an 'unduly burdensome interference' with a woman's freedom to decide whether to terminate her pregnancy" in violation of the Fifth Amendment. 680 F. Supp. at 1474, quoting *Harris* v. *McRae*, 448 U.S. 297, 314 (1980), quoting *Maher* v. *Roe,* 432 U.S. 464, 473-74 (1977). The Title X regulations were further found to impose "content-based censorship which impermissibly impedes a physician's First Amendment freedom to disseminate relevant medical information to his patient." *Id.* at 1477. In addition to violating a physician's right to speak freely to his or her patients, the regulations impermissibly interfere with the patient's "First Amendment right to receive information about abortion. *Bigelow* v. *Virginia*, 421 U.S. 809, 821-22 (1975)." *Id.* Therefore, the implementation of the regulations was enjoined.

The district court in *Commonwealth of Massachusetts* v. *Bowen,* 679 F. Supp. 137 (D. Mass. 1988), focussed almost exclusively on the First Amendment issues, although it also found a violation of the right to privacy. Citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), it found that the regulatory ban on providing

[26] In addition, while Title X funded groups were previously simply required not to use federal funds to perform abortions, the new regulations define "Title X project funds" to include "all funds allocated to the Title X program, including, but not limited to grant funds, grant-related income or matching funds," and a Title X project must be organized so that it is physically and financially separate from all abortion-related activities.

abortion counseling and referral "constitute[s] an unconstitutional penalty for the exercise of First Amendment rights." 679 F.Supp. at 145. It was particularly concerned that the regulations are "specifically designed to suppress speech, and particularly directed at the suppression of one viewpoint." *Id.* at 146.

The court also discussed other portions of the regulations which prohibit lobbying for legislation and other advocacy activities to increase the availability of abortion. It noted that the government had conceded that these activities "are at the 'core' of the First Amendment." 679 F. Supp. at 146. Even if the right to *have* an abortion is controversial, "the right to *talk* about abortion is firmly and expressly guaranteed." *Id.*

Upholding the Title X regulations and allowing content-based censorship to be imposed would seriously hinder family planning efforts in the United States. In 1983, approximately 5 million low income women were served in federally funded family planning clinics. The Alan Guttmacher Institute, *Organized Family Planning Services in the United States, 1981-1983,* at 34 (December 1984). The basic purpose of these clinics is to help women avoid unintended pregnancies. However, contraceptives are not 100 percent effective, and sometimes they are not sought until it is too late. One-half of the pregnancies in the United States are unintended. [27] One out of five teenagers come to Title X clinics for a pregnancy test, and thirteen percent of all clinic visits involve a pregnancy test. M. Chamle, S. Eisman, J.D. Forrest, M.T. Orr, A. Torres, "Factors Affecting Adolescents' Use of Family Planning Clinics," 14 *Family Planning Perspectives* 126 (1982).

The new Title X regulations would not only deny women who are found to be pregnant access to reliable medical information about all their options, including abortion, they would also interfere with services to women seeking contraceptives and general reproductive health care, all to the detriment of women, the rate of population growth and the environment. Plaintiffs in *Planned Parenthood Federation* "submitted numerous declarations from practitioners at Title X facilities detailing the catastrophic effect

[27] J.D. Forrest, "Unintended Pregnancy Among American Women," 19 *Family Planning Perspectives*, No.2, at 76 (1987).

that implementation of the regulations will have upon their ability to serve the entire range of their patients' needs." 687 F. 2d 540, 544 (D. Colo. 1988). Plaintiffs also submitted evidence that some clinics would completely terminate their Title X programs. *Id.*

B. Access to Reproductive Information in Developing Countries Could be Restricted if the Decision Below is Reversed

A second set of cases now before the courts involve restrictions which the federal government has imposed on family planning programs in developing nations. Family planning organizations which receive and distribute funds of the Agency for International Development (AID) have challenged clauses added by AID to its grants and agreements to implement the "Mexico City Policy," a Policy Statement issued by the United States at the United Nations International Conference on Population in Mexico City in August 1984. Under this Policy, the United States will not contribute funds to foreign nongovernmental organizations (NGOs) that perform or actively promote abortion as a method of family planning abroad, even if these abortion-related activities are carried out with non-AID funds.

The AID clauses require every foreign NGO seeking American funding to "certify in writing that it does not perform or actively promote abortion as a method of family planning in AID-recipient countries and does not provide financial support to any other foreign NGO that conducts such activities." The phrase "actively promot[ing] abortion" is defined to include "providing advice and information regarding the benefits and availability of abortion," "encouraging abortion," and "[l]obbying a foreign government to legalize or make available abortion." These clauses have been held to violate the First Amendment by the only court which has reached the issue. *DKT Memorial Fund* v. *AID,* 691 F. Supp. 394 (D.D.C. 1988), appeal pending, Nos. 88-5243 and 88-5266 (D.C. Cir.). [28]

[28] *DKT* and another case in the Southern District of New York were initially dismissed by the district courts on the ground, *inter alia*, that nonjusticiable political questions had been presented. *DKT Memorial Fund* v. *AID*, 630 F. Supp.

In *DKT,* the court stated that "[a]lthough the government may promote childbirth over abortion, it 'may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP* v. *Alabama,* 377 U.S. 288, 307 (1964)." 691 F. Supp. at 404. The AID clauses were found to be unlawful because they "are based on the subject matter of abortion," and "[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech.' " *Id.* at 405, quoting *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530, 546 (1980), (Stevens, J., concurring). The AID clauses were also found to impair the freedom of DKT, a nonprofit organization in the United States, to associate with the foreign NGOs of its choice. 691 F. Supp. at 405.

The chilling effects of the AID clauses have already been felt. For example, one AID cooperating agency was afraid to accept the offer of a large supply of recently out-of-print medical textbooks for distribution abroad because the books included coverage of pregnancy termination. Thousands of the $75 textbooks were ultimately destroyed by the publisher. S. Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries,* 20 N.Y.U. J. Int'l L. & Pol. 35, 46-47 (1987). The gathering of complete medical data about clients by some NGOs has been stopped because of the NGOs' fear of even having information on abortion in their files. *Id.* at 47.

An organization in Bangladesh "not only stopped performing early abortions [which are legal] in 1985, but now turns away women suffering the after-effects of self-induced abortion, even when they might die without medical treatment." N.Y. Times, Feb. 27, 1989, at A16, col. 4. In many countries, people learning to be technicians in family planning clinics "are often given no

238 (D.D.C. 1986); *Planned Parenthood Federation* v. *AID,* 670 F. Supp. 538 (S.D.N.Y. 1987). These findings were reversed by both Courts of Appeals, and the cases were remanded. *DKT Memorial Fund* v. *AID,* 810 F.2d 1236 (D.C. Cir. 1987); *Planned Parenthood Federation* v. *AID,* 838 F.2d 649 (2nd Cir. 1988). The decision on remand is still pending in New York.

information at all on how to handle complications from abortions." *Id.*

American efforts to contribute to effective family planning programs in key countries are being blocked by the AID clauses. An influential women's organization in Brazil which does not provide either abortion services or referrals turned down AID funds because it could not accept being precluded from using other funds to participate in Brazil's ongoing debate over abortion reform. The private organization distributing the AID funds did not even try to approach similar women's groups in Brazil and other Latin American countries which would have been worthy recipients of family planning funds. S. Camp, *supra* p. 20, at 44.

The work of AID cooperating agencies in India has been virtually foreclosed by the AID clauses. Abortion is legal in India, and many effective family planning groups also provide abortions and abortion counseling with funds from the Indian government. *Id.* Not being able to assist these groups is particularly significant because India increases the world's population by 1.4 million every month, which is more than any other country. *Id.* at 45.

The content-based censorship being imposed by AID will have a significant effect on efforts to curb population growth in developing countries. Through AID, the United States is the largest single donor of international population assistance in the world, contributing more than 40 percent of the total $500 million provided by all donors in 1986. [29] Requiring censorship and the limitation of basic democratic rights, such as advocacy of the legalization of abortion, to accompany these dollars will not only mean that women with unplanned pregnancies will be denied accurate information about all their options, but also that the overall provision of safe and effective family planning services will be adversely affected.

As discussed above, voluntary efforts to slow population growth are essential to the preservation of the domestic and the global environment. Therefore, Missouri's prohibition on the use

[29] Affidavit of John J. Dumm, Deputy Director of the Office of Population of AID ¶ 7, submitted in *DKT v. AID,* Nos. 88-5243 and 88-5266 (D.C. Cir.) J.A. 123.

of public funds for "encouraging and counseling" should be declared unlawful in order to send a strong message that content-based censorship of speech about abortion will not be tolerated. Women need access to full information about their reproductive choices so that they can control their lives, which will in turn slow population growth and make it possible to protect the environment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 30, 1989

APPENDIX

APPENDIX

1. Population-Environment Balance is a nonprofit membership organization dedicated to safeguarding the "carrying capacity" of the United States — the number of individuals that can be supported without reducing the ability of the environment to sustain our quality of life over the long term — by stabilizing population size and protecting the environment.

2. Population Communication is an international, nonprofit organization which communicates population and environment messages to world leaders through books, reports, mailings, news releases and motion pictures. During the last twelve years, it has obtained the support of 48 world leaders for a Statement of Population Stabilization.

3. The Sierra Club, founded in 1892, is a nonprofit conservation organization with approximately 500,000 members nationwide. The goals of the Sierra Club are, among others, to practice and promote responsible uses of the earth's ecosystems and resources, and to educate and enlist all people to protect and restore the quality of the natural and human environment.

4. The World Population Society is a nonprofit organization primarily dedicated to implementing the World Population Plan of Action which is supported by 147 nations. The Society is active in assisting developing nations formulate national population policies and action programs to reduce maternal and child mortality, provide family planning services, improve the status of women, and provide information and education on population matters.

5. Worldwatch Institute is an independent, nonprofit research organization established to alert decision-makers and the general public to emerging global trends in the availability and management of both human and natural resources. Population and family planning issues have been a central concern at Worldwatch since its founding in 1974.

6. Zero Population Growth is a national, nonprofit organization with 25,000 members. Founded in 1968, it is working to achieve a sustainable balance between the earth's population,

environment and resources. The organization supports voluntary efforts to stabilize population growth through education and advocacy programs.

7. The Jessie Smith Noyes Foundation is a private foundation committed to preventing irreversible damage to the natural systems upon which all life depends. The Foundation makes grants in the closely interrelated areas of environment and population. The Foundation, therefore, believes that reproductive rights are essential to achieving a balance between environment and population as well as for the individual dignity of women.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* ON BEHALF OF 608 STATE LEGISLATORS FROM 32 STATES

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West Virginia State Board of Education v. Barnette,
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Statutes

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Cal. Health & Safety Code (West Supp. 1989)
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Haw. Rev. Stat. (1985)
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Idaho Code (1988)
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Ill. Ann. Stat. (Smith-Hurd Supp. 1988)
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Other Authorities

Americans United for Life Legal Defense Fund, *Permissable Parental Involvement in the Minor's Abortion Decision* (1986) (unpublished manuscript) 10 n.6

Beale, Sara Sun, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*,
84 Colum. L. Rev. 1433 (1984) 15 n.13

Monagham, *Decisis and Constitutional Adjudication*,
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Dec. 11, 1971, at 36, col. 1 14
Sept. 1, 1972, at 23, col. 1 ..... 12 n.9
Jan. 20, 1989, at 21, col. 1 ..... 11 n.7

Posner, Richard, *The Federal Courts: Crisis and Reform*,
Harvard Univ. Press, 1985 ..... 15 n.13

Rehnquist, James, *Note: The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court,* 66 B.U.L. Rev. 345 (1986)..... 5

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U.S. Department of Commerce, *Statistical Abstracts of the United States 1988* (Dec. 1987)..... 12

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STATEMENT OF INTEREST

This brief is submitted on behalf of over six hundred state legislators from 32 states who, as amici curiae, are united in the belief that it is the unique function of the judiciary to define and preserve individual rights. (The legislators are identified in Appendix A.) As legislators, amici depend on the judiciary to define the constitutional boundaries within which to legislate. Amici submit this brief steadfast in the conviction that identifying and defining the scope of constitutional protection for fundamental individual rights is the role of the judiciary, and not that of elected officials in the legislative branch.

Amici have a direct interest in upholding *Roe v. Wade,* 410 U.S. 113, *reh. den.*, 410 U.S. 959 (1973), and in urging this Court to continue, regardless of political pressures, to recognize the constitutional protections due a woman's right to choose whether or not to terminate her pregnancy according to the criteria articulated in the *Roe v. Wade* decision.

SUMMARY OF ARGUMENT

This Court's function properly includes the identification and definition of the scope of individual rights protected by the Constitution. Where rights so identified and defined conflict with other interests, the legislative function of balancing and compromising interests is necessarily subject to this Court's rulings on the reach of constitutional protections. Thus, invoking the legislative function of achieving an accommodation of competing interests through the political process is simply irrelevant to the quite different constitutional task already performed by this Court.

Moreover, those opponents of abortion who criticize the constitutional balance struck by *Roe v. Wade* on the ground of the legitimacy of the legislative function cannot in good faith

carry out their purported commitment to balancing the competing interests in a responsible way, for they completely ignore the privacy right threatened by unchecked state regulation of abortions.

Furthermore, those who assert that state-by-state regulation of abortions will remove the issue of abortion rights from this Court's docket are mistaken, for the regulation of abortion necessarily implicates constitutional rights other than privacy. Overruling *Roe v. Wade* would merely re-open the abortion question in a host of other constitutional contexts. Not only the right to privacy, but also legislative threats to free speech and the right to travel will raise the issue of a woman's right to decide whether to terminate her pregnancy, and the protection of those rights will continue to require the attention of this Court.

I. THE SCOPE OF THE RIGHT TO PRIVACY AS IT APPLIES TO ABORTION MUST BE DEFINED BY THIS COURT

A. It Begs the Constitutional Question to Propose that State Legislators Be Allowed to Balance the Competing Interests Without Judicial Constraints

State legislatures depend on the judiciary to define the constitutional protections that contain political compromises between competing interests. The Constitution is our basic law, and the courts have the duty and the authority to interpret it. Despite the fact that questions of a woman's reproductive rights and the state's interests in restricting abortion present a "divisive conflict," such questions *must* be addressed from the constitutional perspective, and *must* be adjudicated by the courts.

The Brief for the United States as Amicus Curiae Supporting Appellants advocates leaving it to "the political process" to "reach an accommodation among the competing interests involved." (*Id.* at 20-21.) Appellants' Amici Curiae 127 Members of the Missouri General Assembly ("127 Missouri Assembly Members") similarly argue that absent the nationwide regulation of abortion pursuant to *Roe v. Wade*, "the law might come to reflect a tolerable accommodation of competing views . . . ." (Amicus Brief for 127 Missouri Assembly Members at 21; citations omitted.) In encouraging this Court to turn the regulation of abortion over to state legislatures, however, the opponents of *Roe v. Wade* ignore the constitutionally mandated division of duties between the legislative and judicial branches. Where a statute "impinges on fundamental rights, . . . the judiciary then has a duty to intervene in the democratic process . . . ." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). No elected representative can lawfully regulate the exercise of a fundamental right without reference to constitutional constraints, as determined by the judiciary, regarding the nature and scope of that right.

The argument purportedly based on judicial and legislative functions advanced by many opponents of *Roe v. Wade* is little more than a doctrinal veil, obscuring their determination to eliminate access to abortions for women. While urging this Court to allow state legislatures to balance the interests involved, they fail to provide this Court with anything approaching principled criteria to serve as the basis for a balance of interests different from that defined by *Roe v. Wade* and its progeny. Indeed, the 127 Missouri Assembly Members refuse to acknowledge that women have *any* interest in controlling their reproductive functions. While posturing as enthusiastic proponents of the legislative process as the proper means to balance competing interests, those urging this Court to overrule *Roe v. Wade* must be recognized for who they are: opponents of abortion rights, plain and simple.

If the opponents of the *Roe v. Wade* decision indeed intend to balance competing interests, let them advance an argument that recognizes a woman's right to privacy and justifies a different framework from that of *Roe v. Wade* for weighing that right against the state's interest in regulating abortion. This Court and the courts below have spent the last 16 years carefully assessing the proper balance among those competing interests. The opponents of *Roe v. Wade* demonstrate no commitment to faithful performance of a balancing function. Instead they wish simply to abrogate women's reproductive rights.

The 608 state legislators who join in this brief reject the arguments made by opponents of *Roe v. Wade* that the issues raised by abortion can be resolved simply by deference to federalist principles or to the legislative process. Amici respectfully urge this Court to reaffirm the holdings of *Roe v. Wade* and its progeny. Those decisions are essential to the legislative process, in that they recognize that competing interests exist and establish constitutional criteria that legislators may use in regulating and advancing those interests.

B. This Court Cannot Be Asked to Abdicate Its Judicial Role in the Face of Popular Controversy

Opponents of *Roe v. Wade* cite the existence of political controversy and even acts of civil disobedience opposing the right to abortion in an effort to persuade this Court that state legislatures should be granted an unrestrained hand in resolving the abortion issue. (Amicus Brief for 127 Missouri Assembly Members at 14.) But the strength of feeling of those with opposing views cannot determine the issue. Clearly, this Court must categorically reject the notion that abortion clinic sidewalks constitute the proper forum for shaping the contours of a fundamental right.

Similarly, the lack of unanimity of popular opinion does not undermine the validity of *Roe v. Wade*. Its opponents argue that the existence of state and federal legislation purporting to curtail reproductive rights reflects a lack of national consensus on the abortion issue, and that the absence of consensus in turn requires that constitutional constraints on regulation of abortion should be eliminated. The existence of anti-abortion legislation, however, cannot undercut the decision that reproductive rights merit constitutional protection. That a constitutional right exists contrary to legislation – even widespread legislation – is proof of the vitality of the Constitution, not the invalidity of the right. In the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), "(a)lmost every southern state enacted laws ordering disobedience to the Supreme Court's desegregation decisions." Rehnquist, *Note: The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. Rev. 345 (1986). Yet the local preferences represented by legislation defying desegregation could not defeat the constitutional imperative recognized in *Brown*.

This Court has held that "[the] right to privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade* at 153 (1973). In locating a woman's right of choice within the perimeters of the Fourteenth Amendment, this Court deliberately established a limit on the extent to which public debate over the abortion issue could undermine that right.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1942). The role of this Court is not to tally votes for and against abortion rights, but rather is to provide legislators with clear guidance as to the nature and scope of the constitutional rights implicated in decisions about abortion.

C. This Court's Prior Holdings Are Properly Protected from Political Pressure by the Doctrine of *Stare Decisis*

Only when experience and new facts dictate the overruling of a precedent does this Court "bow to the lessons of experience and the force of better reasoning . . . ." *United States v. Scott*, 437 U.S. 82, 100 (1978). No new arguments are advanced today that were not considered at the time *Roe v. Wade* was decided.[1] Further, the post-*Roe v. Wade* experience has been considered by this Court repeatedly in many decisions reaffirming *Roe v. Wade*.[2]

This Court has articulated its compelling reasons for adhering to stare decisis in applying the principles of *Roe v. Wade*:

> That case was considered with special care. It was first argued during the 1971 Term, and reargued – with extensive briefing – the following Term. The decision was joined by the Chief Justice and six other Justices.

[1]The Court in *Roe v. Wade* discussed at length the profound divisions in society on the question of what significance to attach to the interest in fetal life and when to attach it. *Roe v. Wade* at 156-62.

[2]*See, e.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) [noting that "arguments continue to be made . . . that we erred in interpreting the Constitution," the Court adhered to the doctrine of stare decisis and reaffirmed *Roe v. Wade*].

> Since *Roe v. Wade* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 n.1 (1983). Thus, nothing new has been added to the debate surrounding the abortion issue.

Moreover, where, as in this case, the issue turns on the criteria for resolving conflicting interests, it is of particular importance to follow the principle of *stare decisis* rather than interpreting the matter as if the Court were writing on a clean slate. *See Johnson v. Transportation Agency*, 480 U.S. 616, 648-50 (1987) (O'Connor, J., concurring). Indeed, the Court would render itself vulnerable and risk illegitimacy by repudiating an established right previously recognized as fundamental under our Constitution. Where "expectations, tangible and symbolic, have developed around [this Court's] critical decisions, a successful attack on such decisions threatens the viability of the constitutional order itself." Monagham, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 750 (1988).

Neither "better reasoning" nor "lessons of experience" exist to justify undermining the fundamental right established in *Roe v. Wade*. The existence of serious public debate on abortion does not justify repudiating a line of precedents that have protected reproductive rights for nearly two decades. To the contrary, departure from precedent because of popular controversy would threaten the institutional respect this Court has traditionally received and deserved.

II. THE RECORD OF STATE LEGISLATION ON ABORTION CONTRADICTS ANY CONTENTION THAT CONSTITUTIONAL PROTECTION IS UNNECESSARY FOR THE PRIVACY RIGHTS AT STAKE

A. State Legislatures Have Demonstrated that the Legislative Process Will Not Uniformly Protect Reproductive Privacy Rights with Statutes that Accommodate Competing Interests

State legislatures have not proved by the statutes they have enacted that they should be given unrestricted scope to achieve a political accommodation of competing interests. Opponents of *Roe v. Wade* do not advance their argument by citing the legislative record.

Before *Roe v. Wade*, state legislatures were beginning to repeal their statutes prohibiting abortions and to authorize abortions under certain specified situations.[3] By 1972, thirty-one states permitted abortion only where necessary to preserve the life of the woman. (*See* Appendix B.) The nineteen remaining states had additional and often less restrictive grounds. (*See* Appendix B.) One of the major factors behind the reform movement was the need to ensure uniformity of state

[3]During 1971 and 1972 many states enacted laws patterned after the American Law Institute's Model Penal Code, to permit abortions where: continuance of the pregnancy would gravely impair the physical or mental health of the woman; the child would likely be born with grave physical or mental defect; or the pregnancy resulted from rape, incest, or other felonious intercourse, including illicit intercourse with a girl below the age of 16. *See* Model Penal Code § 230.3 (American Law Institute 1980); *Roe v. Wade* at 140 (noting that the Model Penal Code served as a model for fourteen states' legislation during the period immediately preceding *Roe v. Wade).*

law in an area in which differences in state laws had produced extremely undesirable consequences.[4]

The record of state legislation since *Roe v. Wade* reveals a consistent pattern of attempts to overturn or restrict the fundamental right established in *Roe v. Wade* and its progeny. State legislatures have sought to abrogate or limit reproductive rights by imposing performance requirements, viability and post-viability restrictions, informed consent requirements, parental consent requirements, spousal notification provisions, and other regulations, often in violation of Supreme Court precedent in this area. (*See* Appendix D.)

Inevitably, once states have the option to determine through legislation the scope of the right to privacy, some states will refrain from protecting that right altogether.[5] Most states have already demonstrated through their restrictive laws regulating abortion that they will not give any protection whatsoever to a woman's reproductive rights. (*See* Appendices B and D.)

[4]In the years immediately preceding *Roe v. Wade*, although abortions were forbidden in most states, the procedure was legalized in a number of others, most notably New York and California. The result of these differing laws was that literally hundreds of thousands of pregnant women went to these two states to have abortions. *See* § II.B, *infra*. Additionally, because abortions were permitted in only a small number of states, restrictive abortion laws denied safe and legal abortions to women too poor to travel.

[5]In fact, various state legislatures have stated, on the record, that if *Roe v. Wade* were overturned and the right to abortion given back to the states to regulate, they would not protect that right. *See, e.g.*, Idaho Code § 18-604 (1988) [stating that the legislative intent, if regulation of abortion is returned to the states, would be to criminalize abortion]; La. Rev. Stat. Ann. § 1299.35.0 (West 1987) ["If the decisions of the Supreme Court are reversed or modified or the United States Constitution is amended . . . then the former policy of this state (prohibiting abortion) shall be enforced"]; S.D. Codified Laws Ann. § 34-23A-21 (1988) ["This chapter is repealed on the specific date upon which the states are given exclusive authority to regulate abortion"].

Many of the state laws leave no room for effective protection of the right. (*See* Appendix D.) Nor do these laws reflect a consensus on definition of the right. To allow state legislatures to determine the right of privacy by a balancing of local interests is, effectively, to eliminate the right.

Moreover, imposing on state legislatures sole responsibility for appropriately balancing the competing interests would be misguided because those bodies are often the focus of pressures mounted by well-organized interest groups. Legislative bodies, by design, reflect the views of vocal and politically potent interests. In many instances, some groups have better and more varied opportunities to influence the legislative branch than others do. This point is aptly demonstrated by the post-*Roe v. Wade* period, where current laws appear to reflect the agenda of a small but powerful minority determined to abolish the fundamental right.[6] Courts must play their proper constitutional role in protecting the rights of the individual, if necessary in the face of organized political opposition.

[6]For example, the group Americans United for Life Legal Defense Fund wrote a manual aimed at state legislators drafting parental consent statutes, entitled "Permissible Parental Involvement in the Minor's Abortion Decision" (1986). Attached to the manual is a Model Parental Consent Statute and instructions to state legislatures as to how to draft such a statute. The preambles to most of the parental consent statutes are identical to, or almost identical to, the language in the preamble to the Model Parental Consent Statute. The preamble in the Model Parental Consent Statute has preceded statutes requiring parental consent prior to abortion, Cal. Health and Safety Code § 25958 (West Supp. 1989), and Cal. Civil Code § 34.5 (West Supp. 1989); parental notification prior to abortion, Ill. Ann. Stat. ch. 38, para. 81-82 (Smith-Hurd Supp. 1988); and parental notification prior to both abortion and the minor's receipt of sex education and contraceptives, Vermont House Bill 714 (1988). Witherspoon, *The New Pro-life Legislation: Patterns & Recommendations*, 7 St. Mary's L.J. 637 (1975-76.

B. Abrogating Constitutional Protections Would Not, in Practice, Leave Most State Legislatures in a Position to Regulate Abortion Effectively

Granted the unfettered ability to legislate on the abortion issue, state legislatures would undoubtedly take different approaches. Inevitably, some states would enact outright prohibitions against abortion, while others would not.[7] But the goal of achieving local control of abortion regulations would not be achieved, in practice, by overturning *Roe v. Wade*. In fact, most state legislatures would lack the ability to regulate the reproductive choices made by their residents.

Legislatures would be deprived of this ability for two reasons. First, those women in states prohibiting abortion would engage in interstate travel on a massive scale to obtain abortions elsewhere. Because the number of women of child-bearing age has grown, the number of women who would travel out of state for access to the full range of options would be far greater even than in 1972, prior to this Court's decision in *Roe v. Wade*. In 1972, one of the primary effects of state laws banning abortions was to motivate large numbers of women living in those states to go to another state to obtain an abortion, not to induce them to carry their pregnancies to term. (*See* Appendix C.) By 1972, abortion had been legalized in a limited number of states, most notably California and New York.[8] As a consequence, 40 percent of all legal abortions in the United

[7]As Surgeon General Koop recently observed, such action would "open Pandora's box, because we'll have 50 problems instead of one . . . certain states will opt to be very liberal about abortions and others will clamp down." N.Y. Times, January 20, 1989, § A, at 21, col. 1.

[8]In 1972, 75% of all legal abortions in the United States were performed in just two states, New York and California. By 1974, that figure had fallen to 37%. C. Tetz, et al., Abortion 1974-75: Needs and Services in the United States (1976).

States (approximately 200,000) were performed on women who had left their state of residency to have the procedure performed elsewhere. (*See* Appendix C.) Further, in a number of states *all* residents who obtained legal abortions got them out of state. (*See* Appendix C.)

As a practical matter, then, overturning *Roe v. Wade* would not endow each state legislature with authority over the regulation of abortion. It could, instead, relegate to New York regulation of abortion for Connecticut, New Jersey, Vermont, and a host of other states.[9] California could in practice regulate abortion for the citizens of its neighboring states. Even if only New York and California retained legalized abortion, over 60 percent of the population of the country would be within 250 miles of a jurisdiction – New York, California, Canada, or Mexico – in which abortion was legal. U.S. Department of Commerce, Statistical Abstract of the United States 1988 (Dec. 1987). Thus, those states permitting abortion would have the responsibility of providing for the health not only of their own residents seeking abortion but also of those non-residents coming into the state for that purpose.[10]

Second, in those states prohibiting abortion, many women unable to travel to other states for abortions would instead take the dangerous route of obtaining illegal abortions in their home state. The legislatures of those states would be faced with

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[9]Women from Canada and the five states bordering New York accounted for 44% of the non-resident abortions in New York. *See* New York Times Article, September 1, 1972, p. 23 col. 1.

[10]The decision which strips states of the power to prevent abortion is not *Roe v. Wade*, but *Crandall v. State of Nevada*, 73 U.S. 35 (1868). The very nature of a federal system with open interstate borders places inescapable constraints on the powers of the constituent states. *See Doe v. Bolton*, 410 U.S. 179, 200, *reh. den.*, 410 U.S. 959 (1973) (invalidating Georgia's attempt to limit the abortion procedure to its own residents).

massive public health problems arising from illegal abortions. Thus, by leaving 50 states to "balance competing interests" regarding abortion, a decision to overrule *Roe v. Wade* would effectively leave legislators in most states unable in practice to further the states' interest in regulating the conduct of a large number of their residents.

III. THE BURDEN ON THE FEDERAL JUDICIARY WILL NOT BE EASED IF *ROE V. WADE* IS OVERRULED

Opponents of *Roe v. Wade* suggest that if abortion is regulated by the states, the pressure on the federal judiciary to restore abortion issues will be eased. *See, e.g.*, Brief of 127 Missouri Assembly Members at 15 n.33. This assertion is wrong in two respects. First, if *Roe v. Wade* and its progeny are overruled, the issue of abortion will continue to find its way to this Court and other federal courts. Inevitably, as they have attempted to do in the past, some state legislatures will seek to abridge other constitutional rights in the effort to prohibit abortion. As this occurs, once again the courts will be called on to adjudicate the abortion controversy. Second, as a practical matter, criminal prosecutions of women and their doctors will strain already overburdened federal and state court systems.

Even with *Roe v. Wade* and its progeny as guideposts, state legislatures have attempted to regulate abortion in ways that implicate other constitutional rights. Twenty states have laws restricting speech regarding abortion. *See* Appendix D. One state prohibits the dissemination of any information regarding abortion. *See* Mass. Gen. Laws Ann. ch. 272 § 20 (West 1983). *See also* Fla. Stat. Ann. § 797-02 (West Supp. 1988) and Appendix D generally. Some states purport to require recipients of legal abortions to establish domicile in their state as a precondition to the exercise of privacy rights. *See, e.g.*,

Hawaii Rev. Stat. § 43-161(a)(3) (1985), Appendix D generally.

If *Roe v. Wade* and its progeny were overruled, in all likelihood assaults on other fundamental freedoms would continue. Prior to *Roe v. Wade*, the right to travel and the right to free speech were both vulnerable to infringement by abortion regulation. In Florida, a newspaper editor was prosecuted for printing a story describing abortion clinics. N.Y. Times, October 6, 1971, at 93, col. 6; N.Y. Times, October 10, 1971, at 75, col. 2; N.Y. Times, December 12, 1971, at 94, col. 1; N.Y. Times, November 11, 1971, at 36, col. 1. In Minnesota, a student newspaper in a private college was closed for publishing an ad for a New York abortion clinic. N.Y. Times, February 8, 1970, at 10, col. 8. And in Virginia, a newspaper was convicted for carrying an advertisement for a New York abortion clinic. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Further, some states attempted to restrict a woman's right to travel to obtain an abortion. In Massachusetts, a travel agent was indicted for arranging out-of-state trips for women seeking abortions. N.Y. Times, January 26, 1970, at 20, col. 4; N.Y. Times, February 3, 1970, at 40, col. 2; N.Y. Times, April 3, 1970, at 24, col. 2; N.Y. Times, April 3, 1970, at 24, col. 3.

If *Roe v. Wade* and its progeny were overruled, the judiciary would be inundated not only with constitutional adjudication arising from attempts to restrict travel and expression related to abortion, but with the criminal prosecutions of those performing or obtaining illegal abortions as well.[11] If anything can be

[11]That abortion would be outlawed in some states if *Roe v. Wade* were overruled is not idle speculation. At least four state legislatures have enacted laws that will automatically prohibit abortion if *Roe v. Wade* is overruled. *See* footnote 5, *supra*.

gleaned from our experience with Prohibition it is that to criminalize once-legal behavior does not put an end to it, but merely drives it underground. If *Roe v. Wade* were overruled and abortion made illegal again in some states, women in those states would continue to obtain abortions. If they could not afford to travel or if their travel to a state with legalized abortion were prohibited, they would obtain illegal abortions. As in the case of Prohibition, the end result for law enforcement officials and for local and federal courts will be massive increases in the number of criminal prosecutions for this once-legal behavior.[12]

If abortion regulation were relegated solely to the states, the controversy would once again wend its way to this Court's docket. This Court would once again find itself having to define the parameters of constitutionally permissible abortion regulation. As more and more women were prosecuted for obtaining abortions that were once legal but would then be prohibited, the abortion-related caseloads of the federal and state court systems would grow, not diminish. Thus, overruling *Roe v. Wade* and its progeny would substantially increase, and certainly not reduce, burdens on the judiciary.

[12]In the 1920s and 1930s, Prohibition alone caused a steep rise in criminal and civil cases in the federal courts. Richard Posner, *The Federal Courts: Crisis and Reform*, Harvard Univ. Press, 1985, at 60-61, 76. "Between 1901 and 1932, the number of federal criminal prosecutions increased more than five fold. In 1932, there were more than 92,000 federal prosecutions, including more than 65,000 involving prohibition offenses." Sara Sun Beale, "Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts," 84 Colum. Law Rev. 1433, 1441 (October 1984).

CONCLUSION

The 608 state legislators named below respectfully submit that this Court should once again reaffirm the protection given to women's reproductive rights embodied in *Roe v. Wade*.

Respectfully submitted,

Herma Hill Kay

James J. Brosnahan
Jack W. Londen

Attorneys for the Following State Legislators Listed in Appendix A, as Amici Curiae

Appendix A

AMICI

Alaska	Sen. Pat Pourchot Sen. Bettye Fahrenkamp Sen. Arliss Sturgulewski Rep. Mark Boyer Rep. Kay Brown Rep. Cliff Davidson Rep. Mike Davis Rep. Johnny Ellis, Jr. Rep. Peter Goll Rep. Niilo E. Kaponen Rep. Mike Navarre Rep. Ann M. Spohnholz
Arizona	Sen. Jamie P. Gutierrez Rep. Benjamin Hanley Rep. Bobby Raymond Rep. Peter Goudinoff Rep. Sandra D. Kennedy Rep. Susan Gerard Rep. Patricia Noland Rep. Bob Williams Rep. Ruth Solomon Rep. Earl V. Wilcox
Arkansas	Rep. Jim Lendall
California	Sen. Leroy Greene Sen. Barry Keene Sen. Rebecca Morgan Sen. Dan McCorquodale Sen. Nicholas Petris

State	*Senator or Representative*
	Sen. Herschel Rosenthal
	Sen. Diane Watson
	Sen. Milton Marks
	Asbmn. Tom Bates
	Asbmn. John L. Burton
	Asbmn. Elihu M. Harris
	Asbmn. Dan Hauser
	Asbmn. Johan Klehs
	Asbmn. Burt Margolin
	Asbmn. Gwen Moore
	Asbmn. Willard Murray
	Asbmn. Jackie Speier
	Asbmn. Curtis R. Tucker, Jr.
	Asbmn. Maxine Waters
	Asbmn. Delaine Eastin
	Asbmn. Jerry Eaves
	Asbmn. Ted Lempert
	Asbmn. Terry B. Friedman
	Asbmn. Patrick Johnston
Connecticut	Sen. John Atkin
	Sen. Richard Blumenthal
	Sen. Margaret Morton
	Sen. Cynthia Matthews
	Sen. Amelia P. Mustone
	Rep. Ernest E. Newton II
	Rep. Joseph D. Courtney
	Rep. George Jepsen
	Rep. David Oliver Thorp
	Rep. Norma Gyle
	Rep. Elinor F. Wilber
	Rep. Gary W. Berner
	Rep. Adele Kusnitz

State	*Senator or Representative*
	Rep. Miles Rappaport
	Rep. Nancy Wyman
	Rep. Lynn Taborsak
	Rep. Jonathan Pelto
	Rep. Vincent C. Mazzotta
	Rep. Joseph S. Gragarz, Jr.
	Rep. Edith Prague
	Rep. William Dyson
	Rep. Michael P. Lawlor
	Rep. Jay B. Levin
Florida	Sen. Jack D. Gordon
	Sen. Eleanor Weinstock
	Sen. Helen Gordon Davis
	Sen. Gwen Margolis
	Rep. Elaine Bloom
	Rep. Lois J. Frankel
	Rep. Susan Guber
	Rep. Carrie P. Meek
	Rep. Steve Press
	Rep. Anne Mackenzie
Georgia	Rep. Jim Martin
	Rep. Mary Margaret Oliv
	Rep. Nan Orrock
	Rep. Eleanor Richardson
	Rep. Mable Thomas
Hawaii	Sen. Mary George
	Rep. Roland M. Kotani
	Rep. Karen K. Horita
	Rep. Mike O'Kieffe
	Rep. Rosalyn Baker

State	*Senator or Representative*
	Rep. Peter K. Apo
	Rep. Barbara Marumoto
	Rep. David Y. Ige
	Rep. Joan Hayes
	Rep. Carol Fukunaga
	Rep. Jerry L. Chang
Illinois	Sen. Ethel Skyles Alexander
	Sen. William A. Marovitz
	Sen. Arthur L. Berman
	Rep. Shirley M. Jones
	Rep. Terry A. Steczo
	Rep. Woods Bowman
	Rep. John J. Cullerton
	Rep. Barbara Flynn Currie
	Rep. Monique Davis
	Rep. Mary E. Flowers
	Rep. Gene L. Hoffman
	Rep. Lovana Jones
	Rep. James M. Kirkland
	Rep. Louis I. Lang
	Rep. Robert LeFlore, Jr.
	Rep. Ellis B. Levin
	Rep. Charles G. Morrow, III
	Rep. Helen Satterthwaite
	Rep. William Shaw
	Rep. Grace Mary Stern
	Rep. Donne E. Trotter
	Rep. Calvin R. Sutker
	Rep. Arthur Turner
	Rep. Jesse White, Jr.
	Rep. Anthony L. Young

State	*Senator or Representative*
	Rep. Wyvelter H. Younge
	Rep. Paul Williams
Indiana	Sen. Virginia M. Blakenbaker
	Sen. Louis J. Mahern, Jr.
	Sen. William Dennis McCarty
	Sen. Julia Carson
	Rep. Barbara L. Engle
Iowa	Sen. Charles Bruner
	Sen. Joy Corning
	Sen. Julia Gentleman
	Sen. Jean Hall Lloyd-Jones
	Sen. Elaine Szymoniak
	Rep. Betty Jean Clark
	Rep. Jane Teaford
	Rep. Dorothy F. Carpenter
	Rep. Kathleen H. Chapman
	Rep. Johnie Hammond
	Rep. Maggie Tinsman
	Rep. Joyce Nielsen
	Ralph Rosenberg
Kansas	Rep. Kathleen Sebelius
	Rep. Wanda Fuller
	Rep. Joan Wagnon
	Rep. Dianne Gjerstad
Maryland	Sen. Troy F. Brailey
	Sen. Howard A. Denis
	Sen. John W. Derr
	Sen. Arthur Dorman
	Sen. Idamae Garrott

State	*Senator or Representative*
	Sen. Barbara A. Hoffman
	Sen. Paula C. Hollinger
	Sen. Nathan C. Irby, Jr.
	Sen. Julian L. Lapides
	Sen. Laurence Levitan
	Sen. Frederick C. Malkus
	Sen. Catherine I. Riley
	Sen. Ida G. Ruben
	Sen. Charles H. Smelser
	Sen. Decatur W. Trotter
	Rep. Leon Albin
	Rep. John C. Astle
	Rep. William C. Bevan
	Rep. Patricia H. Billings
	Rep. Rosa Lee Blumenthal
	Rep. Mary H. Boergers
	Rep. Frank D. Boston, Jr.
	Rep. Susan R. Buswell
	Rep. James W. Campbell
	Rep. Joel Chasnoff
	Rep. Gene W. Counihan
	Rep. Elijah E. Cummings
	Rep. Ulysses Currie
	Rep. Clarence Davis
	Rep. Louis L. DePazzo
	Rep. Dana Lee Dembrow
	Rep. John W. Douglass
	Rep. Nathaniel Exum
	Rep. Jennie M. Forehand
	Rep. Peter Franchot
	Rep. Brian E. Frosh
	Rep. Tony E. Fulton
	Rep. Gilbert J. Genn

State	*Senator or Representative*
	Rep. Michael R. Gordon
	Rep. Sheila Ellis Hixson
	Rep. William S. Horne
	Rep. W. Ray Huff
	Rep. Ralph M. Hughes
	Rep. John D. Jeffries
	Rep. Nancy K. Kopp
	Rep. Barbara Osborn Kreamer
	Rep. Donald E. Lamb
	Rep. Lawrence A. LaMotte
	Rep. Gloria G. Lawlah
	Rep. Theodore Levin
	Rep. George H. Littrell, Jr.
	Rep. Anne Mackinnon
	Rep. E. Farrell Maddox
	Rep. Pauline H. Menes
	Rep. R. Clayton Mitchell, Jr.
	Rep. Kenneth C. Montague, Jr.
	Rep. Margaret H. Murphy
	Rep. Samuel M. Parham
	Rep. Anne S. Perkins
	Rep. Carol S. Petzold
	Rep. Paul G. Pinsky
	Rep. Howard P. Rawlings
	Rep. Eileen M. Rehrmann
	Rep. Samuel I. Rosenberg
	Rep. Richard Rynd
	Rep. David Benjamin Shapiro
	Rep. Patricia R. Sher
	Rep. Royd Smith
	Rep. Virginia M. Thomas
	Rep. C. Lawrence Wiser
	Rep. Sylvania W. Woods, Jr.

State	*Senator or Representative*
Massachusetts	Sen. Sal R. Albano
	Sen. Carol C. Amick
	Sen. Frederick E. Berry
	Sen. Richard A. Kraus
	Sen. Michael Lopresti, Jr.
	Rep. John C. Bartley
	Rep. Patricia G. Fiero
	Rep. Augusto Grace
	Rep. Sherwood Guernsey
	Rep. David B. Cohen
	Rep. Mary Jane Gibson
	Rep. Joan M. Menard
	Rep. Suzanne M. Bump
	Rep. Marjorie A. Clapprood
	Rep. Eleanor Myerson
	Rep. Mark Roosevelt
	Rep. Susan D. Schur
Michigan	Lt. Gov. Martha W. Griffiths
	Sen. John F. Kelly
	Sen. Jack Faxon
	Sen. Jackie Vaughn III
	Sen. Virgil C. Smith, Jr.
	Sen. Joe Conroy
	Sen. Lana Pollack
	Rep. David C. Hollister
	Rep. Debbie Stabenow
	Rep. Frank M. Fitzgerald
	Rep. Sharon L. Gire
	Rep. Alma G. Stallworth
	Rep. Justine Barnes
	Rep. Carolyn C. Kilpatrick

State	*Senator or Representative*
	Rep. Maxine Berman
	Rep. W. Perry Bullard
	Rep. Nancy Crandall
	Rep. Robert L. Emerson
	Rep. Donald H. Gilmer
	Rep. David M. Gubow
	Rep. Charlie J. Harrison, Jr.
	Rep. Teola P. Hunter
	Rep. Shirley Johnson
	Rep. H. Lynn Jondahl
	Rep. M.L. Mickey Knight
	Rep. Susan G. Munsell
	Rep. Raymond M. Murphy
	Rep. Mary C. Brown
	Rep. Kay M. Hart
Minnesota	Sen. Linda Berglin
	Sen. Richard Cohen
	Sen. Nancy Brataas
	Sen. Allan H. Spear
	Rep. Lee Greenfield
	Rep. Andy Dawkins
	Rep. Wayne Simoneau
	Rep. Peter McLaughlin
	Rep. Phyllis Kahn
	Rep. Dave Bishop
	Rep. Dee Long
	Rep. Gloria Segal
Missouri	Sen. John F. Bass
	Rep. Louis H. Ford
	Rep. Paula J. Carter
	Rep. Larry Thomason

State	*Senator or Representative*
	Rep. O. L. Shelton
	Rep. John A. Birch
	Rep. Ken Jacob
	Rep. Christopher S. Kelly
	Rep. Mary Groves Bland
	Rep. Martha Jarman
	Rep. Jacqueline McGee
	Rep. Phil Tate
	Rep. Sue Shear
	Rep. Sandra Reeves
	Rep. Annette N. Morgan
	Rep. William L. Clay, Jr.
	Rep. Mark A. Youngdahl
	Rep. Karen McCarthy
	Rep. Charles (Quincy) Troupe
	Rep. Fletcher Daniels
Montana	Sen. Chet Blaylock
	Sen. Dorothy Eck
	Sen. Pat Reegan
	Sen. Michael Walker
	Sen. Cecil Weeding
	Rep. Kelly Addy
	Rep. Jan Brown
	Rep. Vivian M. Brooke
	Rep. Ben Cohen
	Rep. Mary Ellen Connelly
	Rep. Ervin Davis
	Rep. Jerry Driscoll
	Rep. Stella Jean Hansen
	Rep. Mike Kadas
	Rep. Mark D. O'Keefe
	Rep. Angela Russell

State	*Senator or Representative*
	Rep. Bill Strizich
	Rep. Diana E. Wyatt
	Dorothy Bradley
	Vicki J. Cocchiarella
	Hal Harper
	Robert R. Ream
New Hampshire	Sen. Elaine S. Krasker
	Sen. Susan McLane
	Rep. Deborah L. Arnesen
	Rep. Bill Boucher
	Rep. Marion Copenhaver
	Rep. Ned Densmore
	Rep. Katherine D. Foster
	Rep. Gary R. Gilmore
	Rep. Scott E. Green
	Rep. Caroline L. Gross
	Rep. Elizabeth Hager
	Rep. Douglas E. Hall
	Rep. Beverly Hollingworth
	Rep. Robert A. Johnson
	Rep. William F. Kidder
	Rep. Elizabeth D. Lown
	Rep. William R. Matson
	Rep. William McCain
	Rep. William H. McCann, Jr.
	Rep. Cynthia A. McGovern
	Rep. Jeffrey Miller
	Rep. Otto H. Oleson
	Rep. Toni Pappas
	Rep. Janet R. Pelley
	Rep. Debora Becker Pignatelli
	Rep. Irene A. Pratt

State	*Senator or Representative*
	Rep. Ellen-Ann Robinson
	Rep. Patricia Sanderson
	Rep. Merle W. Schotanus
	Rep. Merilyn P. Senter
	Rep. Mary Jane Wallner
	Rep. Jeffrey R. Woodburn
New Jersey	Sen. Matthew Feldman
	Sen. Wynona M. Lipman
	Sen. Richard Van Wagner
	Rep. Walter M. D. Kern, Jr.
	Rep. Gerard S. Naples
	Rep. D. Bennett Mazur
	Rep. Rodney P. Frelinghuysen
	Rep. Elizabeth Randall
	Rep. John S. Watson
	Rep. Barbara Faith Kalik
	Rep. Byron M. Baer
	Rep. Alan J. Karcher
	Rep. Arthur R. Albohn
	Rep. Stephanie R. Bush
	Rep. Robert G. Smith
	Rep. David C. Schwartz
	Rep. Maureen B. Ogden
New Mexico	Sen. Thomas T. Rutherford
	Sen. Victor R. Marshall
	Sen. Ken Kamerman
	Sen. Janice D. Paster
	Sen. Shannon Robinson
	Rep. Robert M. Hawk
	Rep. Delbert F. Sundberg
	Rep. Max Coll

State	*Senator or Representative*
New York	Sen. Mary B. Goodhue
	Sen. Eugene Levy
	Sen. Roy M. Goodman
	Sen. Howard E. Babbush
	Sen. Abraham Berstein
	Sen. Joseph L. Galiber
	Sen. Andrew Jenkins
	Sen. Franz S. Leichter
	Sen. Marty Markowitz
	Sen. Anthony M. Masiello
	Sen. Velmanette Montgomery
	Sen. Manfred Ohrenstein
	Sen. Suzi Oppenheimer
	Sen. David A. Paterson
	Sen. Ada L. Smith
	Sen. Martin M. Solomon
	Rep. Melvin H. Miller
	Rep. Richard N. Gottfried
	Rep. Albert Vann
	Rep. William E. Passannante
	Rep. Samuel Colman
	Rep. Mary M. McPhillips
	Rep. Ronald Canestrari
	Rep. Paul Harenberg
	Rep. Lewis J. Yevoli
	Rep. Earlene H. Hill
	Rep. Arthur O. Eve
	Rep. David F. Gantt
	Rep. Thomas F. Catapano
	Rep. James F. Brennan
	Rep. Alexander (Pete) Grannis
	Rep. Barbara M. Clark

State	*Senator or Representative*
	Rep. Roger Green
	Rep. Angelo Del Toro
	Rep. Nettie Mayersohn
	Rep. Gloria Davis
	Rep. Helene Weinstein
	Rep. Audrey I. Pheffer
	Rep. Steven Sanders
	Rep. Hector L. Diaz
	Rep. G. Oliver Koppell
	Rep. Morton C. Hillman
	Rep. Clarence Norman, Jr.
	Rep. Saul Weprin
	Rep. John Brian Murtaugh
	Rep. Cynthia Jenkins
	Rep. Edward Abramson
	Rep. Jerrold Nadler
	Rep. Eileen C. Dugan
	Rep. Rhoda Jacobs
	Rep. Larry Seabrook
	Rep. Edward C. Sullivan
	Rep. Aurelia Greene
	Rep. Frank Barbaro
	Rep. Catherine Nolan
	Rep. Geraldine L. Daniels
	Rep. George Friedman
	Rep. Audra T. (Pinny) Cooke
	Rep. George H. Winner, Jr.
	Rep. Cecile D. Singer
	Rep. Patricia K. McGee
	Rep. Richard L. Brodsky
	Rep. Gregory P. Young
	Rep. Maurice D. Hinchey
	Rep. Helen M. Marshall

State	*Senator or Representative*
	Rep. Herman D. Farrell, Jr.
	Rep. Mark Alan Siegel
	Rep. William F. Boyland
	Rep. Alan G. Hevesi
	Rep. Anthony Genovesi
	Rep. Martin Luster
North Carolina	Sen. Lura S. Tally
	Sen. Wanda H. Hunt
	Sen. Ralph Hunt
	Sen. Marvin Ward
	Sen. Frank W. Ballance, Jr.
	Sen. Joseph E. Johnson
	Sen. Ted Kaplan
	Sen. James Franklin Richardson
	Sen. William N. Martin
	Rep. Sharon Thompson
	Rep. Marie Colton
	Rep. Nick Jeralds
	Rep. Howard C. Barnhill
	Rep. Milton Fitch, Jr.
	Rep. H. M. Michaux
	Rep. Thomas Hardaway
	Rep. Ruth Easterling
	Rep. Bertha M. Holt
	Rep. W. Pete Cunningham
	Rep. Herman C. Gist
	Rep. Annie Brown Kennedy
	Rep. Logan Burke
	Rep. Frank E. Rhodes
	Rep. Helen Rhyme Marvin

State	*Senator or Representative*
Ohio	Sen. William F. Bowen
	Sen. Michael R. White
	Rep. David Hartley
	Rep. Judy Sheerer
	Rep. June H. Lucas
	Rep. Jane Campbell
	Rep. Vernon L. Sykes
Oregon	Sen. Joyce Cohen
	Sen. Frank L. Roberts
	Sen. Jane Hardy Cease
	Sen. Dick Springer
	Rep. Beverly Stein
	Rep. Tom L. Mason
	Rep. Judith C. Bauman
	Rep. Jim Edmunson
	Rep. Dave McTeague
	Rep. Nancy Peterson
	Rep. Margaret Carter
	Rep. Ron Cease
	Rep. Sam Dominy
	Rep. Mary Alice Ford
Pennsylvania	Sen. James C. Greenwood
	Sen. H. Craig Lewis
	Sen. Hardy Williams
	Rep. Andrew J. Carn
	Rep. Roy W. Cornell
	Rep. John S. Davies
	Rep. H. William DeWeese
	Rep. Dwight Evans
	Rep. Lois Sherman Hagarty
	Rep. Ruth B. Harper

State	*Senator or Representative*
	Rep. David W. Heckler
	Rep. Vincent Hughes
	Rep. Ivan Itkin
	Rep. George W. Jackson
	Rep. Harold James
	Rep. Babette Josephs
	Rep. Allen G. Kukovich
	Rep. Gordon J. Linton
	Rep. Connie G. Maine
	Rep. Nicholas B. Moehlmann
	Rep. Frank Oliver
	Rep. Max Pievsky
	Rep. Joseph Preston, Jr.
	Rep. David P. Richardson, Jr.
	Rep. Karen A. Ritter
	Rep. James R. Roebuck
	Rep. Anthony H. Williams
Texas	Sen. Craig Washington
	Rep. Ernestine Glossbrenner
	Rep. Debra Danburg
	Rep. Nancy McDonald
	Rep. Libby Linebarger
Vermont	Sen. Sally Y. Conrad
	Rep. Vi Luginbuhl
	Rep. Doris Lingelbach
	Rep. Richard D. Hausman
	Rep. K. Micque Glitman
	Rep. Margaret F. Martin
	Rep. Toby Young
	Rep. Bennett S. Truman
	Rep. Andrew Christiansen

State	*Senator or Representative*
	Rep. Linda Almy
	Rep. Julie Peterson
	Rep. Sally Fox
	Rep. Alice Cook Bassett
Virginia	Sen. Clive L. DuVal, II
	Sen. Elliot S. Schewel
	Sen. Thomas J. Michie, Jr.
	Sen. Frank W. Nolen
	Sen. Edward M. Holland
	Rep. Bernard S. Cohen
	Rep. Marian Van Landingham
	Rep. Mitchell Van Yahres
	Rep. Leslie L. Byrne
	Delegate James F. Almand
Washington	Sen. Frank "Tub" Hansen
	Sen. George Fleming
	Sen. Rick S. Bender
	Sen. Paul H. Conner
	Sen. Arlie U. DeJarnatt
	Sen. Nita Rinehart
	Sen. R. Lorraine Wojahn
	Sen. Ray Moore
	Sen. Patty Murray
	Sen. Janice Niemi
	Sen. Al Williams
	Rep. Calvin B. Anderson
	Rep. Marline J. Appelwick
	Rep. Forrest Baugher
	Rep. Jennifer M. Belcher
	Rep. Joanne Brekke

State	*Senator or Representative*
	Rep. Jean Marie Brough
	Rep. Maria Cantwell
	Rep. Grace Cole
	Rep. David R. Cooper
	Rep. Dennis A. Dellwo
	Rep. Brian Ebersole
	Rep. Karen Fraser
	Rep. Ken G. Jacobsen
	Rep. Joseph E. King
	Rep. Richard A. King
	Rep. June E. Leonard
	Rep. Gary F. Locke
	Rep. Dick Nelson
	Rep. Helen Sommers
	Rep. George L. Raiter
	Rep. Busse Nutley
	Rep. Fred O. May
	Rep. Ron Meyers
	Rep. Louise Miller
	Rep. Betty Sue Morris
	Rep. Larry Phillips
	Rep. Margarita Prentice
	Rep. Eugene A. Prince
	Rep. R. Wesley Pruitt
	Rep. Margaret S. Rayburn
	Rep. Nancy Rust
	Rep. Patricia Scott
	Rep. Arthur C. Sprenkle
	Rep. Georgette Valle
	Rep. Max Vekich
	Rep. Art Wang
	Rep. Karla Wilson
	Rep. Jesse C. Wineberry

State	*Senator or Representative*
West Virginia	Rep. Patricia H. White
Wisconsin	Sen. Joe Strohl
	Sen. Charles J. Chvala
	Sen. Russell D. Feingold
	Sen. Mordecai Lee
	Sen. Barbara L. Ulichny
	Sen. Fred A. Risser
	Rep. Spencer Black
	Rep. Marcia Coggs
	Rep. Shirley Krug
	Rep. Peter Bock
	Rep. Rebecca Young
	Rep. David Clarenbach
	Rep. Barbara Notestein
	Rep. Kimberly M. Plache

Appendix B

ABORTION LAWS, MAY 1, 1970

Jurisdiction	Decision of Woman and Physician	Necessary to Preserve Life of Mother Plus Other Grounds*	Necessary to Preserve Life of Mother (Only)
Alabama		X	
Alaska	X		
Arizona			X
Arkansas		X	
California		X	
Colorado		X	
Connecticut			X
Delaware		X	
District of Columbia		X	
Florida			X
Georgia		X	
Hawaii	X		
Idaho			X
Illinois			X
Indiana			X
Iowa			X
Kansas		X	
Kentucky			X
Louisiana			X
Maine			X
Maryland		X	
Massachusetts		X	

*Other grounds included where (1) continuation of the pregnancy was likely to result in death of the woman or impairment of her physical or mental health; (2) the child would probably have serious physical or mental defects; and (3) pregnancy resulted from rape or incest.

ABORTION LAWS, MAY 1, 1970 (cont'd)

Jurisdiction	Decision of Woman and Physician	Necessary to Preserve Life of Mother Plus Other Grounds*	Necessary to Preserve Life of Mother (Only)
Michigan			X
Minnesota			X
Mississippi		X	
Missouri			X
Montana			X
Nebraska			X
Nevada			X
New Hampshire			X
New Jersey			X
New Mexico		X	
New York	X		
North Carolina		X	
North Dakota			X
Ohio			X
Oklahoma			X
Oregon		X	
Pennsylvania		X	
Rhode Island			X
South Carolina		X	
South Dakota			X
Tennessee			X
Texas			X
Utah			X

*Other grounds included where (1) continuation of the pregnancy was likely to result in death of the woman or impairment of her physical or mental health; (2) the child would probably have serious physical or mental defects; and (3) pregnancy resulted from rape or incest.

ABORTION LAWS, MAY 1, 1970 (cont'd)

Jurisdiction	Decision of Woman and Physician	Necessary to Preserve Life of Mother Plus Other Grounds*	Necessary to Preserve Life of Mother (Only)
Vermont			X
Virginia		X	
Washington			X
West Virginia			X
Wisconsin			X
Wyoming			X

Source: Women's Bureau Bulletin on Abortion Laws (May 1970)

*Other grounds included where (1) continuation of the pregnancy was likely to result in death of the woman or impairment of her physical or mental health; (2) the child would probably have serious physical or mental defects; and (3) pregnancy resulted from rape or incest.

Appendix C

WOMEN OBTAINING OUT OF STATE ABORTIONS: 1972

BY STATE OF RESIDENCE

State	Proportion of State Residents Obtaining Their Abortions Out of State	Number of State Residents Obtaining Out of State Abortions
New Jersey	100.00%	22,832
Ohio	100.00%	16,666
Texas	100.00%	16,022
Michigan	100.00%	14,626
Illinois	100.00%	14,091
Missouri	100.00%	6,953
Indiana	100.00%	5,481
Kentucky	100.00%	3,132
Oklahoma	100.00%	2,843
Iowa	100.00%	2,356
Minnesota	100.00%	2,227
Rhode Island	100.00%	1,869
Maine	100.00%	1,690
Nevada	100.00%	1,630
West Virginia	100.00%	1,491
New Hampshire	100.00%	1,483
Louisiana	100.00%	1,210
Utah	100.00%	730
Wyoming	100.00%	269
Montana	100.00%	172
North Dakota	100.00%	148
South Dakota	100.00%	116

WOMEN OBTAINING OUT OF STATE ABORTIONS: 1972

BY STATE OF RESIDENCE (cont'd)

State	Proportion of State Residents Obtaining Their Abortions Out of State	Number of State Residents Obtaining Out of State Abortions
Idaho	100.00%	20
Tennessee	99.8%	4,279
Mississippi	93.0%	809
Arizona	90.4%	2,590
Vermont	81.7%	859
Massachusetts	80.7%	14,187
Wisconsin	76.0%	2,347
South Carolina	72.3%	2,208
Florida	70.9%	8,246
Connecticut	69.1%	5,757
Georgia	64.5%	4,561
Pennsylvania	62.5%	14,232
Virginia	60.0%	6,707
Nebraska	56.1%	1,008
Arkansas	49.0%	762
Alabama	45.1%	948
Delaware	41.7%	914
Maryland	40.3%	6,002
North Carolina	30.0%	3,539
Colorado	10.6%	573
Kansas	6.8%	311
New Mexico	5.1%	100
District of Columbia	2.0%	145

WOMEN OBTAINING OUT OF STATE ABORTIONS: 1972

BY STATE OF RESIDENCE (cont'd)

State	Proportion of State Residents Obtaining Their Abortions Out of State	Number of State Residents Obtaining Out of State Abortions
Alaska	0.8%	9
Oregon	0.7%	49
Hawaii	0.3%	12
Washington	0.2%	42
California	0.1%	152
New York	0.0%	44
Total		199,489

Source: Hearings on Constitutional Amendments Relating to Abortion before the Subcommittee on the Constitution of the Senate Judiciary Committee, 97th Cong., 1st sess. (1981).

Appendix D

This appendix is a compilation of abortion-related statutes passed by the states since *Roe v. Wade* was decided. There are six substantive categories of statutory regulations: trimester/health; viability/post-viability; informed consent; spousal consent; and private advertising, promotion and speech restrictions. The appendix notes where a court has ruled on the constitutionality of a statute or where an attorney general has issued an advisory opinion regarding the statute's constitutionality. In addition, if a statute violates basic Supreme Court tenets about constitutionally permissible abortion regulation, this too has been noted. Finally, where the constitutionality of the statute has not been ruled upon or where constitutional defects are not readily apparent, the statute has been described.

I. Trimester/Health Regulations

Alaska

Alaska Stat. § 18.16.010(a)(1) (1986)
Statute provides that abortion must be performed by licensed surgeon or physician.

Alaska Stat. § 18-16.010(a)(2) (1986)
Statute provides that abortion must be performed in a hospital or other approved facility. Would not satisfy criteria under *Doe v. Bolton*, 410 U.S. 179 (1973); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)

Alaska Stat. § 08.64.105 (1987)
Statutes provides that State Medical Board must regulate abortions.

Arizona

Ariz. Rev. Stat. Ann. § 36-2301 (1975)
Statute provides that practitioner must promote life of fetus if born alive.

Arkansas

Ark. Stat. Ann. § 20-9-302 (1987)
Statute provides that certain clinics must be registered with the State Department of Health.

Ark. Stat. Ann. § 5-61-101 (1987)
Statute provides that only licensed medical practitioners may perform abortions.

Ark. Stat. Ann. § 5-61-102 (1987)
Held unconstitutional in part under *May v. State*, 254 Ark. 194 *cert. denied* 414 U.S 1024 (19973); *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

Ark. Stat. Ann. § 20-18-603 (1987)
Statute provides that certain pregnancy terminations must be registered.

California

Cal. Health S. Code § 25951 (West 1984)
Held unconstitutional under *People v. Barksdale*, 8 Cal. 3d 320, 105 Cal. Rptr. 1, 503 P.2d 257 (1972). California Attorney General has ruled that statute requirement that therapeutic abortions be performed only in

accredited hospital is a reasonable classification which does not result in unconstitutional discrimination, 50 Ops. Atty. Gen. 114, 11-21-67. Would not satisfy criteria under *Doe v. Bolton*, 410 U.S. 179 (1973), to prohibit abortions except where continuation of pregnancy would physically or mentally impair women or in cases of rape or incest.

Cal. Health and S. Code § 25952 (West 1984)
Held unconstitutional under *People v. Barksdale*, 105 Cal. Rptr. 1, 503 P.2d 257 (1972). Provision violates due process.

Cal. Health and S. Code § 25953 (West 1984)
Would not satisfy criteria of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), to prohibit abortion after 20th week. California Attorney General has ruled that prohibition of all abortions after 20th week is constitutional. 65 Ops. Atty. Gen. 261. 4-27-82.

Cal. Health and S. Code § 25954 (West 1984)
Held unconstitutional under *People v. Barksdale*, 105 Cal. Rptr 1, 503 P.2d 257 (1972). Definition of mental health violates due process.

Cal. Health and S. Code § 25955.5 (West 1984)
Records required by statute concerning therapeutic abortions information on individual hospitals, but not individual persons, usually must be available to public and media. 55 Ops. Atty. Gen. 369 9-29-72.

Colorado

Colo Rev. Stat § 18-6-101 (1986)
Language of statute requiring parental consent or spousal consent to abortions is similar to language held unconstitutional in *Danforth*. Portions of this statute were held unconstitutional in *People v. Norton*, 507 P.2d 862 (1973), *e.g.*, prohibition against abortion of fetuses more than 16 weeks old.

Colo. Rev. Stat. § 25-1-666 (1982)
Statute provides that drugs which induce abortions may be sold by prescription with the name of the purchaser and name and residence of physician recorded in book for that purpose. May not satisfy criteria under *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Delaware

24 Del. Code Ann. § 1790(a) (1987)
Would not satisfy criteria under *Roe* as it prohibits abortions except where necessary for mother's health, fetal health or in cases of rape and incest.

24 Del. Code Ann. § 1790(b)(1) (1987)
Would not satisfy criteria under *Roe v. Wade* and *Danforth*, as it prohibits abortion after 20 weeks of gestation.

24 Del. Code Ann § 1790(c) (1987)
Statute provides reporting provisions. *See Thornburgh.*

24 Del. Code Ann. § 1795 (1987)
Statute provides that if fetus is born alive after abortion, must exercise same degree of care as if born alive after natural birth.

Florida

Fla. Stat. Ann. § 390.001(2) (West 1986)
Prohibits abortions in the last trimester except where necessary to preserve health of woman. Would not satisfy criteria under *Roe* or *Bolton*.

§ 390.001(3) (West 1986)
Statute provides that only physicians may perform abortions.

§ 390.001(4)(c) (West 1986)
Requiring corroboration if medical emergency exists. Would not satisfy criteria under *Bolton*.

§ 390.002 (West 1986)
Statute requires reporting provision. *See Thornburgh.*

§ 797.03(1)(2)
Statute prohibits performing abortions outside of licensed facilities except in emergencies.

§ 797.03(3)
Statute prohibits third trimester abortions outside of hospital; would not satisfy criteria under *Roe* since regulates by trimester rather than viability.

Georgia

Ga. Code Ann. § 16-12-141(a) (1988)
Statute provides that abortions be performed only by licensed physicians for medical necessity.

§ 16-12-141(b) (1988)
Abortions after the first trimester may be performed only in licensed hospital or health facility licensed as an abortion facility by the Department of Human Resources. Would not satisfy criteria under *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983).

§ 16-12-141(c) (1988)
Prohibits second trimester abortions unless physician and two consulting physicians certify that it is necessary to save life or health of woman, and if fetus is viable, aid must be rendered. Would not satisfy criteria under *Doe v. Bolton*, 410 U.S. 179 (1973).

§ 16-12-141(d) (1988)
Statute provides reporting provision consistent with privacy of the woman.

§ 15-11-116 (1985)
Statute provides definition of medical emergency.

Hawaii

Haw. Rev. Stat. § 453-16(a)(1) (1985)
Statute provides that only licensed physicians or surgeons may perform abortions.

§ 453-16(a)(2) (1985)
Attorney General found that statutory requirement that abortion be performed in hospital is not enforceable during first trimester of pregnancy.

§ 453-16(a)(3) (1985)
Requirement tha. abortions be performed only on women who have been physically present in the state for 90 days was found unconstitutional by Hawaii Attorney General.

§ 338-9 (1985)
Statute provides that fetal death certificates be issued.

Idaho

Idaho Code § 18-608(1) (1987)
Allows first trimester abortions only after physician considers various factors and deems abortion appropriate. Abortions lawful in hospitals or clinics.

§ 18-608(2) (1987)
Limits second trimester abortions to hospitals and also requires physician to consider factors enumerated in § 18-608(1). Would not satisfy criteria under *Ashcroft*.

§ 18-609(3) (1987)
Statute provides limits to third trimester abortions. Requires corroborating physician. Allows abortions only if necessary to preserve life of mother or fetus. Third trimester abortions are to be performed with survival of the child in mind. Would not satisfy criteria of *Thornburgh*.

§ 39-261 (1985)
Statute requires reporting and records but preserves woman's anonymity.

Illinois

Ill. Ann. Stat. Ch. 38 para. 18-231 (Smith-Hurd 1975)
No abortion may be performed unless medically necessary. Would not satisfy criteria under *Roe*.

para. 81-30, 30.1 (1975)
Statute requires reporting if woman has complications.

para 81-32 (1975)
Statute provides an analysis of fetal tissue.

Indiana

Ind. Code Ann. § 35-1-58.5-2(1)(A) (1986)
Requires first trimester abortions to be performed by a physician.

§ 35-1-58.5-2(2) (1986)
Requires beyond first trimester abortions to meet criteria in (1) *supra* and to be performed in hospital or ambulatory outpatient surgical center. Would not satisfy criteria under *Ashcroft*.

§ 35-1-58.5-3 (1986)
Statute provides that physician must determine fetal viability and if viable, abortion must meet criteria above and be necessary to prevent substantial permanent impairment to life or health of woman.

§ 35-1-58.5-5 (1986)
Statute requires reporting of all abortions. Preserves anonymity of mother but requires name of father, if known.

Iowa

§ 707.10 (1978)
Would not satisfy criteria under *Danforth* to impose duty to preserve live fetus.

§ 707.8, § 707.7 (1978)
Prohibits second trimester abortions; unconstitutional under *Roe*.

Kansas

Kan. Stat. Ann. § 21-3407(2)(a) (1981)

Would not satisfy criteria under *Roe*. Limits abortion to cases in which mother's life is in danger, fetal health is in jeopardy or pregnancy is result of incest or rape.

Held unconstitutional in *Poe v. Menghini*, 339 F. Supp. 986 (1972). Requires that abortion be performed in state accredited hospital and that three physicians attest to its necessity.

Kentucky

Ky. Rev. Stat. Ann. § 311.723 (Michie/Bobbs-Merrill 1983)
Held unconstitutional in *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984). Requiring consultation between physician and patient which is sufficiently long to enable the physician to determine whether the abortion is necessary and requiring physician to write out description of basis for decision.

§ 311.750 (1983)
No person other than a licensed physician may perform an abortion.

§ 311.770 (1983)
Prohibiting the saline abortion after the first trimester. Held invalid in *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976).

§ 213.055 (1982)
Statute requires that records be kept. Woman is not identified by name. All records are to be kept confidential.

Louisiana

Lou. Stat. Ann. Rev. Stat. 40:1299.35.3
Abortion performed or induced after the first trimester of pregnancy shall be performed or induced in a licensed hospital. Would not satisfy criteria under *Bolton* and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

Maine

Me. Rev. Stat. Ann. 1596(2) (1964)
Abortion must be reported by physician to the Dept. of Human Services. Report forms shall not identify woman by name.

1598(3) (1964)
Statute provides that only licensed medical or osteopathic physicians may perform abortions.

Maryland

Md. Health-Gen. Code Ann. § 20-208(a)
Portion of section requires that an abortion be performed in an accredited and licensed hospital. This section held unconstitutional. 62 Op. Atty. Gen. 3 (1977), 70 Opp. Atty. Gen. 12/3/85. Statute violates *Roe v. Wade*, in that it prohibits abortions except where mother or fetus is in danger or where pregnancy is the result of rape. *See Coleman v. Coleman*, 57 Md. App. 755, 741 A.2d 1115 (1984).

20-208(b)(1) (1987)
Subsection (b) held unconstitutional insofar as it prohibits abortion after 26 weeks'

gestation (except in the limited circumstances referred therein). 62 Op. Atty. Gen. 3 (1977).

20-208(c) (1987)
Subsections (b) and (c) held unconstitutional to the extent that they require approval of a hospital abortion review committee. 62 Op. Atty Gen. 3 (1977).

Statute provides that abortion can be authorized only by hospital abortion review authority appointed by the hospital. An order of a juvenile court directing that an abortion be performed would be beyond the power of the court; termination of a human pregnancy can be authorized only by the abortion review authority appointed by an accredited hospital. *In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972).

Portion of this section that requires abortions to be performed by physicians licensed by the State is valid. 62 Op. Atty. Gen. 3 (1977).

Statute provides that violations of the section's provisions are not crimes and carry no criminal sanctions. *State v. Hardy*, Civil No. 514, 308 A.2d 223 (1973). *Vuitch v. Hardy*, Civil No. 71-1129-Y (D. Md. filed June 22, 1972), *aff'd*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973).

Minnesota

Minn. Stat. Ann. § 145.413 (West 1989)
Statute provides reporting provision consistent with preserving woman's anonymity.

145.412 Subd. 1(1)
Statute prohibits any but licensed physicians or physicians in training under the supervision of a licensed physician from performing abortions. Post-first trimester abortions must be performed in a hospital or abortion facility.

145.412 Subd. 2
Statute provides that it is unlawful to perform abortion on an unconscious woman.

145.412 Subd. 3(1)
Statute provides that post-first trimester abortions must be performed in hospital. Would not satisfy criteria under *Ashcroft*.

Only doctors may perform abortions.

Mississippi

Miss. Code Ann. § 97-3-3(1) (1972)
Prohibits abortions except where done by a licensed physician, where (a) necessary for the preservation of the mother's life, or (b) where pregnancy was caused by rape. Subsections (a) and (b) held unconstitutional in *Spears v. State*, 278 So. 2d 443 (1973).

Missouri

Mo. Ann. Stat. § 188.020
Statute provides that only physicians may perform abortions.

§ 188.025
Challenged in this case, requirement that abortions at sixteen weeks' gestation or later be performed in a hospital.

§ 188.052
Statute requires reporting of abortions.

§ 188.055
Statute requires that records of abortions be kept.

Montana

§ 50-20-109(1)(a) (1987)
Statute provides that abortion must be performed by a licensed physician.

§ 50-20-109(1)(b) (1987)
Statute requires that abortion after first trimester be performed in a licensed hospital. Would not satisfy criteria under *Bolton* or *Akron*.

§ 50-20-110 (1987)
Statute requires reporting of abortions.

Nebraska

§ 28-335 (1985)
Statute provides that abortion must be by licensed physician.

§ 28-336 (1985)
Statute provides that abortion must be conducted by acceptable medical procedure.

§ 28-343
Statute provides reporting provisions. Section was held unconstitutional insofar as it requires physicians to make an official report of "prescribed" abortions. *Womens Services, P.C. v. Thone*, 483 F. Supp. 1022., vacated and remanded 452 U.S. 911 (1981), *aff'd* 636 F.2d 206.

28.345
Statute provides public records provision. *See Thornburgh.*

Nevada

442.250(1)(a) (1987)
Statute provides that only licensed physicians may perform abortions.

442.250(1)(b) (1987)
Would not satisfy criteria under *Roe. Danforth*, as it regulates by week of gestation rather than viability.

442.250(2) (1987)
Statute requires hospitalization for abortions after the 24th week of pregnancy.

442.256 (1987)
Statute requires that physician must maintain a record of the abortion for five years.

442.265 (1987)
Statute requires hospital to submit monthly report of abortion complications to state registrar of vital statistics.

442.260
Statute requires Health Division to adopt regulations governing performance and reporting of abortions.

New Jersey — **30.4D-6.1**
Statute requires all abortions to be performed in hospitals. Does not satisfy criteria under *Ashcroft*.

New York — **125.05(3) (1984)**
Statute requires that abortions be performed by duly licensed physician, and within 24 week after conception or if necessary to preserve the woman's life. Does not satisfy criteria under *Roe, Danforth*, as it prohibits abortions after 24th week except where necessary to preserve woman's life.

North Carolina — **14-45.1(a) (1986)**
Statute requires that abortion be performed in a certified hospital or clinic in first trimester. Challenged by *Corkey v. Edwards*, 322 F. Supp. 1248 (WDNC 1971), *judgment vacated*, 410 U.S. 959 (1973) for reconsideration in light of *Roe v. Wade*, 410 U.S. 113 and *Doe v. Bolton*, 410 U.S. 179 (1973).

14-45.1(b)
Statute prohibits abortions after twenty weeks unless in licensed hospital and there is substantial risk to life or health of female. Does not satisfy criteria under *Roe v. Wade, Danforth*.

14-451(c)
Statute provides reporting provision.

Pennsylvania — **Penn. Stat. Ann. § 3207 (1975)**
Statute provides reporting provision upheld in *Thornburgh*, 737 F.2d 283 (3d. Cir. 1984).

§ 3214 (1975)
(a) and (h) held unconstitutional by *Thornburgh*, 476 U.S. 747 (1986).

South Carolina — **§ 44-41-20 (1976)**
Section (c) of statute is unconstitutional as it requires spousal consent to third trimester abortions; *see Danforth*.

§ 44-41-60
Statute provides reporting provisions.

§ 44-41-70
Statute provides minimum licensing standards for abortion clinics.

South Dakota — **§ 34-23A-4 (1986)**
Statute provides abortions following twelfth week and through the twenty-fourth week to be performed only by a physician in a

licensed hospital or if hospital facilities are unavailable, in a clinic facility meeting specified conditions. Does not satisfy criteria under *Akron*.

§ 34-23A-19 (1986)
Statute provides reporting provisions.

Tennessee

Tenn. Code Ann. § 39-4-201(c)(1)
Statute requires that first trimester abortion be obtained with woman's consent and pursuant to attending licensed/certified physician's judgment.

§ 39-4-201(c)(2)
Statute provides that abortion of post-first trimester, pre-viable fetus must be performed with pregnant woman's consent and in a licensed hospital. Does not satisfy criteria under *Akron*, *Ashcroft* and *Doe* v. *Bolton*.

§ 39-4-203 (1986)
Statute provides reporting provision.

Texas

Tx. Rev. Civ. Stat. Ann. art. 4512.8
Statute requires Texas Board of Health to adopt necessary rules and set minimum standards.

Utah

Ut. Code Ann. § 76-7-302
Statute provides that abortion must be done by physician and in hospital if 90 days or more after conception. Does not satisfy criteria under *Akron*, *Ashcroft*.

§ 76-7-309
Statute requires human tissue removed during abortion to be submitted to pathologist for report re: whether there was pregnancy and, if so, whether it was aborted by evacuating the uterus.

§ 76-7-313
Statute provides physician to report age, marital status, county of residence, number of previous abortions, hospital or facility where abortion performed, weight of unborn child, pathological description of unborn child, menstrual age of fetus, measurements, and medical procedure used. May violate *Thornburgh*.

§ 26-2-23(3) (1953)
Statute provides that institutions submit information to local departments and register all information re: induced abortions occurring at the institution.

Virginia

Va. Code Ann. § 18.2-72 (1988)
Statute conforms to *Roe* v. *Wade*. Any licensed physician can perform abortion in first trimester. Applied in *Northern Va. Women's Medical Center* v. *Balch*, 617 F.2d 1045 (1980).

§ 18.2-73 (1988)
Statute requires that second trimester abortions be performed in licensed hospital (clinic); upheld in *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983).

§ 18.2-74
Statute unconstitutionally vague under *Colautti v. Franklin*, 439 U.S. 379 (1979).

§ 18.2-74.1 (1988)
Statute provides medical emergency exception.

§ 82.1-264 (1985)
Statute provides reporting provision.

Washington

Wash. § 9.02.060 (1987)
Statute provides abortion of nonviable fetus by physician.

§ 9.02.070 (1987)
Held unconstitutional as requires spousal consent, abortion to be performed in a hospital, and that woman be resident of state; *see State v. Koome*, 84 Wn. 2d 901 (1975).

§ 43.20A.625 (1982)
Statute mandates record-keeping of "fetal deaths."

West Virginia

West Virginia Code Annotated § 16-2F-6 (1984)
Statute provides that physician must report performing an abortion.

Wisconsin

§ 69.186 (West Supp. 1988)
Statute provides reporting requirement.

Wyoming

Wyoming Statutes Ann. § 35-6-107 (1988)
Statute requires the preparation and filing for 7 years of compilations of information submitted on abortion reporting forms.

§ 35-6-108 (1988)
Statute provides reporting requirement.

§ 35-6-111 (1988)
Statute requires that only licensed physicians perform abortions.

II. Viability and Post-Viability Regulations

Alaska

Alaska Stat. § 18.16.010(d) (1962)
Statute defines abortion as an operation or a procedure terminating the pregnancy of a nonviable fetus.

Arizona

Ariz. Rev. Stat. Ann. § 36-2301.01 (1956)
In requiring physicians to try to preserve life of fetus, statute does not satisfy criteria under *Danforth, Colautti*.

Arkansas

Ark. Stat. Ann. § 20-16-703 (1987)
In fixing viability at 25 weeks, statute goes against statement in *Danforth* that this is not a proper legislative function.

§ 20-16-705
Statute prohibits abortion of viable fetus unless necessary to preserve health or life of woman.

§ 20-16-707(a)
Statute provides physician must use abortion method designed to preserve life of viable fetus unless doing so would endanger woman.

§ 20-16-707(a)-(b)
Statute requires attendance of second physician in abortion of viable fetus.

Hawaii — **Haw. Rev. Stat. tit. 25 § 453-16(b)**
Statute defines abortion as intentional termination of "the pregnancy of a nonviable fetus."

Idaho — **Idaho Code § 18-608(3) (1987)**
Statute prohibits third trimester abortions except where necessary to preserve woman's life. Violates *Roe*.

Illinois — **Ill. Ann. Stat. Ch. 38 para 81-25 (Smith-Hurd 1975)**

§ 81-26
Statute does not satisfy criteria under *Thornburgh* to require preservation of life and health of viable fetus without an emergency exception.

§ 81-26(2)(a)
Statute provides no abortion of viable fetus unless second physician is present. Emergency exception.

Indiana — **Ind. Code Ann. § 35-1-58.5-2(3) (1986)**
Statute requires physician to certify in writing that abortion of viable fetus is necessary for the woman's health.

§ 35-1-58.5-7 (1986)
Statute provides abortions of viable fetuses to be performed in hospitals as well as a second physician to be present. If fetus is viable, must take steps to preserve its life and health. Emergency exception.

Kentucky — **Ky. Rev. Stat. Ann. Title 18 § 311.780 (1983)**
Statute prohibits abortion of viable fetuses except where necessary to preserve mothers life or health.

Louisiana — **La. Rev. Stat. Ann. A-§ 14:87.5 (1985) § 40:1299.35.4 (1989 Supp.)**
Statute prohibits abortions of viable fetuses except where necessary to preserve mother's health.

Maine — **Me. Rev. Stat. Ann. § 22 § 1598(4)(1964) Supp. 1988**
Statute prohibits abortions where knowingly disregard viability and knew not necessary

for preservation of the life or health of mother.

Minnesota

§ 145.411, subd. 2
Defines "potentially viable" as second trimester. Does not satisfy criteria under *Colautti* or *Danforth*.

Minn. Stat. Ann. § 145.415 (West 1989)
Statute prohibits abortion of a potentially viable fetus which is alive following birth.

§ 145.412, subd. 3
Statute prohibits abortion when fetus "potentially viable" unless performed in hospital; doctor certifies in writing that abortion is necessary to preserve life of woman and procedure reasonably assures live birth of fetus. May violate *Thornburgh*.

Missouri

Mo. Ann. Stat. § 188.029
Challenged in this case.

Montana

Montana Stat. Ann. § 50-20-108 (1987)
Statute prohibits causing death of premature infant born alive, if viable.

§ 50-20-109(c) (1987)
Statute prohibits abortions of viable fetuses except to preserve life or health of mother.

Nebraska

Neb. Rev. Stat § 28-329 (1985)
Statute prohibits abortion after viability except when necessary to preserve health of mother. Viability determination left to medical judgment of attending physician.

§ 28-330 (1985)
Statute requires procedures to be taken to insure protection of viable unborn child compatible with preserving the life or health of the mother in any abortion performed.

New York

N.Y. Pub. Health Law § 4164 (McKinney 1984)
Statute requires abortions after 12th week to be performed in hospital. Does not satisfy criteria under *Akron, Ashcroft*.

Statute requires physician who performed abortion after twentieth week to corroborate judgement with opinion of another physician. Does not satisfy criteria under *Doe v. Bolton*.

North Dakota

14-02.1-04(1)
Statute provides abortion procedure to be performed by licensed physician.

14-021-04(2)
Statute provides that after the first 12 weeks, but before viability, abortion must be performed in licensed hospital.

14-02.1-04(3)
Statute provides that after viability, abortion be performed only in a hospital, and only where necessary to preserve life of woman. Unconstitutionally vague under *Colautti* ("may reasonably be expected to have reached viability").

14-02.1-05
Statute provides that abortion of a viable child can only be performed with a second physician who must take "reasonable steps" to preserve unborn child. No medical emergency exception. Unconstitutionally vague, *Leigh v. Olson*, 497 F. Supp. 1340 (1980).

14-02.1-07
Statute requires all facilities and hospitals to keep records for 27 years. The records shall remain confidential and be used only for statistical purposes and to ensure compliance. Record-keeping requirements not unconstitutional. (*Leigh v. Olsen*, 497 F. Supp. 1340 (1980)). *But see Thornburgh.*

14-021-07.1
Statute provides that North Dakota department of health provide all required forms for compliance with statutory reporting requirements.

Ohio

3701.341
Statute provides requiring Public Health Council to adopt rules relating to abortions.

Oklahoma

Statutes Annotated Tit. 63 1-731
Statute allows any licensed physicians to perform abortions.

1-731(B)
Statute provides that after first trimester, abortion must be in a hospital. Does not satisfy criteria under *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

1-733
Statute requires self-induced abortions to be performed only under supervision of licensed physician.

1-737
Statute requires abortion procedure to be performed in hospital. Does not satisfy criteria under *Planned Parenthood v. Ashcroft.*

1-738
Statute provides requires reporting requirement.

1-739
Statute provides that records shall be kept by hospitals and facilities.

1-732
Statute provides that no person shall obtain abortion after viability, unless necessary to prevent death of mother or impairment of her health. (emergency exception).

Statute provides that performing physician determines viability and must take care to preserve child. Does not satisfy under *Colautti*.

Statute presumes viability at 24 weeks. Does not satisfy the Supreme Court's desire for flexibility in defining viability expressed in *Danforth*.

1-734
Statute provides care and treatment for live-born fetuses. No person shall take the life of viable child, "reasonable measures" must be taken to preserve.

Oregon

Or. Rev. Stat. 435-496
Statute provides that there be a report to the vital statistics unit.

Pennsylvania

Pa. Stat. Ann. Tit. 18, § 3210 (Purdon 1975)
Held unconstitutional under *Thornburgh*, which invalidates regulations that prohibit post-viable abortions and do not also include an emergency exception.

Tit. 18, § 3211 (Purdon 1975)
Held unconstitutional under *Thornburgh*. Provision required physician to report basis for determination that fetus is not viable if abortion after first trimester.

Utah

§ 76-7-302 (Supp. 1988)
Statute prohibits abortion except where performed by physician within first two trimesters and where fetus is viable prohibits abortion unless it is necessary to save woman's life. Does not satisfy criteria under *Roe* or *Akron*.

§ 76-7-308 (1953)
Statute provides that physician must use all his medical skills to save life of unborn child. Does not satisfy criteria under *Danforth*.

Wisconsin

Wis. Stat. Ann. § 940.11(2), (3) (West Supp. 1988)
Statute prohibits abortion after viability; includes emergency exception.

§ 940.15(4)
Statute requires post viability abortion to be performed in a hospital.

§ 940.15(6)
Statute requires physician to use abortion method likely to preserve life of fetus. Does not satisfy criteria under *Thornburgh*.

Wyoming

Wy. O. Stat. § 35-6-102 (1988)
Statute prohibits post viability abortions. Does not satisfy criteria under *Thornburgh*.

§ 35-6-103 (1988)
Statute provides that physician may not terminate the viability of unborn infant.

III. Informed Consent Regulations

Delaware	**Del. Code Ann. tit. 24 § 1794 (1974 rev.)** Statute requires mother to give written consent. Does not satisfy criteria under *Akron* as it requires practitioners to tell women details of fetal development.
Florida	**Fla. Stat. Ann. § 390.001(4) (West 1986)** Statute requires written informed consent of pregnant woman. If woman is married, requires that husband be given notice of the abortion. Spousal notice provision violates *Danforth*. **§ 390.025(2) (West 1986)** Statute provides that abortion referral or counseling agency shall furnish pregnant woman with full and detailed explanation of abortion – including effects and alternatives. May violate *Akron, Thornburgh*.
Idaho	**Idaho Code § 18-609 (1987)** Statute provides that hospital must give detailed descriptions of physical characteristics of fetus and abortion procedures. Does not satisfy criteria under *Akron*.

	§ 18-610 (1987) Statute provides that the mother's refusal to consent is grounds for not performing abortion.
Illinois	**Ill. Ann. Stat. Ch. 38 para 81-26 § 6(b) (Smith-Hurd 1975)** Statute requires practitioner to inform woman of pain reliever for fetus. Does not satisfy criteria under *Akron* .
Iowa	**Iowa Code Ann. § 707.8 (1978)** Statute prohibits non-consensual termination of pregnancy except where to preserve life or health of mother or fetus.
Kentucky	**Ky. Rev. Stat. Ann. § 311.726 (1983); § 311.729 (1983)** Statute requires that every abortion patient receive materials describing alternatives to abortion and describing fetus at various stages. Held unconstitutional. *Eubanks v. Brown*, 604 F. Supp. 741 (W.D. Ky. 1984).
Pennsylvania	**Pa. Stat. Ann. Tit. 18, § 3208** Statute provides that the Department of Health publish information to inform women of services available to assist them through pregnancy, childbirth, and while the child is dependent. The Department of Health must also provide materials designed to inform women of the anatomical and physiological characteristics of the unborn child in two-week gestational increments from fertilization

to full term. The material must be objective and convey accurate scientific information. Held unconstitutional under *Thornburgh*.

Rhode Island

R.I. Gen. Laws § 23-4.7-2, § 23-4.7-3, § 23-4.7-5
Statute provides informed consent provisions. Does not satisfy criteria under *Thornburgh* as they require the physician to inform the woman of the gestational age of the fetus and of the availability of foster care and adoption.

South Carolina

S.C. Code Ann. § 44-41-20
Statute requires consent of woman for first and second trimester abortions; requires additional consents of her spouse and a consulting physician for third trimester abortions. Does not satisfy criteria under *Danforth*.

S.C. Code Ann. § 44-41-30(a)
Statute provides that the pregnant woman's consent is required prior to the abortion unless there is a medical emergency involving the woman's life or if the woman is judged mentally incompetent.

South Dakota

S.D. Codified Laws Ann. § 34-23A-7
Statute provides that prior to an abortion, the pregnant woman shall give written consent to such an abortion stating she is having the abortion of her own free will. The physician or facility will retain the consent. If the

woman is an unmarried minor, prior written consent is required from her parent or person in loco parentis. If the woman is a married minor, prior written consent must be obtained from her spouse. Spousal consent provision does not satisfy criteria under *Danforth*. Parental consent provision does not satisfy *Bellotti v. Baird*, 443 U.S. 622 (1977) ("Bellotti II").

S.D. Codified Laws Ann. § 34-23-A-10
Statute provides that all physicians and facilities performing abortions provide upon request, information on services and counseling which provide alternate solutions for "problem pregnancies." Does not satisfy criteria under *Thornburgh*.

S.D. Codified Laws Ann. § 34-23A-10.1
Statute requires that at least 24 hours before an abortion is scheduled, unless there is an emergency situation, the physician will request that the woman sign a form informing her about adoption and financial assistance. Does not satisfy criteria under *Thornburgh*.

Tennessee

Tenn. Code Ann. § 39-4-201(c)
Statute requires obtaining woman's consent before abortion.

Section 2, which provides that abortions performed after first trimester but before viability of fetus may be performed only in a

licensed hospital, or a hospital operated by the state or federal government, by the woman's attending physician, does not satisfy criteria based on *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

Tenn. Code Ann. § 39-4-202
Statute provides that informed consent of a pregnant woman is required prior to abortion; certain information including information about adoption, must be provided by physician; there must be a waiting period of two days between the time the information is given and the time the consent is signed; the physician will inform a minor's parents two days prior to the operation that an abortion is to be performed on the minor, but this section is not designed to authorize parental objection or to alter or prevent the decision with the abortion. Information requirements do not satisfy criteria under *Thornburgh*. Waiting period does not satisfy criteria based on *Akron*.

Utah

Utah Code Ann. § 76-7-305.5
Statute provides the Department of Health will publish information regarding available services, descriptions of physical characteristics of a normal unborn child during various stages of development and descriptions of abortion procedures. Facilities will provide this information upon request. They will inform every patient that these materials are available. The Department

of Health will compile and report information about the consent materials. Statute does not satisfy criteria under *Thornburgh*.

Virginia

VA. Code Ann. § 18.2-76
Statute provides that before performing an abortion the physician will obtain informed written consent of the pregnant woman unless she is incompetent. If she is incompetent, the parent, guardian, committee, or person in loco parentis must provide written consent. The physician must inform the woman about the procedure and its risks.

Washington

Wash. Rev. Code Ann. § 9.02.070
A woman "not quick with child" and not more than four months pregnant may have an abortion with her prior consent and, if married and residing with her husband, with her husband's prior consent, or, if under 18 only (a) with parental consent, (b) if she has resided in the state for 90 days, and (c) if the abortion is performed in a hospital or approved medical facility unless in an emergency. The spousal consent provision does not satisfy criteria based on *Danforth*. The residency requirement violates *Doe v. Bolton*. Requiring all first trimester abortions to be performed in a hospital violates *Akron*.

Wisconsin

Wis. Stat. Ann. § 146-78
Statute provides that prior to performing an abortion the physician or assistant must provide the woman with, unless it is an

emergency constituting an immediate threat and grave risk to the life and health of the woman, certain accurate information, including information about her condition, the procedure, available services providing birth control, and agencies providing during pregnancy and after birth services. If the woman is a minor the physician must discuss the availability of services to assist a minor contemplating an abortion who wishes to notify her parents or guardian of the contemplated abortion. The physician must inform the woman of possible risks. The physician may inform the woman of probable physical characteristics of the child. Upon request, the physician shall supply written information regarding, among other things, services available to assist the woman during pregnancy and after the birth of the child, including adoption agencies. After receiving information the woman must sign a statement that she received the information and stating she consents to the abortion. The hospital or clinic must have a written policy regarding notification of a minor's parent or guardian. The clinic cannot notify a minor's parents of the minor's intent to have an abortion. Does not satisfy criteria under *Thornburgh*.

IV. Parental Notice/Consent Regulations

Arizona	**Ariz. Rev. Stat. Ann. § 36-2152 (1987 Supp.)** Statute requires that one parent or legal guardian of unemancipated or unmarried minor be notified prior to minor's abortion. Written notice must be given at least 24 hours before the abortion. Notice requirement is waived if minor receives a judicial order that she is mature enough to make the abortion decision or that her best interests would be served. Notice requirement may also be waived if there is an emergency need for the abortion or if the parent/legal guardian cannot be contacted and physician certifies that either of these is the case.
Arkansas	**Ark. Stat. Ann. § 41-2555 (1977)** Requires that prior written permission by the parents or guardian of an unmarried minor be given. If the minor is married, written permission must be given by her husband. Spousal consent provision held in *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).
California	**Cal. Health & Safety Code § 25955 (1988 Supp.)** Statute requires parental consent of one parent before an abortion may be performed upon a minor except where there is a medical emergency. Provides for an expedited judicial bypass procedure to determine if the

minor is sufficiently mature to consent to her own abortion.

Preliminary injunction issued pending trial, *American Academy of Pediatrics v. John Van De Kamp*, No. 884574, Cal. Superior Court Dec. 28, 1987.

Delaware

Del. Code Ann. tit. 13 § 708 (1981)
Statute requires prior written consent of the parents/guardians with whom the unmarried minor resides or if she does not reside with either of her parents or guardians, then the statute requires the written consent of one parent or guardian. Does not satisfy criteria under *Bellotti v. Baird ("Bellotti II")*, 443 U.S. 622 (1979) as does not include judicial bypass provision.

Florida

Fla. Stat. Ann. § 390.001(4)(a) (West 1985 Supp.)
Statute prohibits abortion, on an unmarried pregnant woman under 18 unless the physician has first obtained the prior written, informed consent of her parent, custodian, or guardian. Includes judicial bypass option.

Held unconstitutional under *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981).

Georgia

Ga. Code Ann. § 15-11-110 to 15-11-118 (1987)
Requires that notice be given to a parent, guardian, or person standing in loco parentis prior to an abortion. Minor must submit

written statement from parent/guardian to that effect or "actual" notice in person or by phone by the physician must be given at least 24 hours before the abortion or notice may be given by mail at least 48 hours before the scheduled abortion. Enjoined as unconstitutional, *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988).

Idaho

Idaho Code § 18-609(6) (1987)
Requires notice to both parents or legal guardian of unmarried pregnant woman under 18 of pending abortion at least 24 hours prior to performance of the abortion. Opinion letter from Attorney General – constitutional under *H.L. v. Matheson*, 450 U.S. 398 (1981). However, does not satisfy criteria under *Bellotti II* as does not include waiver provision.

Illinois

Ill. Rev. Stat. ch. 38 § 81-61 et. seq. (1984 Supp.)
Waiting period held unconstitutional in *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided court*, 108 S. Ct. 429 (1987), *rehearing denied*, 108 S. Ct. 1064 (1988).

Indiana

Ind. Code Ann. § 35-1-58.5-2.5 (Burns 1985 Supp.)
Statute requires physician to obtain the prior written consent of one parent or guardian if unemancipated pregnant woman under 18. Physician or minor may seek judicial waiver.

Consent provision does not apply in an emergency.

Kentucky

Ky. Rev. Stat. § 311.732, 311.990 (1988)
Dual parental informed consent provision and bypass procedure enjoined as unconstitutional until promulgation of Supreme Court rules. *Eubanks v. Wilkinson*, Civ. No. 82-03260-; Slip. op. (W.D. Ky. August 23, 1988); appeal filed 88-6085 (6th Cir); statute due to go into effect.

Louisiana

La. Rev. Stat. § 40: 1299.35.5 (West 1985 Supp.)
Statute provides consent provision. Upheld as constitutional, *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984) *aff'd* 794 F.2d 994 (5th Cir. 1986).

Maine

Me. Rev. Stat. Ann. tit. 22 § 1597 (1980)
Requires physician to notify both parents or guardian of an unemancipated minor of his intention to perform the abortion or to notify the Department of Human Services of his inability to obtain notice. Actual notice must be given 24 hours before the abortion. Mail notice must be given at least 48 hours before the abortion. Requires physician who is unable to notify parents/guardian to delay performing abortion for 24 hours after notifying Dept. of Human Services. No judicial bypass provision is included.

Preliminarily enjoined as unconstitutional under *Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D. Me. 1979).

Maryland

Md. Health-Gen. Code Ann. § 20-103 (1982)
Statute requires physician to notify parent/guardian of unmarried minor prior to performing abortion. No notice required if minor does not live with a parent or guardian or if physician is unable to reach parent/guardian. No judicial bypass provision. Attorney General opinion is that statute is unconstitutional. 70 Op. Atty. (Maryland) Gen. (Dec. 31, 1985).

Held unconstitutional by Opinion from Atty. Gen. re: Provisions requiring notice to parents.

Mass.

Mass. Gen. Laws Ann. ch. 112 § 12 (1982)
Requires prior consent of both parents or legal guardian (unless parent has died or is otherwise unavailable, in which case one parent consent will suffice) of unmarried woman under 18 before abortion may be performed. Includes judicial bypass option.

Statute challenged by *Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). Facially constitutional; still in courts but presently enforceable/operative.

Minnesota

Minn. Stat. Ann. § 144.343(2)-(7) (West 1985 Supp.)
Statute requires minor to notify both her parents at least 48 hours before a planned abortion or demonstrate to a court that she is mature enough to make the abortion decision or that the abortion is in her best interests.

Upheld as unconstitutional in *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (holding).

Mississippi

Miss. Code Ann. § 41-41-53 (Supp. 1988)
Requires written consent of both parents or legal guardian of unemancipated minor. Both parents need not consent in specific circumstances including when minor's pregnancy was due to incest. Includes judicial waiver provision. (41-41-55.)

Statute enjoined pending final determination on merits. *Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. July 2, 1986) (TRO entered until S. Ct. rules issued) Miss. S. Ct. Rules issued Nov. 1986.

Missouri

Mo. Ann. Stat. § 188.028 (Vernon 1982)
Requires physician to secure written informed consent of the minor and one parent or guardian. Parental consent is not required if minor is emancipated or has obtained court order granting minor the right to self-consent.

Inlcudes judicial bypass option; considered by two justices in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); enjoined in *T.L.J. v. Ashcroft*, 585 F. Supp. 712 (W.D. Mo. 1983); injunction lifted *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986).

Montana

Mont. Code. Ann. § 50-20-107 (1983)
Statute requires written notice to parent or legal guardian of minor. Does not satisfy criteria under *Bellotti II* as it does not include a judicial bypass procedure.

Nebraska

Neb. Rev. Stat. § 28-347 (1984 Supp.)
Requires 24-hour actual notice to one parent or legal guardian of minor prior to performing abortion or 48-hour mail notice. Includes judicial bypass option.

Statute challenged by *Orr v. Knowles*, No. CV 81-0-301 (D. Neb. Sept. 19, 1983). *See also, Orr v. Knowles*, 337 N.W. 3d 699 (Neb. 1983). Prior consent provision struck; present notice provision enjoined.

Nevada

Nev. Rev. Stat. ch. 442.255
Prohibits abortions upon unmarried, unemancipated women under 18 unless one parent or guardian is personally notified before the abortion. Provision is waived if abortion is immediately necessary to preserve

minor's life or health. Includes judicial waiver option.

Glick et al. v. McKay et al., 616 F. Supp. 322 (D. Nev. 1985) interlocutory appeal pending 9th Cir. No. 85-2335; presently enjoined.

North Dakota

N.D. Cent. Code § 14-02.1-03.1 (1981)
Statute prohibits abortions upon women under 18 unless both parents provide written consent; if the minor is married, parental consent is not required. Includes judicial bypass option.

Statute held unconstitutional, prior notice statute struck. *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980); no known challenge to present consent statute.

Ohio

Ohio Rev. Code Ann. § 2919.12 (1987)
Statute prohibits abortions upon unmarried, unemancipated women under 18 unless 24-hour prior notice to one parent or guardian has been given. Notice may be given to a grandparent or sibling if woman signs affidavit stating she fears abuse from the parent. Notice provision is waived if one parent provides written consent or if juvenile court authorizes abortion. 48-hour notice by mail may be given if relative or guardian cannot be contacted.

Statute held unconstitutional under *Akron Center for Reprod Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) *aff'd sub nom Akron Center for Reprod. Health v. Slaby*, 854 F.2d 852 (1988)

Pennsylvania

18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983)
Injunction against enforcement of statute issued because statute lacked detailed provisions ensuring confidentiality and dispatch, and establishing a clear procedure.

A.C.O.G. v. Thornburgh, 656 F. Supp 879 (E.D. Pa. 1987). Pennsylvania Supreme Court, directed by statute to promulgate rules to implement statute, adopted such rules in 1986. Preliminary injunction continued because certain implementing rules did not satisfy constitutional requirements. *A.C.O.G. v. Thornburg*, 656 F. Supp. 879 (E.D. Pa. 1987).

Rhode Island

R.I. Gen. Laws § 23-4.7-6 (1984 Supp.)
Statute prohibits abortion upon unmarried, unemancipated women under 18 without the consent of the woman and one of her parents unless a family court judge determines that the minor is mature and is capable of giving informed consent or determines that an abortion is in the minor's best interest.

Prior statute held unconstitutional under *Women's Medical Center of Providence v.*

Roberts, 530 F. Supp. 1136 (D.R.I. 1982); new statute enacted after court decision; no challenge of new statute; presently operating.

South Carolina — **S.C. Code Ann. § 44-41-30 (Law. Co-op. 1985)**
Statute requires parental consents.

Statute held unconstitutional under *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977) *vacated and remanded*, 440 U.S. 445 (1979) *rehearing denied*, 441 U.S. 928 (1979)

South Dakota — **S.D. Codified Laws Ann. § 34-23A-7 (1977)**
Statute requires written parental consent for unmarried minors. Married minors must obtain written consent from husband. Does not satisfy criteria under *Danforth*, and also under *Bellotti II* because no waiver provision.

Tennessee — **Tenn. Code Ann. § 39-4-202(f) (1982)**
Statute held unconstitutional *Planned Parenthood of Nashville v. Alexander*, No. 79-843, Slip op. (Chancery Ct. 1979).

Utah — **Utah Code Ann. § 76-7-304 (1978)**
Statute held unconstitutional as applied to unemancipated dependent and immature minors. *H.L. v. Matheson*, 450 U.S. 398 (1981).

West Virginia — **W. Va. Code § 16-2F-3 (1985)**
Statute provides parental notification/waiver; notice to minor of right to petition court; minor to be referred for counseling upon notification to parents; parental notification waived where independent physician not to perform abortion, finds minor mature enough to make decision or finds that notification is not in minor's best interests.

V. Spousal Consent/Participation Requirements

Colorado — **Colo. Rev. Stat. § 18-6-101(1) (1986)**
Prohibits, among other things, performing abortions upon married women who live with their husbands unless husband and wife both request it. Does not meet the criteria of *Danforth*.

Florida — **Fla. Stat. Ann. § 390.001(4)(b) and (1) (West 1986)**
Statute requires that if a woman is married and living with her husband, that he must be notified and given an opportunity to consult with her. To comply with this section, the woman may give a written statement that such notice and opportunity has been given. If a medical emergency exists, this section may be waived if physician obtains one corroborative medical opinion attesting to the medical necessity of the abortion. Held unconstitutional in *Scheinberg v. Smith*, 550 F. Supp. 1112, S.D. Fla. (1982).

Kentucky

Ky. Rev. Stat. Ann. 12 § 311.735 (1983)

Statute requires physician or his agent to notify husband prior to performing abortion, if this is "reasonably possible." If it is not "reasonably possible," notice must be given to husband within 30 days after the abortion. Section requiring pre-abortion notice to husband does not apply if couple has filed for dissolution of marriage, or if there is a medical emergency. Failure to comply with this section creates tort liability. Held unconstitutional under *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky 1984).

Montana

Mont. Code Ann. §§ 50-20-107(a) (1987)

Statute provides that no abortion may be performed on woman without written notice to husband, unless husband is voluntarily separated from her. Does not satisfy criteria under *Danforth*.

Rhode Island

R.I. Gen. Laws § 23-4.8-2

Statute provides that if a married woman consents to an abortion, the physician who will perform the abortion must notify the husband, if possible, prior to the abortion. Does not satisfy criteria under *Danforth*.

South Carolina

S.C. Code Ann. § 44-41-20(c)

Statute provides that during the third trimester, the abortion must be performed

with the woman's consent, and if married and living with the husband, with the husband's consent. Does not satisfy criteria under *Danforth*.

South Dakota

S.D. Codified Laws Ann. § 34-23A-7

Statute provides that prior to any abortion, the pregnant woman must sign a written consent stating she is having the abortion of her own free will. The physician or the facility where the abortion is performed shall retain the consent. If the woman is a married minor consent must be obtained from her husband as well as herself. Does not satisfy criteria under *Danforth*.

Utah

Utah Code Ann. § 76-7-304

Statute provides that the physician must consider all factors relevant to the pregnant woman's well-being including: physical, emotional and psychological health, age, familial situation. The physician, if possible, must notify a minor's parents or guardian or a husband if the woman is married. Does not satisfy criteria under *Danforth*.

Washington

Wash. Rev. Code Ann. 9.02.070(a)

Statute provides that a woman "not quick with child" and not more than four months pregnant may have an abortion if she consents, and if she is married and living with her husband or unmarried and under 18 she must get the consent of her husband or

parent or legal guardian. Does not satisfy criteria under *Danforth* and *Bellotti II*.

VI. Private Advertising, Promotion, Speech Restrictions

Arizona

Ariz. Rev. Stat. Ann. § 13-3605 (1986)
Statute makes it a misdemeanor to willfully write, compose or publish a notice of advertisement of any medicine or means for producing or facilitating a miscarriage or abortion. Statute held unconstitutional in *State v. N.Y. Times*, 20 Ariz. App. 183, 511 P.2d. 196 (Ariz. Ct. App. 1973).

California

Cal. Bus. & P. Code § 601 (West 1974)
Statute prohibits writing, composing, publishing any notice or advertisement of medicine or means of producing or facilitating an abortion or miscarriage. Held unconstitutional by *People v. Orser*, 31 Cal. App. 3d 528, 107 Cal. Rptr. 458 (Cal. Ct. App. 1973).

Colorado

Colo. Rev. Stat. § 25-1-665 (1982).
Statute prohibits advertisement, sale or public exposure for sale of products designed expressly to induce abortions. Does not meet criteria under *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Connecticut

Conn. Gen. Stat. Ann. § 53-31 (1958 rev.)
Prohibits the publication, lecture, advertisement or any other means of encouraging illegal abortions (as defined by C.G.S. § 53-29, 53-30). Also prohibits sale or advertisement of medicines that induce abortions, except to licensed physicians or approved hospitals. Finally, statute prohibits advertisement of "monthly regulator[s]" for women. Statute enjoined as unconstitutional, *Abele v. Markle*, 369 F. Supp. 807 (D. Conn.).

Florida

Fla. Stat. Ann. § 797-02 (West Supp. 1988)
Statute criminalizes advertisement, distribution, circulation of any written document containing language that conveys any "hint" or reference to where, from whom or how one may obtain an abortion. Does not satisfy criteria under *Bigelow*.

Idaho

Idaho Code § 18-607 (1987)
Statute provides that only physicians and druggists may sell or advertise anything designed to terminate a pregnancy. Others are permitted to advertise/sell if ad or sale is not likely to reach the general public.

Maryland

Md. Health-Gen. Code Ann. § 20-201 (1987)
Statute prohibits advertisement of abortion referrals. Does not meet criteria under *Bigelow*.

Massachusetts — **Mass. Gen. Laws Ann. Ch. 272 § 20 (West 1983)**
Statute prohibits dissemination of any printed information about abortion services. Does not meet criteria under *Bigelow*.

Michigan — **Mich. Comp. Laws Ann. § 750.15 (West 1968) § 750.40 (West 1968) § 750.34 (West 1968)**
Statute makes it a misdemeanor to disseminate advertisement of abortion services; upheld by *Larkin v. Cahalon*, 208 N.W.2d 176 (1973). Does not meet criteria under *Bigelow*.

Minnesota — **Minn. Stat. Ann. § 617.25 (West 1986) § 617.26 (West 1986)**
Statutes prohibit dissemination, written and oral, of information pertaining to procuring an unlawful abortion. Does not meet criteria under *Bigelow*.

Mississippi — **Miss. Code Ann. § 97-3-5 (1972)**
Statute prohibits advertisement of unlawful abortions. Does not meet criteria under *Bigelow*.

Montana — **Mont. Code Ann. § 50-20-109(4) (1987)**
Statute prohibits physician and others from affirmatively seeking patients for abortions. Does not meet criteria under *Bigelow*.

Nevada — **Nev. Rev. Stat. § 202.200 (1987)**
Statute prohibits advertisement of abortion. Does not meet criteria under *Bigelow*.

North Dakota — **N.D. Cent. Code § 14-02.1.-06 (1981)**
Statute prohibits physicians and hospitals from advertising or participating in any form of communication for the purpose of inviting or inducing a woman to undergo an abortion.

Held unconstitutional under *Leigh v. Olson*, 487 F. Supp. 1340 (1980) as unconstitutionally vague.

Oklahoma — **Okla. Stat. Ann. Tit. 63 § 1-736 (West 1983)**
Statute prohibits hospitals from advertising performance of abortions. Does not meet criteria under *Bigelow*.

Virginia — **Va. Code. Ann. § 18.2-76.1 (1988)**
Statute prohibited all forms of encouragement for procuring an abortion by advertisement.

Held unconstitutional by *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Wyoming — **Wyo. Stat. § 35-6-116 (1988)**
Statute prohibits advertisement of abortion services. Does not meet criteria under *Bigelow*.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
APPELLANTS,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,
APPELLEES.

On Appeal from the United States Court of Appeals For the Eighth Circuit

BRIEF FOR BIOETHICISTS FOR PRIVACY AS AMICUS CURIAE SUPPORTING APPELLEES

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Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

QUESTIONS PRESENTED

Should personal medical decisions, such as abortion, that currently are made by the individual patient in the privacy of a doctor-patient relationship, be made instead by state legislatures?

Should a state be able to require physicians to withhold information from their patients that is essential for their patients to make informed medical decisions?

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In the Matter of Jobes, 108 N.J. 394, 529 A.2d 434 (1987) 23
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In re Yetter, Northampton Co. Orphans Ct. No. 1973-533 (Williams, J.) (Pa. 1973) 23
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Planned Parenthood Federation v. *Bowen*, 680 F.Supp. 1465 (D. Colo. 1988) 14
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Satz v. *Perlmutter*, 362 So.2d 160 (Fla. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980) 23
Smith v. *Cote*, 128 N.H. 231, 513 A.2d 341 (1986) 16
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Ad Hoc Committee on Medical Ethics, *American College of Physicians Ethics Manual*, Part I, 101 Annals of Internal Medicine, 129 (1984) 12
A. Jonsen, M. Siegler & W. Winsdale, *Clinical Ethics* 62 (2nd ed. 1986) 14
Annas, *Protecting the Liberty of Pregnant Patients*, 316 New Eng. J. Med. 1213 (1987) 22
Annas, *The Insane Root Takes Reason Prisoner*, 19 Hastings Center Report 29 (Jan./Feb. 1989) 22
Annas, *Webster and the Politics of Abortion*, 19 Hastings Center Report 36 (March/April 1989) 7

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American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 18-19 (5th ed. 1985) 16
R. Faden & T. Beauchamp, *A History and Theory of Informed Consent* (1986) 13
S. Elias and G. J. Annas, *Reproductive Genetics and the Law* (1987) 16, 17
T. Engelhardt, *The Foundations of Bioethics* 224 (1985). 22
Glantz, "Abortion: A Decade of Decisions" *Genetics and the Law III* 305 (A. Milunsky & G. Annas, eds. 1985) .. 7
R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 81 (1988) 14
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Hohler, *State Policy, Human Tragedy*, Boston Globe, Feb. 26, 1989 21
Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New. Eng. J. Med. 1192 (1987) 22
Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women*, 259 J.A.M.A. 1060 (1988) 22
Plato, *Laws*, 4.720b-e 12
President's Commission for the Study of Ethical Problems in Medicine, *Screening and Counseling for Genetic Conditions* 22-31 (1983) 16
President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Reseach, *Making Health Care Decisions* 2-3 (1982) 13

In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, et al.,
APPELLANTS,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,
APPELLEES.

On Appeal from the United States Court of Appeals For the Eighth Circuit

BRIEF FOR BIOETHICISTS FOR PRIVACY AS AMICUS CURIAE SUPPORTING APPELLEES

Interest of Amicus

Amicus is an ad hoc group of 57 philosophers, theologians, attorneys, and physicians from 20 states and the District of Columbia who teach medical ethics to medical students and/or physicians, or who have a major professional interest in medical ethics. Although the precise beliefs and practices of the members of this group vary, as do their professional and religious backgrounds, the members believe that permitting competent adults to make important, personal medical deci-

sions in consultation with their physician is a fundamental principle of medical ethics, and that the doctor-patient relationship deserves the constitutional protection this Court has afforded it under the right of privacy. Medical ethics, individual autonomy, and professional accountability will all be fostered by preserving the right of privacy. Compromising the right of privacy, and substituting the state as the decision-maker in the doctor-patient relationship, would undermine principles of medical ethics and compromise principles of good patient care and good medical practice to the detriment of physicians and patients alike.

Summary of Argument

I

Missouri asks this Court to renounce a right of privacy which this Court has described as "older than the Bill of Rights." This Court has provided lawmakers with a consistent and coherent set of parameters for identifying what the right of privacy protects, especially with respect to decisions about abortion. Abandonment of the right of privacy would permit state legislatures to control personal decisions that are now made in the doctor-patient relationship. Without the protection of the right of privacy, each legislature would be free to impose its values by dictating the outcome of what are and should be personal medical care decisions.

II

A. As this Court has recognized, a woman's right to decide to terminate a pregnancy is exercised within the context of the doctor-patient relationship. The ancient tradition of safeguarding the privacy and freedom of unfettered communication between doctor and patient is embodied in ethical precepts which the law recognizes and supports. The Missouri

legislation is a direct, governmental attack on this relationship, thereby jeopardizing patients' rights, and compromising physicians' ethical obligations to their patients.

B. Both legal and ethical principles require physicians to discuss health risks that are caused or exacerbated by pregnancy and information concerning possible fetal genetic or congenital disorders. The Missouri statutes prohibit such discussions by publicly-funded physicians if they may lead to a decision to abort. Physicians' speech is censored and patients are deprived by the state of critical information on which to base decisions about pregnancy. The ethical practice of medicine is made unlawful and the health and well-being of pregnant patients is likely to be seriously jeopardized as a result. Missouri gives "any taxpayer" of the state standing to enforce its restrictions in the courts. Thus, whatever is said or done in the privacy of the doctor-patient relationship is subject to public scrutiny at any time.

C. Without the constitutional right of privacy, there would be no constitutional principle that would prevent a state from prohibiting patients from using *any* medically recognized and accepted treatments which a majority of the legislature happens to disfavor. Worse, a state would be free to prevent physicians from even telling their patients about such treatment. This differs dramatically from a state's merely refusing to pay for certain treatments.

Advances in medical science have made possible new methods of treatment for a wide variety of medical conditions, often controversial, and with the potential for profound consequences for the patient. Scientific progress has increased the importance of the doctor-patient relationship, for it is only in this context that difficult personal medical decisions can be made taking into consideration all of the medical and personal consequences that may ensue. Thus there is even more reason today to uphold the constitutional protection of decisions made in the privacy of the doctor-patient relationship than when *Roe* v. *Wade* was decided. For these reasons the decision of the court of appeals should be affirmed.

Argument

I. The Constitutional Right of Privacy Which Protects the Right To Make Personal Medical Decisions Is a Fundamental Right and a Central American Value Which Is "Implicit in the Concept of Ordered Liberty" and the Court Should Continue To Protect It.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), this Court, in striking down a state statute forbidding married couples from using contraceptives, stated, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." *Id.* at 486. In explaining this fundamental constitutional right of privacy the Court recognized that there are decisions that are so personal, so private, and that so profoundly affect the individuals who must live with the consequences, that the state has no power to interfere in those decisions, absent a compelling interest. Since *Griswold*, this Court has applied the right of privacy to protect an unmarried person's right to decide "whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), and decisions whether or not to terminate a pregnancy. *Roe* v. *Wade*, 410 U.S. 113 (1973).

When the State of Missouri and the United States as amicus curiae ask this Court to overrule *Roe* v. *Wade*, they are asking that the most private decision that can be made by any individual be removed from that affected individual and turned over to a state legislature. We respectfully submit that this Court should not take such action.

In *Griswold* this Court recognized that the private relationship between a husband and wife prevented the state from intruding on their contraceptive decisions. In *Roe* the Court recognized the privacy of the doctor-patient relationship. While *Roe* further defined a woman's right to make reproductive decisions, it also recognized that the pregnant woman required the advice and counsel of a licensed physician. Thus,

in *Roe* the Court concluded that during the first trimester "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at 163. Later the Court stated that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. The Court also pointed out that its decision "vindicates the right of the physician to administer medical treatment according to his professional judgment" up until the point that compelling state interests justify intervention. *Id.* at 165-66. Finally, the Court pointed out that the abortion decision is "inherently, and primarily, a medical decision" for which "basic responsibility" rests with the physician. *Id.* at 166.

Thus, as *Griswold* protected the privacy of the marital relationship, *Roe* protected the privacy of the physician-patient relationship. "The right of privacy has no more conspicuous place than in the physician-patient relationship..." *Doe* v. *Bolton*, 410 U.S. 179, 219 (1973) (Douglas, J., concurring). In this relationship both the physician and the pregnant woman must agree that termination of pregnancy is appropriate in order to have this medical procedure performed. Whether abortion is an appropriate option for a *particular* patient is, by definition, a decision that must be made by the doctor and the patient in each case. It is the right to make particularized personal decisions that is at the core of *Roe* and its progeny, and it is this right that Missouri and the United States desire to destroy.[1]

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[1] Justice Douglas, concurring in *Doe* v. *Bolton*, 410 U.S. at 211, described the right of privacy as *"freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."* He also thought of it as *"freedom to care for one's health and person, [and] freedom from bodily restraint or compulsion..."* *Id.* at 213.

In *Doe* v. *Bolton*, the court found that the restrictions Georgia had placed on abortion violated both the patient's and physician's freedom. For example, Georgia's requirement that two licensed physicians must agree with a woman's personal physician's judgment that an abortion is appropriate, and that a hospital committee of at least three other doctors must concur in the abortion decision violated the privacy protection of both the doctor and patient. In the Court's words, "The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview." 410 U.S. at 197.

Since *Roe* this Court has reviewed a large body of legislation designed to deny patients and physicians their right to make personal and professional judgments about how best to deal with a patient's pregnancy. As even the United States concedes, "Roe and its progeny have resolved most of the central questions about the permissible scope of abortion regulation. . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 21, n. 15. Through sixteen years of constitutional adjudication this Court has provided lawmakers with a consistent and coherent set of constitutional guidelines in this area.[2] Laws that recognized and protected the physi-

[2] A review of the Court's abortion decisions indicate that it has used the following "tests" in various combinations to evaluate the constitutionality of abortion statutes:

1. Has the state placed an obstacle in front of the woman or otherwise significantly burdened the pregnant woman's ability to choose or obtain an abortion?
2. Is abortion being treated differently from other similar medical or surgical procedures?
3. Does the regulation interfere with the treating physician's exercise of professional judgment?
4. Does the regulation conflict with, or is it stricter than, accepted medical and scientific norms?
5. Is the regulation designed to protect maternal health where no less intrusive or less expensive alternative will do?
6. If a postviability rule, does the regulation protect the fetus without putting the mother in jeopardy?

Annas, *Webster and the Politics of Abortion*, 19 Hastings Center Report 36 (March/April 1989), citing Glantz, "Abortion: A Decade of Decisions," in *Genetics and the Law III* 305 (A. Milunsky & G. Annas, eds. 1985).

cian-patient relationship have been upheld, and laws designed to weaken or destroy that decision-making unit have been struck down. Thus, in *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court readily upheld a general informed consent provision, even as it applied to the first trimester, because not only did it not burden the abortion decision, it enhanced the physician-patient relationship. On the other hand, the Court has struck down a provision requiring physicians to recite a "parade of horribles" because it intruded "upon the discretion of the pregnant woman's physician." *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 445 (1983). Under this statute every physician was made an agent of the state who was required to recite the state's anti-abortion message to every patient, regardless of her individual need or desire.

A similar statute was involved in this Court's most recent case on abortion law. The Court reiterated that forcing a physician to provide prescribed information "makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 763 (1986). The Court summarized the situation aptly: "All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it offically structures—as it obviously was intended to do—the dialogue between the woman and her physician." *Id.*

The controversy that ranges over abortion is not resolvable through reason, logic, or majority vote. It is an emotional issue governed by one's background, religious upbringing, and moral beliefs. The post-*Roe* state statutes were not health or

safety laws, but rather means to control physicians and their patients so that a particular legislature's philosophical position could be imposed on pregnant women and their physicians. The Court in *Roe* recognized this problem when it pointed out that there is great diversity of opinion among philosophers, theologians and scientists about when life begins. It further recognized that the judiciary is certainly in no position to resolve this issue. 410 U.S. at 159. This is equally true of legislatures. As a result, the Court concluded that "we do not agree that, by adopting one theory of life Texas may override the rights of the pregnant woman that are at stake." *Id.* at 162.

Justice Stevens, concurring in *Thornburgh*, made a similar point: "In a sense, the basic question is whether the 'abortion decision' should be made by the individual or by the majority 'in the unrestrained imposition of its own, extraconstitutional value preferences.'" 476 U.S. at 777-78. That is also the issue posed in this case. Justice Stevens was correct in pointing out that without the safeguards in *Roe*, there is essentially no way to restrain what the state may do in imposing its value judgments on the individual:

> . . . if federal judges must allow the State to make the abortion decision, presumably the State is free to decide that a woman may *never* abort, may *sometimes* abort, or, as in the People's Republic of China, must *always* abort if her family is already too large. In contrast, our cases represent a consistent view that the individual is primarily responsible for reproductive decisions, whether the state seeks to prohibit reproduction or to require it.

Id. at 778, n. 6 (emphasis in original, citations omitted).

The pre-*Roe* world to which Missouri and the United States would like us to return is a world in which the State would have essentially absolute discretion to permit or outlaw abortions. Thus, women who were pregnant as a result of rape

could be required to maintain their pregnancies and be forced to go through labor and delivery with the rapist's unwanted child. Women who would become blind, paralyzed or suffer other grave injury as a result of the continuation of their pregnancy could be compelled by state legislatures to suffer such harm. Parents who, as a result of genetic counseling and testing, know that their child will be born with a genetic disease that will cause it to die a slow, painful death, could be required to carry that pregnancy to term. These examples are not based on wild speculation about what the state of the law *might* be if *Roe* were overruled—it is based on what the state of the law *actually was* at the time of *Roe*. Prior to *Roe*, abortions were outlawed in a majority of states unless the *life* (not health) of the pregnant woman was jeopardized by the continuation of the pregnancy. *Roe*, 410 U.S. at 118.[3]

The abortion cases are not just about abortion, but about the very basis of what it means to be a free person in a free society.[4] If the state can make reproductive decisions on behalf of any individual, what decision is it precluded from making? If legislatures are allowed to impose without restraint value judgments that deeply and directly affect individual citizens, what is left of personal freedom? Without the right of privacy,

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[3] In its brief, the United States readily admits that states have passed "inflammatory" abortion statutes since *Roe* was decided. Brief for the United States as Amicus Curiae Supporting Appellants at 21, n.15. What is remarkable is that the United States blames the existence of *Roe* for the "inflammatory" nature of these statutes, rather than legislators' hostility to the right of pregnant women and their physicians to make decisions concerning termination of pregnancy. Should *Roe* be overruled, the tendency of legislatures to pass such inflammatory statutes will continue. What will be absent is the constitutional protection from such legislative excesses.

[4] In *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977), the Court noted that the constitutional right of privacy protects an individual's "interest in independence in making certain kinds of important decisions." In that case the Court upheld a New York statute requiring physicians to report to a state agency the prescription of certain controlled substances, because under the statute "the decision to prescribe, or to use, is left entirely to the physician and the patient." *Id.* at 603.

what constitutional principle would prevent states from reimposing restrictions on contraceptive distribution and use, since unfertilized ova constitute *potential* human life? *Doe* v. *Bolton*, 410 U.S. at 217 (Douglas, J. concurring). Indeed, since both Missouri and the United States argue that the state should be free to determine when life begins, a state could choose any point in time it pleases-conception, live birth, the time the ovum develops, or three years of age.[5] Since there is no scientific answer to this question, any value judgment on this point is as "rational" as any other. However, just as this Court found that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," *Planned Parenthood* v. *Danforth*, 428 U.S. at 74, it should also conclude that one's constitutional rights are not destroyed magically because of an arbitrarily state-defined point at which "life begins."

The problem with providing the state with the essentially unlimited power sought by Missouri and the United States is that the state's actions have such a potentially profound impact on the lives of citizens. It must be kept in mind that the State is attempting to impose its values on individual citizens in order to control their decisional rights. Under *Roe* no one's values are imposed on anyone else; people are free to make the decisions that they believe are best for themselves. As Justice Stevens put it,

> In the final analysis, the holding in *Roe* v. *Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon

[5] *See*, Brief for The New England Christian Council as Amicus Curiae at 12. Therein is described an effort to place on the ballot in Massachusetts the following referendum question: "In *Biological Terms*, when does an individual human life begin?" The choices the voters could check off included "A. Conception" "B. Viability" "C. Birth" "D. Write In - specify a different term____."

> their destiny. Arguably a very primitive society would have been protected from evil by a rule against eating apples; a majority familiar with Adam's experience might favor such a rule. But the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Thornburgh, 476 U.S. at 781-82 (concurring opinion).

II. The Right Of Privacy Protects The Rights Of Individuals To Make Personal Medical Decisions In A Doctor-Patient Relationship

A. *The Doctor-Patient Relationship, not the Legislature, is the Proper Locus for Medical Care Decisions*

The central question before the Court is whether personal medical care decisions should be made by patients and their physicians, or by the state. The doctor-patient relationship is highly valued in our society.[6] The importance of the doctor-patient relationship to individual citizens increases in proportion to advances in medical science. These advances have made the consequences of many medical interventions increasingly dramatic in the lives and deaths of individual citizens and their families. The importance of who makes the treatment decision increases as the complexity of the options and the severity of the impact of treatment on the individual patient increases. *Roe* properly took full account of changing medical science. The central premise of *Roe* and *Doe*, that

[6] Indeed, protecting the ethical integrity of the medical profession in ways consistent with the individual autonomy of patients has been deemed a "compelling state interest" by courts since *Roe* v. *Wade*. *E.g.*, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. den. sub nom. Garger* v. *New Jersey*, 429 U.S. 922 (1976); *Superintendent of Belchertown* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

inherently personal medical decisions, including those involving abortion, should be made in the context of a doctor-patient relationship protected from governmental dictates, remains sound jurisprudence.

The doctor-patient relationship has been a privileged and protected one throughout the history of Western civilization. Plato, for example, describes how in Ancient Greece slaves were treated as objects and that therefore no conversation between them and the physician occurred. The relationship between a free physician and a free citizen, by contrast, fit what it means to be a free person; that is, physicians talked to their patients:

> The free practitioner who, for the most part, attends free men, treats their disease by going into things thoroughly from the beginning in a scientific way, and takes the patient and his family into his confidence . . . He does not give his presciptions until he has won the patient's support . . .

Laws, 4.720b-e.

The doctor-patient relationship between two free citizens that has become the cornerstone of Western medical ethics begins with an individual who determines that a condition requires medical attention. Medical attention is voluntarily sought, and the physician makes a decision as to whether or not medical care can be of benefit to the patient, and if so, recommends one or more alternatives. The doctor and patient then discuss these alternatives. Together they decide what course of action to pursue based on their perceptions of benefit in a private, confidential relationship which ethical principles of autonomy, beneficence and justice have structured and the law has fostered and protected.[7]

[7] *See, e.g.*, Ad Hoc Committee on Medical Ethics, American College of Physicians, *American College of Physicians Ethics Manual*, Part I, 101 Annals of Internal Medicine 129, 130 (1984).

The decision to continue or terminate a pregnancy is just one example, albeit a dramatic one, of important, personal medical decisions made in this relationship. To insure that a mutually-acceptable decision is arrived at with full understanding, the common law has required physicians to share information with their patients under the doctrine of "informed consent."[8] Law and ethics, therefore, have now effectively merged. As the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research concluded,

> Although the informed consent doctrine has substantial foundations in law, it is essentially an ethical imperative. . . . Ethically valid consent is a process of shared decisionmaking based upon mutual respect and participation. . . adults are entitled to accept or reject health care interventions on the basis of their own personal values in furtherance of their own personal goals.

Making Health Care Decisions 2-3 (1982).

B. *States Should Not be Permitted to Dictate or Censor the Content of Discussions that Occur in a Doctor-Patient Relationship*

It is in the informed consent context, and its respect both for the rights of individual patients and the integrity of the medical profession, that *Roe's* placement of the abortion decision with "the woman and her physician" is properly understood. Neither party has total or arbitrary power, but both must agree and consider the decision appropriate and reasonable before it can be acted on. *Roe* properly assumed

[8] Legal action to remedy instances of nondisclosure developed where the Platonic ideal was not being followed and physicians were withholding important information from their patients. R. Faden & T. Beauchamp, *A History and Theory of Informed Consent* (1986).

that "states would subject the woman's wishes to interpersonal testing within a clinical relationship, by treating abortion as a medical procedure. . . A medical decision, at its best, is made between a patient and a doctor who acts pursuant to professional values, ones developed out of clinical encounters and subjected to peer criticism within a regimen of professional education, research, and ethical study." R. Goldstein, *Mother-Love and Abortion: A Legal Interpretation* 81 (1988); *see also* A. Jonsen, M. Siegler & W. Winslade, *Clinical Ethics* 62 (2d ed. 1986).

Of course, such an interpersonal dialogue can only take place in an atmosphere in which the physician is free to exercise his or her best professional judgment and discuss with a patient all of the information, including treatment options, relevant to the patient's decision. Section 188.205 of the Missouri statute before this Court, however, would prohibit such dialogue. That section makes it "unlawful for any public funds to be expended. . . for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." The term "encourage or counsel" is so vague that reasonable people would be unable to distinguish between lawful and unlawful behavior. It does not merely prohibit coercing a woman to have an abortion. Rather, the state uses words that describe the personal discussions between a woman and her physician about the management of her pregnancy. Other courts have agreed that this language prohibits physicians from talking to their patients.[9]

[9] Two federal district courts found that the Department of Health and Human Services regulations prohibiting family planning programs funded under Title X from counseling or referring for abortion, 53 Fed. Reg. 2922 (Feb. 2, 1988), violated the First Amendment rights of the programs and enjoined their enforcement. *Massachusetts* v. *Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal docketed, No. 88-1279 (1st Cir. Mar. 24, 1988); *Planned Parenthood Federation* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988). A third district court agreed that the prohibition forbade speech but concluded (erroneously we believe) that granting Title X funds to support one idea and not another did not infringe free speech. *State of New York* v. *Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd.*, 863 F.2d 46 (2d Cir. 1988).

In section 188.210, Missouri attempted to make it "unlawful" for a publicly-employed physician or other health care personnel to "counsel or encourage a woman to have an abortion not necessary to save her life." In this appeal, Missouri has abandoned any defense of this direct prohibition against counseling of patients by physicians. Instead Missouri seeks to achieve the same result by a different means in section 188.205. This section certainly prohibits any publicly-employed physician from counseling or encouraging abortions because it is unlawful to expend public funds for that purpose, and the physician's salary is derived from state funds. Thus, its impact is identical with the second sentence of section 188.210. In fact this section has an even wider impact than 188.210 because it applies not just to public employees, but to anyone who receives state funds.

The statute both silences physicians and forces patients to remain ignorant, erecting a state-created barrier between a woman and her physician. Under the stature, for example, a physician, public or private, who receives state funds would be unable to honestly respond to a pregnant woman whose health is endangered by the pregnancy when she asks, "Doctor, what do you think I should do?", if the honest answer were, "I would recommend you have an abortion."[10]

Prohibiting physicians who receive state funds from "encouraging or counseling" pregnant women consistent with their best medical judgment is contrary to good medical practice and jeopardizes patients' rights. Information concerning health risks that are caused or exacerbated by pregnancy and information concerning possible fetal genetic or congenital

[10] An analogous "gag rule" is apparently in effect in the Soviet Union in the area surrounding Chernobyl where it is reported that government authorities assure everyone that all is normal, "and then advise villagers not to bear children or eat locally grown mushrooms." When the villagers take their children to special government clinics in Kiev for regular medical tests, "the doctors refuse to disclose the results." Gumbel, *Villagers Suffering Chernobyl's Fallout Face Soviet Silence*, Wall Street J., March 6, 1989, at 1, col. 4.

disorders are squarely among the categories of information that a physician is obligated by law and ethics to disclose to a pregnant woman in order to facilitate knowledgeable decisions about managing her pregnancy.[11] It is good and accepted medical practice to inquire into the genetic and medical history of a prospective mother and father who consult any physician for advice or care concerning family planning, contraception, and pregnancy evaluation. *See* American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 18-19 (5th ed. 1985); S. Elias and G.J. Annas, *Reproductive Genetics and the Law* (1987); President's Commission for the Study of Ethical Problems in Medicine, *Screening and Counseling for Genetic Conditions* 23-31 (1983).

By attempting to silence certain physicians, Missouri seeks to prevent them from performing their ethical and legal obligations to their patients consistent with existing medical science, and thereby deprive patients of information they need in order to decide whether to have a child. In this regard the state of Missouri promotes ignorance, viewing an uninformed patient as a desirable result. There are medical conditions for

[11] The Federal Food and Drug Administration itself requires manufacturers of intrauterine devices to inform physicians that if a woman becomes pregnant with an I.U.D. in place, and removal of the I.U.D. is difficult, "termination of the pregnancy should be considered and offered the patient as an option . . ." 21 C.F.R. 310.502(b)(1). The physician's counseling obligation includes informing parents of the availability of prenatal diagnosis of genetic abnormalities. *E.g.*, *Goldberg* v. *Ruskin*, 128 Ill. App. 3d 1029, 471 N.E. 2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E. 2d 406 (1986) (failure to advise parents of tests designed to detect Tay-Sachs disease). Physicians also have an obligation to diagnose abnormalities with due care and disclose their findings. *E.g.*, *Smith* v. *Cote*, 128 N.H. 231, 513 A.2d 341 (1986) (failure to timely diagnose rubella and inform parents of consequences). So strongly have courts insisted on counseling, that they have held physicians liable for failing to offer information which might lead a patient to consider abortion even when abortion was statutorily proscribed in most states. *See*, *e.g.*, *Jacobs* v. *Theimer*, 519 S.W. 2d 846 (Tex. 1975) (physician's failure to diagnose rubella in pregnant woman in 1958 and to advise her of risks to fetus held actionable wrong even though abortion was illegal in Texas).

which abortion is one of the reasonable medical procedures that should be discussed. For example, Tay-Sachs disease is a genetic disorder that occurs in one in four pregnancies when both husband and wife are carriers of the gene. The disease "is characterized by motor weakness, usually beginning between 3 and 6 months of age. . . deafness, blindness, convulsions, and generalized spasticity are usually in evidence by 18 months of age. . . the child develops a state of decerebrate rigidity, with death usually resulting. . . by 3 years of age. No specific therapy for Tay-Sachs disease is available." S. Elias & G. Annas, *Reproductive Genetics and the Law* 63 (1987) and sources cited therein. Since abortion is the *only* way to prevent this tragedy, a physician who informs a couple of the existence of prenatal testing to detect it, and discusses the option of abortion with them would be violating the proscription against "counseling or encouraging" abortion. Without the option of prenatal screening, many at risk couples would simply choose to abort all pregnancies. "In fact, since more than 95% of all prenatal diagnostic tests are negative, the overwhelming majority of such testing helps lead to the birth of children that might not otherwise have been born." *Id.* at 83. Thus the irony is that any law that inhibits physicians from counseling pregnant women about the availability of genetic testing and the option of abortion may actually increase the number of abortions performed.

Since section 188.210 prohibits publicly-employed physicians from *performing* abortions, it is essential that they be permitted to refer a patient in need of abortion to a physician who is willing and able to do so. Yet, such a medically appropriate referral would violate the proscription against encouraging and counseling, since abortion is a probable outcome of the referral. At the same time, failure to refer the

patient to the second physician would be negligent medical practice which could harm the patient.[12]

The fact that the physicians currently targeted by the Missouri statute are paid with state funds does not lessen either the extent of the invasion or the obligation such physicians have to counsel their patients.[13] Government-employed physicians who were not expected or obliged to render ongoing care to individuals have been found to owe a duty of disclosure to persons they examine. For example, in *Betesh* v. *United States*, 400 F. Supp. 238 (D.D.C. 1974), a selective service physician was found liable for failing to disclose a chest abnormality in a recruit during a pre-induction physical. The recruit later died of Hodgkins disease, which might have been successfully treated had treatment begun when the abnormality was first discovered. Even in the absence of a consensual doctor-patient relationship, concealment of the information was actionable, the court found, because "the Government physicians were under a duty to act carefully, not merely in the conduct of the examination, but also in subsequent communications to the examinee." *Id.* at 246. Thus, the legal and ethical obligation to counsel does not depend upon the nature of the physician's employer or source of payment.

The Missouri legislation not only interferes with honesty on

[12] *See, e.g., Jewson* v. *Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982). If a physician determines, in the exercise of sound clincal judgment, that the pregnancy poses a threat to the health or well-being of his patient, he is not excused from disclosing that judgment simply because he may be unable to perform an abortion. If he is unwilling or unable to perform an abortion that he believes is medically indicated, he must also disclose that fact to the patient. *Manion* v. *Tweedy*, 257 Minn. 59, 100 N.W.2d 124, 128 (1959). In addition, the physician must immediately refer the patient to an appropriate provider, because delay could cause harm and make further treatment, including later termination of pregnancy, more risky and harmful. *See, e.g., Steele* v. *United States*, 463 F. Supp. 321, 330 (D. Alaska 1977); *Wells* v. *Pillars*, 391 N.W.2d 668 (S.D. 1986).

[13] The source of payment does not excuse a physician from fulfilling his obligations to his patient. As the California Appeals Court said in *Wickline* v. *California*, 192 Cal. App. 3d 1630, 1645, 228 Cal. Rptr 661 (1986), *app. dism'd*, 239 Cal. Rptr. 805, 741 P.2d 613 (1987): "[T]he physician who complies without protest with the limitations imposed by a third party payor, when his medical judgment dictates otherwise, cannot avoid his ultimate responsibility for his patient's care."

the part of the physician, it does so in the most intrusive fashion, sundering the curtain of privacy from the physician-patient relationship. Not only does the state claim the right to control what doctors say to patients, it encourages strangers to police what is said. Section 188.220 of the Missouri statute grants standing to "any taxpayer of [the] state" to enforce the provisions which prohibit encouraging or counseling a woman to have an abortion. Thus, perfect strangers are given the power of private attorneys general to scrutinize the highly personal information discussed in a physician's office. The statute can only be enforced by requiring physicians and their patients to publicly disclose the content of their discussions held in the privacy of the doctor-patient relationship. Having strangers invade this relationship is every bit as offensive and chilling as permitting "police to search the sacred precincts. . .of marital bedrooms." *Griswold* v. *Connecticut*, 381 U.S. at 485.[14]

C. *Overruling the Constitutional Right of Privacy Would Seriously Undermine Individual Autonomy and Would Permit the State To Make Medical Care Decisions That Belong to Individuals*

A consistent series of decisions since *Roe* v. *Wade* permit individuals to refuse various medical interventions. Many of

[14] A recent New York case underscores the inappropriateness of encouraging strangers to intervene in these private decisions. The case, *In the Matter of Martin Klein*, Supreme Ct. of New York, Nassau Cty. No. 1736/89 (Feb. 7, 1989), involved a 32-year-old woman who was 17 weeks pregnant, and comatose as a result of an automobile accident. Her husband was advised by her physician that continuation of her pregnancy presented a serious threat to her life, and that termination of the pregnancy was indicated. He then petitioned the court for an order that he be appointed his wife's temporary guardian for the purpose of authorizing her physician to perform such medical procedures, including abortion, as may be necessary to preserve her life. Two total strangers with an anti-abortion agenda petitioned the court requesting to be made the guardian of the woman and the non-viable fetus, in an attempt to exclude the patient's husband and parents from making these decisions. Both trial court and Appellate Division decided for the husband. As the Appellate Division stated, "these absolute strangers to the Klein family, whatever their motivations, have no place in the midst of this family tragedy." *Matter of Nancy Klein*, New York Appellate Division, Second Department, New York Law Journal, Feb. 14, 1989, at 21.

these decisions are based in part on the constitutional right of privacy which enables individuals to make important personal medical decisions for themselves. In a widely cited case, for example, the New Jersey Supreme Court decided that, were she competent, Karen Ann Quinlan, a young woman in a permanent coma, would have the authority under the constitutional right of privacy to decide to have the mechanical ventilator that sustained her life removed. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 663 (1976), *cert. den. sub nom. Garger* v. *New Jersey*, 429 U.S. 922 (1976). Since she was incompetent, the court ruled that her parents could act in her behalf. In *Quinlan*, as in many similar cases decided since, the state argued that it, not the patient, should make the decision whether or not to employ an intrusive, and often futile, medical intervention.

Without the shield of the constitutional right of privacy, citizens would have no protection from such state interventions in private medical matters, because states would be free to legislate virtually any restrictions on individual treatment decisions that even a bare majority of legislators wished. This is particularly important today when new forms of medical treatment and knowledge require patients to make controversial choices. Since 1973, physicians have learned to fertilize human eggs in a petri dish and transfer the resulting embryo to the wife for gestation; to accurately detect severe fetal handicaps such as anencephaly and neural tube defects; and to maintain patients who cannot breathe on their own in a permanent coma for months and even years.

It would not be far-fetched to hypothesize a state that would choose to outlaw the use of *all* prenatal diagnostic techniques by both public and private physicians. Legislators may feel that such tests lead couples either not to have children or to abort their pregnancies. Without the protection of the constitutional right of privacy, state legislatures would be empowered to control the knowledge and use of such medical techniques, and require couples to make their child-bearing

decisions in ignorance.[15] What would prohibit states from outlawing new and "unnatural" means of conceiving a child such as *in vitro* fertilization techniques? What would prohibit states from requiring that *every* medical intervention must be used to keep a dying person alive as long as biologically possible, regardless of the desires of the patient or family, and no matter that the patient's physician agrees that this would not be good medical practice? No constitutional principle, other than the right of privacy, would protect these decisions, and others like them, from being made for patients by the state. Unfettered by the constitutional right of privacy, states would have virtually unlimited power both to prohibit citizens from obtaining basic medical care from their physicians, and to require them to undergo medical procedures against their will.

We have already witnessed examples of how state power can be misused in a way that increases the suffering of its citizens when the right to make personal medical decisions is not treated as a fundamental constitutional right. In one example, a competent pregnant woman who was dying of cancer was forced to endure a cesarean section against her will, and that of her family and physicians, by a judge who thought that the state's interest in potential fetal life outweighed

[15] Prohibitions against *payment* for treatment should not be confused with prohibitions against providing *information* about treatment. For example, the state of New Hampshire has the right not to pay for bone marrow transplants, as evidenced by its initial decision in the case of a six-year-old boy in February 1989. Hohler, *State Policy, Human Tragedy*, Boston Globe, Feb. 26, 1989, at 1. It would be astonishing, however, to even suggest that New Hampshire should be able to forbid the boy's physician, even if the physician were a state employee, from telling him that he needed a transplant and could get it elsewhere. Yet this is what Missouri claims it may do.

any interest she might have in refusing surgical intervention. *In re A.C.*, 533 A.2d 611 (App. D.C. 1987), *vacated* 539 A.2d 203 (App. D.C. 1988).[16] After the forced surgery—which was, in effect, a forced abortion of a non-viable fetus—both mother and child died.

In a second example, with facts virtually identical to those in *Quinlan*, a Missouri trial court found that it had sufficient evidence, based on the patient's prior statements and her family's testimony, that the patient would not wish to receive treatment if she were in a permanent coma, and ruled that treatment should therefore be stopped in accordance with her "constitutionally guaranteed liberty." *Cruzan* v. *Harmon*, 760 S.W.2d 408 (Mo. 1988). The Missouri Supreme Court overruled the trial court's finding and, disregarding the patient's previous statements and her parent's wishes, turned over her medical treatment decisions to employees of the state. This means that for the rest of her life the people who know and love her most are relegated to the role of passive observers. *See*, generally, Annas, *The Insane Root Takes Reason Prisoner*, 19 Hastings Center Report 29 (Jan./Feb. 1989). The

[16] There are at least twenty-one orders by lower court judges that have required competent adult women to undergo cesarean section operations (a major surgical procedure which is substantially more life-threatening than abortion) instead of the normal delivery that they wished to have. Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987). These orders were based on the notion that the state, through its judges, has a greater interest in the potential life of the fetus and the method of childbirth than the woman herself, and demeaned and dehumanized the pregnant woman by denying her the right to voluntarily choose the method of childbirth. Continued discussion with her physician, rather than hasty resort to emergency decisions by judges, is properly encouraged by recognizing the right to privacy in the doctor-patient relationship. Indeed, "By protecting the liberty of the pregnant patient and the integrity of the voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses." Annas, *Protecting the Liberty of Pregnant Patients*, 316 New. Eng. J. Med. 1213, 1214 (1987). *And see T. Engelhardt, The Foundations of Bioethics* 224-27 (1985); and Nelson & Milliken, *Compelled Medical Treatment of Pregnant Women*, 259 J.A.M.A. 1060 (1988).

Missouri Supreme Court's decision was based in part on its reading of the preamble of the abortion statute at issue in this case.

These examples demonstrate that state interference is not hypothetical. State medical treatment decisions are at best arbitrary and impersonal, and at worst cruelly at odds with a patient's wishes and well-being. This leads inexorably to the conclusion that personal medical decisions should be made by those who are most affected by them, in the context of a constitutionally-protected doctor-patient relationship.[17]

If the state is given absolute control of a decision as personal and private as the decision whether or not to continue a pregnancy, based on its interest in "potential human life," then it could certainly control these other decisions. If this Court adopts such a statist notion of decisionmaking then the value of "personhood" will have been significantly demeaned for all citizens. Having control over these most important and private decisions is an essential element not only of freedom, but of being a person. As the Massachusetts Supreme Judicial Court put it: "The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." *Saikewicz*, 370 N.E.2d at 426.

Missouri does not claim that its power is limited to prohibiting abortion. Their sole interest is in protecting *potential*

[17] Unlike the Missouri Supreme Court, in the vast majority of cases decided since *Roe*, courts have recognized that the constitutional right of privacy places control of personal medical decisions in the hands of patients or their guardians if the patient is incompetent. For example, courts have upheld the patient's right to decide whether to accept or reject medical treatments such as surgery for breast cancer, *In re Yetter*, Northampton Co. Orphans Ct., No. 1973-533 (Williams, J.) (Pa. 1973); amputation, *Lane* v. *Candura*, 376 N.E.2d 1232 (Mass. App. 1978); kidney dialysis, *In the Matter of Spring*, 389 Mass. 629, 405 N.E.2d 115 (1980); respirators, *Satz* v. *Perlmutter*, 362 So.2d 160 (Fla. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980); and artificial nutrition and hydration, *In the Matter of Jobes*, 108 N.J. 394, 529 A.2d 434 (1987)

life, rather than *existing* human life. What is most remarkable about virtually all of the briefs submitted to this Court on behalf of Missouri is that they imply that the United States is composed exclusively of state governments and fetuses; women and their physicians are treated as almost irrelevant, and the relationship between a pregnant woman and her physician is ignored.

Missouri seeks to reintroduce the Platonic ideal in a particularly pernicious manner: men are to be treated as "free citizens"; women are to be treated in a manner similar to the way "slaves" were treated by free physicians in ancient Greece: conversation is to be censored and treatment decisions made without regard for the wishes of the patient. Such a situation is incompatible with both liberty and equal protection. As this Court has properly emphasized: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . That promise extends to women as well as to men." *Thornburgh*, 476 U.S. at 772 (1986).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL WOMEN'S HEALTH ORGANIZATIONS IN SUPPORT OF APPELLEES

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Finland, Law 239 of 24 March 1970, as amended by Law 564 of 14 Jul 1979, and Law 572 of 12 Jul 1985 ..... 9, 10, 16, 18

France, Decree No. 80-285 of 17 April 1980, Decree No. 82-1826 of September 1982 (hospitals)..... 10
Law 75-17 of 17 Jan 1975 ..... 9, 10
Law 79-1204 of 31 Dec 1979 18
Law No. 82-1172 of 31 Dec. 82 (funding)..... 14

Greece, Law 1609 of 28 June 1986..... 8, 18
Law No. 11609/86 § 1(3) 7

Germany (Fed. Rep. of), Law 15 of 18 May 1976 ....8, 9, 19
Reichsversicherungsordnung, § 200f (funding)..... 14

Greenland, Law of 12 June 1975 ..... 8, 9

Iceland, Law of 22 May 1975 on Counselling & Education Concerning Sex and Childbirth and on Termination of Pregnancy and Sterilization 8, 9, 10

PAGE

Italy, Law 194 of 22 May 1978.....8, 9, 10, 11, 14, 18

Luxembourg, Law of 15 Nov 1978.....8, 9, 10, 14, 18

Netherlands, Law of 7 May 1981 .....8, 9, 10, 19

New Zealand Crimes Act 1961, § 183-187, as amended 1977 (abortion)..... 8, 19

Contraception, Abortion and Sterilization Act 1977 as amended..... 9

Norway, Law 66 of 16 June 1978 .....8, 9, 14, 18

Portugal, Law 6 of 11 May 1984 7

Spain, Organic Law 9 of 5 July 1985..... 18

Sweden, Abortion Law 595 of 14 June 1974 ..... 8, 14
Law 1962-381 amended by Law 1982-120..... 14

Switzerland, Law of 9 Oct. 1986..... 14

United States, 42 U.S.C. §§ 300-300a-41 (1982)..... 10
Minnesota, Stat. Ann. § 145.424 20
Missouri, Stat. Ann. § 188.130 20
Utah, Stat. Ann. § 76.7-305.5 20

International Declarations and Treaties:

American Declaration of the Rights and Duties of Man, Organization of American States, OEA/ser.L./V./1.4 Rev. (1948), reprinted in OAS, Handbook of Existing Rules Pertaining to Human Rights, OEA/ser.L./V.11.50 doc. 6 (1980) 20

European Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, 213 U.N.T.S. 222 .....3, 5, 6

Universal Declaration of Human Rights, G. A. Res. 216, U.N. doc. A/810 at 71 (1948) 3

PAGE

Legislative History, U.S.:

S. Rep. No.82, accompanying H.R. 2577, 99th Cong. 1st Sess., (1985) 23

131 Cong. Rec. H5335 23

Other Authorities:

Alan Guttmacher Institute, *Abortions and the Poor: Private Morality, Public Responsibility* (1979) 17

Buquicchio-De Boer, *Children and the European Convention on Human Rights*, in Protecting Human Rights: The European Dimension (F. Matscher and H. Petzold eds. 1988) 4

M. Cappelletti & W. Cohen, *Comparative Constitutional Law* (1979).....11, 22

Committee on Terminology of the American College of Obstetricians and Gynecologists, *Obstetric-Gynecological Terminology* (1972) 19

Cook, *Regional Developments in Abortion Laws: 1967-1988*, 15 People (chart) (Int'l Planned Parenthood Fed. 1988) 7

Cook & Dickens, *A Decade of International Change in Abortion Law: 1967-1977*, 68 Am. J. Pub. Health 637 (1978) 7

Cook & Dickens, *International Developments in Abortion Laws: 1977-1988*, 78 Am. J. Pub. Health 1305 (1988) 7

Couzinet, *et al*, *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 New Eng. J. Med. 1565 (1986) 11

PAGE

David, Fleischhacker and Höhn, *Abortion and Eugenics in Nazi Germany*, 14 Population and Development Rev. 81 (1988)..... 22

Der Spiegel, October 20, 1986..... 22

A. Eser and H.G. Koch, *Schwangerschaftaabbruch im Internationalen Vergleich* (Termination of Pregnancy in International Comparison) (1988) 14

European Convention on Human Rights, *Collected Texts* (1987) 4

M. Glendon, *Abortion and Divorce in Western Law: American Failures, European Responses* (1987)..... 2

H. Golsong, *The European Court of Human Rights and the National Law-maker*, in Protecting Human Rights: The European Dimension 239 (F. Matscher and H. Petzold eds. 1988) 4

Greenberg, *Impact of Prenatal Care in Different Social Groups*, 145 Am. J. of Obstet. & Gyn. 797 (1983)... 15

Grossman & Jacobowitz, *Variations in Infant Mortality Rates Among Counties of the United States: The Roles of Public Policies and Programs* 18 Demography (1981) 695 17

The International Bill of Rights (L. Henkin ed. 1981).. 3

Jonas and Gorby, *West German Abortion Decision—A Contrast to Roe v. Wade*, 9 J. Mar. J. Prac. & Proc. 551 (1976) 6

E. Ketting and P. Van Praag, *Schwangerschaftaabbruch: Gesetz und Praxis im Internationalen Vergleich* (Termination of Pregnancy: The Law and Practice in International Comparison) (1985) 14

Kolder, Gallagher & Parsons, *Court-ordered Obstetrical Interventions*, 317 New Eng. J. Med. 1192 (1987).... 23

PAGE

National Center for Health Statistics, 37 *Advanced Report on Final Mortality Statistics* 6, Monthly Vital Statistics Reports Supp. 42 (1988)..... 15

National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality* (1988). 17

Population Reports, *Healthier Mothers and Children Through Family Planning*, Series J No. 27 (May-June 1984)..... 15

Rodger & Baird, *Induction of Therapeutic Abortion in Early Pregnancy with Mifepristone in Combination with Prostaglandin Pessary*, [1987] ii Lancet 1415.... 11

Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989)..... 21

Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 Stan. L. Rev. 1027 (1988)..... 21

P. Sieghart, *The International Law of Human Rights* (1983)..... 4

Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 Am. J. Comp. L. 513 (1987)..... 12

L. Sumner, *Abortion and Moral Theory* (1981)..... 19

C. Tietze and E. Henshaw, *Induced Abortion: A World View 1986*, (6th ed. 1986)..... 14

Wilcox, *et al*, *Incidence of Early Pregnancy Loss*, 319 N.Engl. J. Med. (1988)..... 19

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are twenty-two international women's health or population organizations and fourteen individuals, actively involved in promoting the health and well-being of women on five continents. Their activities range from health care delivery in small villages to the planning and implementation of global programs and include education, research, and providing accessible, meaningful health care for women. All are committed to insuring that a full range of reproductive health services, including abortion, be available to all women who want and need them. The individual statements of interest of each *amici* are attached in an Appendix to this brief. Through their counsel, both parties have consented to the filing of this *amici curiae* brief.

SUMMARY OF ARGUMENT

Contrary to the Government's contention, Western democracies, with which the United States shares a common cultural, moral and political tradition, do not entrust fundamental questions of reproductive freedom to the unfettered discretion of national legislatures. In fact, the European Commission of Human Rights has found that legislative decisions regarding reproductive freedom which fail to safeguard the liberty, health and welfare of women violate International Conventions, including the European Convention on Human Rights and Fundamental Freedoms. The domestic courts of Western nations incorporate these same principles in their own adjudications regarding reproductive freedom.

In recent years, Western democracies have consistently promoted both the health and welfare of women and their families by liberalizing abortion laws. Reflecting a common awareness that a denial of reproductive health services would greatly increase maternal and infant mortality, especially among poor women, these laws have safeguarded a wide range of reproductive choices and have mandated publicly-funded counseling, contraceptive and abortion services.

The trimester-based framework of *Roe v. Wade* is reflected in the decisions of courts and legislatures throughout the Western world. These legislative and judicial bodies, like this Court, have uniformly rejected the notion that potential human life is qualitatively the same throughout all the stages of gestation, and therefore have rejected attempts to enact into law recognitions of fetal personhood from the moment of conception.

Recent history and current events have shown that governments can and will fashion abortion regimes that seek to coerce reproductive choice as official state policy. The nightmarish policies of criminalized abortion in Nazi Germany and the Soviet Union on the one hand and forced abortion in China on the other, are chilling reminders that women must be afforded the ability to make fundamental reproductive decisions free of governmental interference. Recent developments in the United States which raise the specter of coerced sterilization and abortion can only be halted by an affirmation of the opinion of the Eighth Circuit and a reaffirmation of *Roe v. Wade*.

ARGUMENT

I. ALL WESTERN DEMOCRACIES SUBJECT LEGISLATION AFFECTING ACCESS TO ABORTION TO JUDICIAL SCRUTINY WHICH INSURES RESPECT FOR THE HEALTH AND WELFARE OF WOMEN.

The United States government relies upon the European model of legislative decision-making when it argues that the legality of abortion should be determined by the individual states.[1] The Government's reliance upon the "European model" distorts the reality of that model and is misplaced. The contention that *Roe v. Wade*[2] "has shut down the legislative process of bargaining, education, and persuasion on the abor-

1 Brief for the United States as Amicus Curiae Supporting Appellants at 23 [hereinafter "U.S. Brief"].

2 *Roe v. Wade*, 410 U.S. 113 (1973).

tion issue,"[3] in contrast to the supposedly congenial legislative resolution of these issues in Europe, ignores the fact that legislation affecting human rights on the European Continent is subject to judicial supervision.

The European nations and the United States share common legal and constitutional traditions. The United States is not unique in subjecting state legislation to the overview of a higher supra-state institution empowered to identify violations of individual freedoms. European nations also reverse their own state legislation when it fails to protect the health and welfare of women under the European Convention on Human Rights and Fundamental Freedoms.[4]

The European Convention was adopted in 1953 to give effect to the 1948 Universal Declaration of Human Rights[5] and to curtail the capacity of state legislatures, whether democratically or otherwise constituted, to pass legislation that violates human rights and fundamental freedoms. Europeans approach the Convention with the same respect and admiration granted the Bill of Rights in the United States.[6] It represents the will of countries with which the United States "shares a common cultural tradition"[7] to subject state legislation to a judicial institution empowered to identify and correct violations of human rights. The Government ignores the fact that seventeen of the eighteen European countries it proffers as examples of indepen-

3 U.S. brief at 23, *citing* M. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* 2 (1987).

4 European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, Europ. TS No. 5, 213 U.N.T.S. 222 (hereinafter referred to as the European Convention).

5 Universal Declaration of Human Rights, G.A. Res. 216, U.N. Doc. A/810 at 71 (1948). References to the importance of the Declaration pervade the Preamble of the European Convention, *supra* note 2, which concludes: "*Being resolved*, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."

6 Henkin, *Introduction*, in The International Bill of Rights 27 (L. Henkin ed. 1981).

7 U.S. Brief at 23.

dent legislative authority, actually subscribe to the European Convention on Human Rights and Fundamental Freedoms and are subject to the jurisdiction of the European Commission and the European Court of Human Rights.[8]

Much like the United States Constitution, the European Convention insures uniform minimum legislative standards for member nations, and protects the fundamental rights of all their citizens. In each country, the legislative process of bargaining, education, and persuasion proceeds much as it does in the United States. Such legislation is amenable to review under the European Convention in a manner similar to review of legislation in the United States under the United States Federal Constitution.

The European Commission and Court of Human Rights circumscribe the scope of legislative activity at the state level.[9] According to the Court of Human Rights, legislative powers are directed to achieve those results compelled by the European Convention.[10] For example, the Court in *X. v. United Kingdom* condemned certain English laws regulating English mental health care. In so doing, it observed that "[c]ertainly, the

8 These seventeen countries are Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom: European Convention on Human Rights, *Collected Texts* 68 (1987). As of 1987 Finland had not acceded to the European Convention.

9 For helpful surveys, *see* Buquicchio-De Boer, *Children and the European Convention on Human Rights*, in Protecting Human Rights: The European Dimension 73 (F. Matscher and H. Petzold eds. 1988), and H. Golsong, *The European Court of Human Rights and the National Lawmaker*, *id*, 239.

10 "Since [The European] Convention on Human Rights entered into force in 1953, [The Commission] and [The Court] have developed a substantial and extensive jurisprudence in the interpretation and application of its provisions, often resulting in changes in the legislation or the administrative arrangements of the State Parties concerned . . . In addition, recourse to the Commission has led in many cases to 'friendly settlements' between the victim and the State Party, often again involving changes in the State Party's internal arrangements for the future."

P. Sieghart, *The International Law of Human Rights* 27 (1983).

domestic law itself must be in conformity with the Convention, including the general principles expressed or implied therein."[11] Further, each state which is party to the European Convention undertakes to explain "the manner in which its internal law ensures the effective implementation of . . . the provisions of this Convention."[12] National legislatures do not exercise unrestrained sovereignty over issues affected by the European Convention. They are held accountable under the European Convention and often must implement new legislation in conformity with the decisions of the Court.

The internal courts of the individual European nations regularly evaluate their own national legislation in conformance with the European Convention and with decisions of the European Commission and Court of Human Rights.

For instance, in its decision to uphold the Austrian Penal Code's 1974 provision permitting abortion on request during the first trimester, and on specified grounds thereafter, the Constitutional Court of Austria based its reasoning on Article 2 of the European Convention, which provides that "everyone's right to life shall be protected by law." *Id.*, Art. 2. The Court held that this Article does not recognize a right to life before live birth.[13] A similar interpretation of Article 2 was applied in a review of an English High Court decision on the legality of abortion practice under the British Abortion Act 1967.[14] The European Commission of Human Rights affirmed this decision and concluded that ". . . both the general usage of the term "everyone" in the Convention and in the context in which

11 *X. v. United Kingdom* (Re Detention of a Mental Patient), 4 E.H.R.R. [European Human Rights Reporter] 188, 203 (Eur. Ct. of Hum. Rts.) (1981).

12 European Convention, Art. 57. Europ. T.S. No. 5, 213 U.N.T.S. 222.

13 *Judgment of October 11, 1974*. Constitutional Court, Erklarungen des Verfassungsgerichtshofs 221 (Aus.).

14 The United Kingdom Legislature enacted the Abortion Act 1967 to apply to England and Wales and to Scotland (that is, Britain) but not to Northern Ireland. Accordingly, the Act is described here as the British Abortion Act.

it was employed in Article 2 tend to support the view that it does not include the unborn."[15] In a different context, the European Commission upheld a 1976 West German abortion law, which permits abortion for reasons of distress during the first trimester, and for specified criteria of mental and physical health thereafter, as not being violative of the right to respect protected by Article 8 of the Convention.[16]

The vision advanced by the Government of European state legislatures each conducting their own unfettered democratic discourse on the legality of abortion is fundamentally inaccurate and misstates the European practice. Europe is advancing towards universal acceptance of fundamental rights already recognized in the United States. For the United States Supreme Court now to abandon the protection of individual rights expressed in *Roe v. Wade* for variable and potentially invasive state legislation would be a historical error of immense proportions.

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15 *Paton v. United Kingdom*, 3 E.H.R.R. 408, 413 (1980) (Eur. Comm'n Hum. Rts.).

16 *Bruggeman and Scheuten v. Federal Republic of Germany*, 3 E.H.R.R. 244 (Eur. Comm'n Hum. Rts.) (1977). The 1976 West German Abortion Law conformed to broad guidelines for legislation on abortion laid down by the Constitutional Court of the Federal Republic of Germany in *Judgment of February 25, 1975* Bundesverfassungsgericht, 39 BVerfGE 1, *translated in* Jonas & Gorby, *West German Abortion Decision—A Contrast to Roe v. Wade*, 9 John Marshall J. Prac. & Proc. 551 (1976), which held the earlier 1974 law permitting abortion on request during the first trimester unconstitutional.

The Commission is likely to consider in due course appeals from the highest courts of the Republic of Ireland and of Belgium on abortion-related issues. The decision of the High Court of Ireland, holding that to advertise in Ireland the availability of abortion services in England constituted the crime of conspiracy to corrupt public morals, *A.G. (S.P.U.C.) v. Open Door Counselling*, 1987 I.L.R.M. 477 (Ir. H. Ct.) is being appealed to the European Commission of Human Rights. The decision of Nov. 14, 1988 of the Cour d'Appel de Gand overturning the acquittal of individuals for performing abortions (*Judgment of Feb. 12, 1988* Tribunal Correctionnel de Gand) is being appealed to the highest Belgian Court, the Cour de Cassation. Once domestic remedies are exhausted it is likely to be appealed to the European Commission of Human Rights.

II. IN ORDER TO PROTECT WOMEN'S REPRODUCTIVE HEALTH, MANY WESTERN COUNTRIES HAVE LIBERALIZED THEIR ABORTION LAWS IN A MANNER CONSISTENT WITH *ROE V. WADE*.

In recent years, the liberalization of abortion laws in numerous Western jurisdictions has improved women's reproductive health and family well-being.[17] These countries have developed a variety of different legislative approaches to improving women's reproductive health by requiring non-directive counseling, by facilitating women's access to abortion at the earliest possible stage of pregnancy, and by providing a full range of contraceptive information and services. Many of these countries have decriminalized abortion in the early stages of pregnancy and permit abortion thereafter according to specified criteria.

All of these countries allow and facilitate abortion at any stage of gestation when continuation of the pregnancy would endanger a woman's life. Seven Western countries permit abortion on request during the early stages of pregnancy and sometimes thereafter, while nine other Western countries permit

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17 In the past 20 years 26 Western jurisdictions, including the United States, have liberalized their abortion laws either through legislation or court decisions. These jurisdictions are Australia (six jurisdictions: Capital Territory, New South Wales, Northern Territory, Queensland, South Australia and Victoria), Austria, Britain, Canada, Denmark, Federal Republic of Germany, Finland, France, Greece, Greenland, Iceland, Italy, Liechtenstein, Luxembourg, New Zealand, Netherlands, Norway, Portugal, Spain, Sweden and the United States; *see* Cook, *Regional Developments in Abortion Laws: 1967-1988*, 15 People (International Planned Parenthood Federation), chart 1988. *See also*, Cook & Dickens, *A Decade of International Change in Abortion Law: 1967-1977*, 68 Am. J. Pub. Health 637 (1978); Cook & Dickens, *International Developments in Abortion Laws: 1977-1988*, 78 Am. J. Pub. Health 1305 (1988). English translations available in U.N. Population Fund and Harvard Law School Library, *Annual Review of Population Law* (1974-85); World Health Organization, *International Digest of Health Legislation*.

abortion under specific health and social criteria.[18] However, in practice, these laws accommodate abortion on request early in pregnancy, since either the woman herself[19] or the woman in consultation with her doctor, are the sole determinors of whether the statutory criteria are met.[20]

For example, the British Abortion Act 1967 may appear restrictive because, except in case of emergency, it allows abortion only when two physicians form the opinion "that the continuance of the pregnancy would involve risk to the life of the

18 Western countries other than the U.S. that permit abortion on request or on broad grounds early in pregnancy.

Country	*Grounds*	*Duration of Pregnancy**
Austria	On request § 97(1)	first trimester § 97(1) (after implantation)
Britain	Broad criteria § 1(1)(2)	until viability § 5
Canada	On request	until viability
Denmark	On request § 1	12 weeks § 1
Finland	Broad criteria § 1	12 weeks § 5
France	Broad criteria § 1	10 weeks § 1 (from conception)
Germany (Fed. Rep.)	Broad criteria § 218(a)	12 weeks § 218(a)(3) (after implantation)
Greece	On request § 304(4)(1)	12 weeks § 304(4)(1)
Greenland	On request	12 weeks § 1
Iceland	Broad criteria § 9(1)	12 weeks § 10
Italy	Broad criteria § 4	90 days § 4
Luxembourg	Broad criteria	12 weeks § 353(1)
Netherlands	Broad criteria § 5	Until viability § 1 after implantation
New Zealand	Broad criteria § 187(a)	Not more than 20 weeks § 187(a) (after implantation)
Norway	On request § 1	12 weeks § 1
Sweden	On request § 1	12 weeks § 1

* For purposes of abortion, pregnancy is generally measured from the first day of the last menstrual period in accordance with standard medical practice, except where otherwise indicated. With the exception of Canada, all section numbers refer to the respective abortion laws listed in the Table of Authorities.

19 In France, for example, the woman herself decides whether she satisfies the "in distress" indication. This is a "notion purement subjective que la femme apprecie souverairement," (purely subjective notion that the woman sovereignly appreciates); *Judgment of October 31, 1980*, Conseil d'Etat Recueil Dalloz-Sirey [D.S.Jur.] 19732 (France 1982).

20 In the Netherlands, for example, the woman together with her doctor decide whether she is "in distress," Law of 7 May 1981, § 5.

pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated."[21] In practice, this formula presents no real obstacle to abortion since, in modern medicine, continuing a pregnancy is invariably of greater risk than terminating a pregnancy in early stages. The British Act also provides that, when determining the risk of injury to health, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment."[22]

In many Western countries, abortion legislation is framed primarily in terms of women's reproductive health and family well-being. Many laws require non-directive counseling, and impose an affirmative duty upon the government to provide reproductive health services, including contraception and abortion. For instance, the Italian law of 1978 emphasizes promotion of women's reproductive health and the related prevention of unwanted pregnancy.[23] This legislation facilitates access to contraception and voluntary sterilization, both by requiring that local and regional governmental authorities promote contraceptive services, and by requiring that abortion providers counsel women on family planning methods.[24]

Consistent with Western ethical doctrines on informed consent to medical treatment, at least thirteen countries require that women seeking abortions be provided with non-directive counseling.[25] This is in marked contrast to the censorship of

21 § 1 (1) (a).

22 § 1(2). § 1(1) (b) of the British Act also permits abortion if there is "a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

23 § 15 of Law No. 194 of 22 May 1978 on the Social Protection of Motherhood and the Voluntary Termination of Pregnancy requires that health regions provide refresher training courses for health and allied health personnel in contraception.

24 *Id.* § 14.

25 These countries are Austria § 97, Denmark § 8, Finland § 4, France § 3, Germany (Federal Republic of) § 218 b, Greenland § 8, Iceland § 12, Italy § 5, Luxembourg § 353 (1)(d)(1), Netherlands § 5, New Zealand § 35, Norway § 1, Sweden—paid for as a matter of government policy. With the exception of Sweden all section numbers refer to the respective abortion laws listed in the table of authorities.

abortion speech which the United States is seeking to impose on physicians in publicly-funded clinics in the United States,[26] and which Missouri seeks to impose here. Several of the countries that require such counseling, such as France,[27] Italy,[28] Iceland,[29] and the Netherlands,[30] also mandate that physicians provide a full range of contraceptive information and services. Some countries, such as Luxembourg,[31] require the use of public funds to provide contraceptives to teenagers.

Finland,[32] France,[33] and Italy[34] impose an affirmative duty upon governmental agencies to provide pregnancy counseling and abortion services. Some countries emphasize the obligation to provide such services at the earliest possible stage of pregnancy.[35] Other countries, such as Italy, require "the use of modern techniques of pregnancy termination, which are physi-

26 42 U.S.C. §§ 300-300a-41 (1982). *See New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending*, Nos. 88-6204/06 (2d Cir.); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction), 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass.) (permanent injunction), *appeal pending*, No. 88-1279 (1st Cir.).

27 § 4, Law 75-17 of 17 Jan. 1975 (Fr.)

28 § 2 of Law 194 of 22 May 1978 (Italy).

29 § 16 of Law of 22 May 1975 (Ice.).

30 § 5(1)(d) of Law of May 1981 (Neth.).

31 § 9 of Law of 15 November 1978 (Lux.).

32 § 11 of Law 2439 of 24 March 1970 (Fin.) requires that the "State Medical Board shall take measures to ensure that there are a sufficient number of physicians with authority to render opinions, and a sufficient number of abortion hospitals, in all parts of the country, and that physicians with authority to render opinions, and operating physicians make every effort to adopt an impartial and consistent approach." Moreover, § 5 of the same law imposes a duty upon the State Medical Board to perform abortions "at the earliest possible stage of pregnancy."

33 Decree No. 80-285 of 17 April 1980 (Fr.) and Decree No. 82-1826 of September 1982 (Fr.) obligate regional and general hospitals and all public establishments equipped with surgical and maternity services to carry out voluntary interruptions of pregnancy.

34 § 15 of Law 194 of 22 May 1978 (Italy).

35 § 5 of Law 239 of 24 March 1970 (Fin.).

cally and mentally less damaging to the woman and are less hazardous."[36]

This legislative trend in western democracies toward liberalization of abortion laws has been reinforced by judicial action. In January 1988, the Supreme Court of Canada ruled that the Canadian federal Criminal Code provision restricting abortion violated women's rights to liberty and security of the person protected by the Canadian Charter of Rights and Freedoms.[37] This rendered the law inoperative. The Constitutional Court of Austria sustained the legality of that country's liberal abortion law of 1974.[38] France's liberal abortion law, which permits therapeutic abortion in broadly defined terms, including a woman's distress, was sustained by the French Conseil Constitutionnel in 1975 as consistent with "the principle of liberty stated in Article 2 of Declaration of the Rights of Man and of the Citizen."[39]

In 1975, the Constitutional Court of Italy declared the abortion provision of the Italian Criminal Code unconstitutional because it restricted lawful abortion to life-threatening pregnancies.[40] New legislation, more protective of women's health

36 § 15 of Law 194 of 22 May 1978. The development of antiprogestin drugs provides the prospect of abortion done by medical, as opposed to surgical, means, which may, in time, prove to fulfill these criteria. *See* Rodger & Baird, *Induction of Therapeutic Abortion in Early Pregnancy with Mifepristone in Combination with Prostaglandin Pessary*, [1987] ii Lancet 1415; Couzinet, *et al*, *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 New Eng. J. Med. 1565 (1986).

37 *Morgentaler, Smoling and Scott v. The Queen*, [1988] 44 D.L.R. (4th) 385. *See* Brief of Canadian Women's Health Organizations as *Amicus Curiae* in support of Appellees.

38 *See* Note 13 and accompanying text, *supra*.

39 *Judgment of January 15, 1975*, Conseil Constitutionnel, [1975] D.S.Jur. 529, Journal Officiel, Jan. 16, 1975.

40 *Judgment of February 18, 1975*, Corte Costituzionale [Corte Cost.], no. 27, 98 Foro It. I, Giurisprudencia Constituzionale e Civile [Giur. Cost. e Civ.] 515 (Italy), translated in part in M. Cappellotti & W. Cohen, *Comparative Constitutional Law: Cases and Materials* 612-14 (1979). The Court observed that women's health prevails over fetal life, because "there is no equivalence between the right not only to life but also to health of one who—like the pregnant woman—is already a person, and the safeguard of an embryo which has yet to become a person." *Id*. at 613.

interests, was reviewed by the Italian Constitutional Court and upheld under various articles of the Constitution, including Article 2 which protects human life.[41]

Rather than focusing on either women's health or on fetal interests, Constitutional Courts in West Germany and Spain have approached abortion legislation in the context of "communitarian values," which are based on sentiments within the community affected by the law in question. A commentator has observed, however, that "at the same time that they (i.e., the Spanish and German decisions) base the protection of fetal life on the importance of public values they withdraw that protection when continuation of a pregnancy is 'too much to demand' or 'nondemandable' ["*inexigible*" and "*unzumutbar*", in the words of the Spanish and German courts respectively] of the individual pregnant woman."[42]

Moreover, courts have protected a woman's decision to have an abortion over claims of spousal and parental veto in, among other countries, Australia,[43] Canada,[44] England,[45] France,[46] and Italy.[47]

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41 *Judgment No. 108/81 of June 25, 1981*, Corte Costituzionale, 57 Raccolta Ufficiale della Corte Constituzionale [Rac. uff. corte cost.] 823 (1981).

42 Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 Am. J. Comp. L. 513, 514 (1987). The author further observes that "The 1973 U.S. Supreme Court abortion decision, *Roe v. Wade*, is in surprisingly many ways similar to the Spanish and German decisions." *Id.* at 528. See Table of Authorities for German and Spanish case citations.

43 In *Attorney-General for Queensland: Ex rel. Kerr v. I*, 46 A.L.R. 275 (1983) the High Court of Australia confirmed a decision of the Queensland State Court that an injunction could not be granted to an unmarried man to restrain the woman he had made pregnant from having an abortion. Moreover, there is a consistent trend in Australia for their state courts to recognize legitimacy of abortion on grounds of preservation of physical or mental health as determined by a physician acting in good faith; New South Wales—*R. v. Wald*, [1971] 3 D.C.R. (N.S.W.) 25; Queensland—*The Queen v. Bayliss and Cullen*, [1986] 9 Q. Law. Rep. 8; Victoria—*R. v. Davidson*, [1969] V.R. 667. *See also* the consistent New Zealand decision *R. v. Woolnough*, 2 N.Z.L.R. 508 (1977).

(*footnotes 44, 45, 46 and 47 appear on following page*)

In sum, *Roe v. Wade* and its progeny are consistent with legislation and jurisprudence in at least sixteen Western countries. The Government's claim that, under the abortion jurisprudence established by *Roe v. Wade*, ". . . we have less regulation of abortion in the interest of the fetus than any other Western nation . . ."[48] cannot be sustained.

III. RESTRICTING PUBLIC FACILITATION OF ABORTION ENDANGERS WOMEN'S HEALTH AND IS "OUT OF STEP" WITH THE PRACTICE OF OTHER WESTERN COUNTRIES.

The Government's claim that a legal regime that is "out of step with the legislative judgment of virtually every other country with which we share a common cultural tradition by itself suggests that the decision ought to be reconsidered"[49] in fact compels that the decision of the Eighth Circuit in *Reproductive Health Services v. Webster*, 851 F.2d 1071 (8th Cir. 1988), be affirmed.

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44 *Re Medhurst and Medhurst*, 45 O.R. (2d) 575 (1984 Ontario S.C.); *Medhurst v. Medhurst*, 46 O.R. (2d) 263 (1984 (Ont. S.C.) (husband's attempt to enjoin his wife from having an abortion rejected).

45 *Paton v. Trustees of British Pregnancy Advisory Service*, [1978] 2 A11 E.R. 987, affirmed by the European Commission on Human Rights—*Paton v. U.K.*, 3 E.H.R.R. 408 (1980) (husband's attempt to enjoin his wife from having an abortion rejected); *Gillick v. West Norfolk and Wisbeck Area Health Authority*, [1985] 3 A11 E.R. 402 (parents' attempt to enjoin their minor daughter from having an abortion rejected); *C. v. S.*, [1987] 2 W.L.R. 1108 (putative father denied injunction to restrain a mother's abortion). Ct. App. Eng.)

46 *Judgment of October 31, 1980*, Conseil d'Etat D.S.Jur. 19732 (1982) (husband's attempt to enjoin his wife from having an abortion rejected); *Judgment of November 8, 1982*, Tribunal pour les Enfants d'Evry, 15 D.S.Jur. 218, (April 12, 1983) (parents' attempts to enjoin their minor daughter from having an abortion rejected).

47 *Judgment of March 31, 1988*, Corte Cost., Gazzetta Ufficiale, 1 serie speciale, April 13, 1988, n.15; Giur. Cost. e Civ. 2110 (1988) (husband's attempt to enjoin his wife from having an abortion rejected).

48 U.S. Brief at 23.

49 *Id.*

In contrast to the Missouri statute, which prohibits persons who receive public funds or work in public facilities from performing or providing counseling for abortion, the prevailing legislative and judicial judgment of Western democracies is that government has an affirmative obligation to provide medical services, including abortions, that protect personal health. Accordingly, legally sanctioned abortion is provided through public facilities and publicly paid personnel in seventeen Western countries.[50] Where health services are funded on a fee-for-

50 See § II, supra. Western countries that provide for or subsidize all legally indicated abortions from public funds:

Country	*Payment plan and reference*
Australia	100% state: Commonwealth Health Insurance Act 1982, scheduled medical service (item 6469)
Austria	100% state: A. Eser & H. Koch, *Schwangerschaftaabbruch im Internationale Vergfleich* (Termination of Pregnancy in International Comparison) 1122 (1988)
Britain	100% state: Nat'l Health Svce. Act 1977, § 1(2)
Canada	100% state: scheduled medical services
Denmark	100% state: Ministry of Justice guidelines on the termination of pregnancy of 24 Mar 1976; Social Assistance Act of 1984; E. Ketting & P. van Praag, *Schwangerschaftaabbruch: Gesetz und Praxis im Internationalen Vergleich* (Termination of Pregnancy: Law and Practice in International Comparison) 106 (1985)
France	75% state: Law No. 82-1172 of 31.12.82; Eser & Koch, *id.* at 531
Germany (Fed)	100% state: Reichsversicherungsordnung, § 200 f; Eser & Koch, *id.* at 126; Ketting and van Praag *id.* at 108
Greece	100% state: Law No. 1609/86 § 1(3); Eser and Koch *id.* at 600
Italy	100% state: Law No. 194 of 22 May 78 § 10(1)
Luxembourg	100% state: Law of 15 November 78 § 13
Netherlands	100% state: Ketting & van Praag at 107
New Zealand	100% state: C. Tietze & E. Henshaw *Induced Abortion: A World View 1986* 126, (6th ed. 1986)
Norway	100% state: Tietze & Henshaw, *id.* at 126
Portugal	100% state: Eser & Koch, *id.* at 1298
Spain	100% state: Social security coverage
Sweden	40 kroner deductible: Law 1962-381 amended by Law 1982-120: Eser & Koch, *id.* at 1432; Ketting & van Praag, *id.* at 106
Switzerland	100% state: Law of 9 Oct. 1986; Judgment of Court of Insurance, BGE 108 V 35; Eser & Koch, *id.* at 1515 and Ketting & van Praag, *id.* at 110

service basis, abortion is included in schedules of fees paid to health personnel or reimbursed to patients, while physicians who are paid on a salary or *per capita* basis are permitted and often required to perform medically and legally indicated abortions.[51]

The Court of Appeals for the Eighth Circuit rightfully held that the prohibition against the use of public funds, facilities or employees to perform abortion or counsel women regarding the full range of reproductive choice unconstitutionally restricts women's access to abortion.[52] Such denial violates the health interests of women, their dependent children and their families.[53]

In the United States, the incidence of maternal mortality associated with pregnancy is far higher among disadvantaged women than among women with adequate financial and health resources.[54] Those rates could be lowered, as the Western expe-

51 A number of countries offer conscientious exemptions from abortion laws, except in the case of emergency, to physicians. *See, e.g.* Brit. Abortion Act 1967 § 4.

52 *Reproductive Health Services v. Webster*, 851 F. 2d 1071, 1083 (8th Cir. 1988).

53 Paradoxically, although the Missouri statute contains an exception for "the life of the mother," it prohibits the one health measure shown to be effective in reducing both maternal and infant mortality among low-income women, i.e., access to safe and legal abortion. *See* Greenberg, *Impact of Prenatal Care in Different Social Groups*, 145 Am. J. Obstet. & Gyn. 797 (1983).

54 There is a high risk of death from pregnancy and childbirth when women experience pregnancy too early (before age 18), or too late (after age 35) in their reproductive lives and when they exeperience repeated pregnancy (more than four births), particularly at intervals of less than 24 months. Population Reports, *Healthier Mothers and Children Through Family Planning*, Series J No. 27 (May-June 1984). In contrast to these restrictive policies in the United States, many Western countries permit lawful abortion when continuation of a woman's pregnancy involves risk of injury to the physical or mental health of the pregnant woman "*or any existing children of her family*". (emphasis added) (British Abortion Act 1967 § 1(1)(a)). In 1986, maternal mortality for white women was 4.9 deaths per 100,000 live births and for black women, it was 18.8 per 100,000 live births; National Center for Health Statistics, *Advanced Report on Final Mortality Statistics* 37:6 Monthly Vital Statistics Reports Supp. 42 Table 16 (1988)

rience has shown, by greater access to abortion or to paid or subsidized medical care throughout pregnancy—neither of which are available under the Missouri statute.

American abortion policies do not reflect the reality that unmet health needs in the United States lead to sickness and premature deaths, particularly among poor women living in inner cities and rural areas.[55] Public facilities and personnel are virtually the only available health resource to those sectors of American society lacking private and employer-based health insurance.

Restrictions on abortion information cause delay in obtaining care, thus fostering the additional hazards of late abortions. By contrast, in most other Western countries, legislation provides that abortions be performed with dispatch and with appropriate counseling regarding the procedure. For example, legislation in Finland expressly provides that abortions should be performed as early as possible,[56] and places a duty on the State Medical Board to ensure availability of services.[57]

Prohibiting, or obstructing, access to abortion information and services exposes children as well as women, to risk of death or sickness. The Court of Appeals for the Eighth Circuit perceptively observed that such risk is a product, not of social forces that the state government bears no legal duty to relieve, but of policies that the state has decided itself to implement.[58] It has been established that the increase in the legal abortion rate is the single most important factor in reductions in both white and nonwhite neonatal mortality rates.[59]

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55 Greenberg, *supra*, note 53.

56 Law No. 239 of 24 Mar 1970; § 5 (Fin.).

57 *Id.*, § 11.

58 "Just as a statutory prohibition on access to public facilitates for privately-paid abortions constitutes such a government-created obstacle [in the path of a woman's exercise of her freedom of choice], so too does Missouri's ban on public employees performing or assisting abortions": *Webster*, 851 F.2d at 1083.

59 Infant mortality rates among the poor are a major contribution to the U.S. rank of 19th in the world in infant mortality, a decline from its 15th ranking twenty years ago; National Commission to Prevent Infant Mortality *Death Before Life: The Tragedy of Infant Mortality* (1988). *See also* Grossman & Jacobowitz, *Variations in Infant Mortality Rate Among Countries of the United States: The Roles of Public Policies and Programs* 18 Demography 695 (1981). Alan Guttmacher Institute, *Abortions and The Poor: Private Morality, Public Responsibility* (1979).

The effect of restrictive abortion policies on maternal and infant mortality and morbidity is clear. Therefore, a decision by the Supreme Court to uphold Missouri's restrictions on publicly funded services would endanger the health and lives of many women, children and families in the United States.

IV. ABORTION LAWS IN MANY WESTERN COUNTRIES UTILIZE FRAMEWORKS COMPARABLE TO THE TRIMESTER-BASED APPROACH OF *ROE V. WADE*

The trimester-based framework of *Roe v. Wade* is compatible with the laws of Western countries generally, and should be sustained against the Missouri statute's proposal to treat all stages of unborn life equally from conception. In many Western nations, laws establishing legal and medical criteria for abortion incorporate rational distinctions based on stages of gestational development, reflecting the jurisprudence of *Roe v. Wade*.[60]

Both appellants' brief and the Government's brief reject the proposition that a state's interest in protecting prenatal life is qualitatively different at different periods of pregnancy and defend the Missouri statute's recognition of legal personhood from the moment of conception.[61] This is in marked contrast to the stance of the legislatures and Supreme Courts in most Wes-

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60 *Roe v. Wade*, 410 U.S. 113 (1973) has been cited with approval by courts in Great Britain, Canada, Europe, and Australia: *C. v. S.* [1987] 2 W.L.R. 1108, 1239 (English Court of Appeal) (House of Lords refused leave to appeal); *Morgentaler, Smoling and Scott v. The Queen*, [1987] 44 D.L.R. (4th) 393, 445, 489 (Supreme Court of Canada); *Paton v. U.K.* [1980] 3 E.H.R.R. 408, 1239 (Eur. Comm'n. Hum. Rts.); *The Queen v. Bayliss and Cullen* [1986] 9 Q. Law. Rep. 8, 10, 49, 54-56 (Dist. Ct. of Queensland, Australia).

61 The expression "fetus" is a biological misnomer at this stage; the word is now used uncritically to cover different stages of biological development of a conceptus from the union of an ovum and a sperm to live birth of a fetus of full gestational age.

tern countries, who reject as irrational the notion that potential human life is of equal legal significance at all gestational stages.

This idea was fully expressed when the Supreme Court of Canada struck down all restrictions on abortion in *Morgentaler, Smoling and Scott v. The Queen*.[62] In her concurring opinion Madame Justice Wilson observed that:

> "The undeveloped foetus starts out as a newly-fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life . . . I agree . . . that the foetus is potential life from the moment of conception . . . in balancing the state's interest in the protection of the foetus as potential life under Section 1 of the Charter [of Rights and Freedoms] against the right of the pregnant woman under Section 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly . . . be viewed in differential and developmental terms."[63]

Many laws place controls on abortion according to the different stages of gestation. Other countries approximate the American notion of viability and limit late abortions if a woman's life or permanent health would not be endangered by continuation of pregnancy. For example, legislation in Finland,[64] France,[65] Greece,[66] Italy,[67] Luxembourg,[68] Norway[69] and Spain[70] requires

62 [1988] 44 D.L.R. (4th) 385.

63 *Id.* at 499 (Wilson, J., concurring).

64 Law 239 of 24 Mar 1970 as amended by § 5.

65 Law 79-1204 of 31 Dec 1979, § 12.

66 Law 1609 of 28 Jun 1986, § 304 (4)(1), (4).

67 Law 194 of 22 May 1978, § 6.

68 Law of 15 Nov 1978, § 353(3).

69 Law 66 of 16 Jun 1978, § 2.

70 Organic Law 9 of 5 July 1985, § 417(3).

stronger medical evidence that the criteria for abortion are satisfied in later pregnancy than in early pregnancy.

While the fetus is indeed "*potential* life . . . in the first weeks of pregnancy,"[71] by the same token so are each sperm and ovum.[72] The laws of most Western countries are responsive to the evidence of biological science that even after conception there is a significant rate of spontaneous pre-embryonic, embryonic and fetal wastage, both through failure of the conceptus to implant in the uterus, and following implantation as well.[73]

Applying the same standards of protection to unborn life at all stages of development would blithely ignore the nature of human reproductive biology. Accordingly, a number of nations clearly accommodate contraception which operates to prevent implantation of a fertilized egg into the uterine wall.[74]

Courts at international and national levels have resisted claims that fetuses have a right to life from conception in ways that would limit access to abortions, consistent with this Court's holding in *Roe v. Wade*.[75] Instead they have held that

71 *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J. dissenting).

72 L. Sumner, *Abortion and Moral Theory* 104-05 (1981).

73 Wilcox, *et al*, *Incidence of Early Pregnancy Loss*, 319 N. Engl. J. Med. at 189 (1988).

74 Some abortion laws, such the 1974 Austrian law, the 1981 law of The Netherlands, the 1977 New Zealand law and the 1976 West German law, expressly decriminalized medical interventions for the period between fertilization and completion of implantation of the fertilized ovum. This is a period of up to about 21 days since fertilization or, whether fertilization is difficult to pinpoint, up to about 35 days since the last menstrual period. In such countries the use of birth control methods during this period such as antiprogestins, contraceptives or post-ovulatory methods does not need to meet the requirements of the respective abortion laws. Accordingly, the use of such methods is medically encouraged in order to prevent occurrence of pregnancy which biologically is generally accepted to begin at completion of implantation; *see* Committee on Terminology of the American College of Obstetricians & Gynecologists: *Obstetric-Gynecological Terminology* 327 (1972).

75 *See* notes 13-16 and accompanying text, *supra*.

the welfare of women is no less significant than that of fetuses, and that the balance of competing interests favors women and their families. For example, the European Commission on Human Rights has declined to extend human rights provisions to the unborn,[76] and the Inter-American Commission on Human Rights has interpreted the American Declaration of the Rights and Duties of Man 1948 to uphold a woman's right to abortion over any putative right of the unborn.[77] This Court, too, must and reject Missouri's attempt to define human life from the moment of conception.

V. *ROE V. WADE*, WHICH PROTECTS PRIVATE REPRODUCTIVE DECISIONS FROM COERCIVE GOVERNMENTAL POLICIES, MUST BE MAINTAINED.

Historical and contemporary experience demonstrate that, given the opportunity, governments often attempt either to promote childbirth or suppress it through abortion legislation. Protection of individual reproductive choice against state coercion is compelled by the most enduring values of individual liberty. The Court's decision in *Roe v. Wade*, which safeguards individual choice from coercive intervention, must be maintained.

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76 *Paton v. United Kingdom*, 3 E.H.R.R. 408 (1980).

77 *Case 2141*, Inter-American Comm'n on Human Rights, OEA/ser.L./V./1154, doc. 9 rev. 1 (1980). American Declaration of the Rights and Duties of Man, Organization of American States, OEA/ser.L./V./1.4 Rev. (1948), reprinted in OAS, Handbook of Existing Rules Pertaining to Human Rights, OEA/ser.L./V.11.50 doc. 6 (1980).

In the United States, a state supreme court has upheld the constitutionality of a legislative provision that prevents a child born alive from pursuing a "wrongful life" action for prenatal injuries, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). Such a provision may be enacted to remove any incentive for a potential medical defendant to advise or perform an abortion on a fetus so afflicted in order to forestall such a suit.

Legislation to this effect exists, for instance, in Minnesota: Stat. Ann. § 145.424; Missouri: Stat. Ann. § 188.130; and Utah: Stat. Ann. § 76.7-305.5.

The U.S. Supreme Court may in time be called upon to assess state legislation that denies individuals such rights of action claimed to arise from prenatal conduct.

Some may argue that a woman who is compelled against her wishes to continue a pregnancy initiated through her voluntary conduct is not suffering any legislative "invasion."[78] When one considers, however, what a restrictive abortion law affirmatively brings about, rather than what it prohibits, namely involuntary gestation and childbirth, the invasiveness of the law is apparent. It has recently been observed that:

> Even if the propensity of anti-abortion laws to exert power over the body and to instrumentalize women is discounted, it remains the case that such laws radically and affirmatively redirect women's lives. Indeed it is difficult to conceive of a particular legal prohibition with a more total effect on the life and future of the one enjoined. It is no exaggeration to say that mandatory childbearing is a totalitarian intervention into a woman's life. With regard to the occupation and direction of lives, the positive ramifications of anti-abortion laws are unparalleled.[79]

In totalitarian countries, abortion legislation has routinely been used to force women to bear children or refrain from childbirth according to the dictates of state policy. In 1920, the Soviet Union decriminalized abortion. But, by 1936, anticipating a renewed World War and the prospect of devastating population loss, the Soviet Union adopted a pro-natalist population policy. This policy was implemented by the removal of contraceptives and the recriminalization of abortion. The Decree of 1936 described the fundamental duty of "woman, as a mother and a citizen who bears the great and responsible duty of giving birth to and bringing up citizens."[80] At the end of the Stalin era, in 1955, abortion was again decriminalized. Rumania, in order to counter its declining population, introduced restrictive abortion legislation in 1985, along with highly directive provisions on prenatal care. President Ceausescu proclaimed in 1986 that

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78 *See, e.g.* U.S. Brief at *26*.

79 Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

80 Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 Stan. L. Rev. 1027 (1988).

"the fetus is the socialist property of the whole society. Giving birth is a patriotic duty, determining the fate of our country."[81]

The use of coercive legislation to achieve state population policies is not confined to communist regimes. Within four months of Hitler becoming Chancellor of Germany's Third Reich in 1933, laws restricting abortion were introduced, and a month later the newly created Ministry of Propaganda established an Office for Exploring Population Policies. A Gestapo-led antiabortion campaign intensified in 1937, when nine times as many abortionists were charged as in 1936.[82] During the Second World War, tribunals in Vichy France and Germany were authorized to impose the death penalty for illegal abortion, and carried out their mandate.[83] In Germany, however, it was an accepted defense to a charge of illegal abortion that the woman was Jewish, because the termination of unborn Jewish life did not offend the principle of the abortion prohibition.[84] Even before its political association with Germany, Italy had legislation prohibiting abortion, which the King of Italy explained protected "the demographic interest of the State."[85] This reflected a pervasive view that the reproductive potential of its women was an asset of the state and could be legislatively deployed for nationalist ends. Nazi Germany also considered women's reproductive capacity a state asset, and increased population by providing facilities for breeding racially "pure" children.

In countries where government is not subject to the processes of Western-style democracy, states can use legislative fiat to suppress or to compel abortion and women and their families may be forced to sacrifice their physical integrity to serve the purposes of the state. In China, for instance, evidence of mandatory abortion has persuaded the United States government to

81 Ceausescu, N., cited in *Der Spiegel*, Oct. 20, 1986.

82 David, Fleischhacker & Hohn, *Abortion and Eugenics in Nazi Germany*, 14 Population and Development Rev. 81 (1988).

83 *Id.* at 81.

84 *Id.* at 94.

85 Cappelletti & Cohen, *supra* note 40, at 612.

terminate funding for reproductive health care undertaken through the United Nations Fund for Population Activities.[86]

At first, the state-sanctioned coercion in other countries may seem alien to the situation in the United States. But the United States itself has also begun to witness judicially-sanctioned coercion of reproductive choices. In a series of cases, beginning with *Jefferson v. Griffin Spalding County Hospital Authority*,[87] courts have forced mentally competent women to undergo Caesarean delivery despite their refusal. The District of Columbia Court of Appeals, currently considering the case of a terminally ill woman forced to undergo Caesarean surgery, will decide whether the reproductive choice guaranteed in *Roe v. Wade* precludes this massive bodily intrusion.[88]

The climate of fear surrounding the AIDS virus is already raising discussion of the possibility of coerced abortions or sterilizations as a condition of treatment. The possibility that state legislatures in the United States will mandate or accommodate pressure for termination of pregnancy cannot be precluded.

In the face of these truly chilling developments, *Roe v. Wade* safeguards women's fundamental freedom to decide whether and when to bear children against the coercive and intrusive power of government. Respect for human integrity and dignity embodied in reproductive choice must be preserved, and the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

86 The United States President is empowered to certify when China ceases to employ abortion powers coercively. S. Rep. No. 82 to accompany H.R. 2577 (1985); 131 Congressional Record H5335-5355.

87 274 S.E. 2d 457 (Ga. 1981); *see generally* Kolder, Gallagher & Parsons, *Court-ordered Obstetrical Interventions*, 317 New Eng. J. Med. 1192 (1987).

88 *In Re A.C.*, 533 A.2d 611 (D.C. App. 1987) *reh'g granted and opinion vacated*, No. 87-609 (March 17, 1988).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision of the United States Court of Appeals for the Eighth Circuit holding Missouri's law unconstitutional.

Respectfully submitted,

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APPENDIX

APPENDIX

Organizational Amici

Abortion Rights Coalition is a coalition of organizations and individuals committed to providing information regarding the safety and availability of abortion. It was formed in 1956 and is based in New South Wales, Australia.

The Association for the Legal Right to Abortion (Western Australia), formed in 1965, is a non-partisan, non-sectarian, organization of Western Australians dedicated to womens' rights to safe, legal abortion.

The D.K.T. Memorial Fund is a private organization based in Washington, D.C. which supports and supervises family planning projects, primarily in developing countries, including the provision of birth control options for men. The DKT Memorial Fund is dedicated to the furtherance of a woman's right to reproductive freedom, including the right to choose abortion.

The Family Planning Association of New South Wales has provided fertility control, sex education and reproductive health care services for over fifty years. With over 26 clinics in the Sydney Metropolitan area, the Association provides clients with direct clinical services which include advice on birth control, preventive health care, medical gynecology and specialized counseling on pregnancy, menopause, infertility and sexual difficulties, as well as providing advocacy for its clients in matters relating to reproduction and sexuality education. As a result, the Association is well aware of the need for women to have access to legal, medically safe abortions.

The International Fund for Health and Family Planning (IFHFP) is a private foundation based in Washington, D.C., which supports and supervises family planning projects, primarily in developing countries. These programs include the provision of a wide variety of contraceptive and birth control options for women and men around the world. The IFHFP is dedicated to the furtherance of women's rights to reproductive freedom, including the right to choose abortion.

International Projects Assistance Services (IPAS) is a non-governmental, charitable organization based in Carrboro, North Carolina that works around the world, and especially in developing countries, toward safe reproductive health care for women. It provides training, information and other educational services regarding access to and delivery of comprehensive health services, especially abortion. In countries where abortion is restricted, IPAS works within prevailing cultural, legal and social contexts to reduce the maternal morbidity and mortality associated with unsafe abortion practices. In countries where abortion services are not so restricted, IPAS works to improve access to safe abortion services.

The International Women's Health Coalition (IWHC) is a private, non-profit organization, based in New York City. Founded in 1980, IWHC promotes improvement in women's reproductive health in the Third World. IWHC supports innovative health care projects, policy-oriented field research, and public education, through 35 projects in 11 countries. IWHC also serves as an advocate for U.S. and International population and health policies and programs to insure that women can exercise their internationally recognized right to control the number and spacing of their children, and that they may have access to the safe abortion services that are essential for the exercise of this right.

Marie Stopes International, founded in 1973, is the largest non-governmental provider of family planning services in Britain, and supports full-service birth control programs in fifteen other countries, including India, Sri Lanka, Indonesia, the Philippines, Bangladesh and Kenya. In all the countries in which it works the organization is deeply concerned with the administrative, legislative and judicial issues that restrict the fundamental human right of the individual to all forms of birth control.

The National Abortion Campaign of Britain is a nationwide, non-partisan, membership organization which seeks to preserve access to safe, legal abortions in Britain. It is based in London, England.

The Pathfinder Fund, founded in 1957 and based in Watertown, Massachusetts, is dedicated to ensuring the availability of family planning services throughout the developing world. Its activities include the development of new service delivery mechanisms, local institution building, training health care providers, and providing contraceptive supplies. In both the United States and overseas, it addresses public policy issues that affect the availability of safe and effective family planning services.

Population Crisis Committee (PCC), based in Washington, D.C., seeks to increase public awareness of the need for the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of abortion complications and menstrual regulation procedures. PCC conducts authoritative analyses of U.S. population assistance programs, one of which has been a comprehensive study of the impact of current U.S. abortion restrictions on family planning programs overseas.

The Population Council, an international, nonprofit organization established in 1952, undertakes social and health science programs and research relating to developing countries and conducts biomedical research to develop and improve contraceptive technology. The Council provides advice and technical assistance to governments, international agencies, and nongovernmental organizations, and disseminates information on population issues through publications, conferences, seminars, and workshops. It is based in New York City.

Population Planning Associates (PPA) is a non-profit private voluntary organization which implements family planning programs in developing countries. PPA is dedicated to the furtherance of programs and of policies which advance free choice by private citizens in the area of contraception and reproduction.

Population Services International (PSI) is a non-profit organization that provides contraceptive and health marketing and communications services in several developing countries. As such, it has a particular concern for the limitations that prevent individuals from learning about, or choosing, family planning.

PRETERM Foundation, founded in 1974, provides population control services, research and education. It operates professional clinics providing lawful medical treatments and surgical operations, including termination of pregnancy. It is based in Surry Hills, Australia.

Program for the Introduction and Adaptation of Contraceptive Technology (PIACT) is a non-profit, non-governmental organization whose goal is to improve the effectiveness, safety, availability, and acceptance of reproductive health products and technologies in developing countries. Since its incorporation in 1976, PIACT has managed nearly 100 family planning projects in 30 developing countries. PIACT is particularly interested in projects that contribute to the well-being of *both* mothers and children. It is based in Seattle, Washington.

TOLERATION is a coalition of organizations and individuals (including the New South Wales Council for Civil Liberties, New South Wales Humanist Society and Women in Education) whose purpose is to promote laws which increase individual freedom of choice. It was founded in 1981 and is based in Glebe, Australia.

Transnational Family Research Institute (TFRI) is a multidisciplinary, nongovernmental, and nonprofit research organization in the behavioral sciences. TFRI develops and conducts research in reproductive behavior, often in cooperation with colleagues abroad. Research interests focus on the behavioral regulation of fertility, motivations for pregnancy resolution, and the decision-making process. TFRI currently has offices in Palo Alto, California; Copenhagen, Denmark; Mexico City, Mexico; and Bangkok, Thailand. Since 1972, the Institute has publisned *Abortion Research Notes*, reviewing scientific literature related to pregnancy termination.

Women's Abortion Action Campaign, (WAAC) is a national organization based in Sydney, Australia. Since its founding in 1972, WAAC has consistently campaigned for the continued availability of abortion in Australia.

Women's Economic Network (WEN), based in Glebe, Australia, is an organization that shares skills and information to help women achieve economic independence. WEN is concerned that any restriction of the right to seek and obtain medically safe abortion would restrict women's ability to gain economic independence, limiting their life chances in education, training and employment and disadvantaging them socially, economically and psychologically.

Women's Electoral Lobby Australia (WEL Australia), formed in 1972, is a voluntary organization of women committed to the goal of achieving economic, educational and sexual equality for women. It is represented officially at the national level on the National Women's Consultative Council, and on the international level through affiliation with the International Alliance of Women, which has consultative status with the United Nations. WEL Australia is committed to promoting the status of women and regards the right to fertility control, including safe abortion, as fundamental to women's ability to live healthy and meaningful lives.

Women's Global Network on Reproductive Rights (WGNRR) is an autonomous network of groups and individuals in 90 countries who are working for women's rights to decide whether, when, and how to have children. Based in Amsterdam, the Netherlands, WGNRR is in the midst of an international campaign for the prevention of maternal mortality and morbidity, much of which is caused by the inevitable complications and deaths resulting from unsafe and clandestine abortion.

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AMICUS CURIAE

BRIEF

FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN NURSES' ASSOCIATION AND THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Dated: March 30, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICI CURIAE

Amici curiae are the American Nurses' Association ("ANA") and the Nurses' Association of the American College of Obstetricians and Gynecologists, also known as NAAGOG: the Organization for Obstetric, Gynecologic and Neonatal Nurses ("NAACOG"). The ANA is an association of registered nurses that is dedicated to the advancement of the goals and interests of registered nurses and of the nursing profession generally. Founded in 1897, the ANA is comprised of fifty-three constituent member organizations. NAACOG is a 22,000-member professional organization for nurses who provide health care for women and infants. Founded in 1969, NAACOG's purpose is to establish relevant nursing standards and to

assist its members in supplying the highest quality nursing care to their clients.

Registered nurses constitute the largest group of health care providers in this country; there presently are approximately two million registered nurses in the United States. The role of the registered nurse in providing professional care includes the responsibility of furnishing information and assistance to clients to enable them to make informed decisions regarding their health care. These responsibilities are incumbent upon the registered nurse regardless of the social or economic status, life style or individual value system of the clients involved or the nature of their health problems.

The ANA's and NAACOG's interest in the instant case is related to the unique role of registered nurses in the provision of health care. In order to fulfill nurses' responsibilities to their clients, to their profession, to society and to themselves, they must have the freedom to speak to clients freely and openly about the full range of available health care options, as well as the potential benefits and risks inherent in those options, given the clients' circumstances. Concomitantly, clients must be given all the relevant information necessary for them to make fully-informed decisions regarding their health care. Finally, ANA and NAACOG are committed to the principle that all persons have the right to reasonable access to health care. Because *amici* herein believe that the Missouri statute in issue in this case infringes on these inalienable rights, they are submitting this brief to the Court as *amici curiae* in support of Appellees.

SUMMARY OF ARGUMENT

The State of Missouri has enacted a law proscribing the use of public funds to, among other things, counsel a woman to have an abortion not necessary to save her life. As the court of appeals held, that provision is unconstitutionally vague because the line between permitted

discussion and prohibited counseling is not clear. Further, the Missouri law effectively precludes all public health care providers, including registered nurses, from fulfilling their professional obligations and exercising their constitutional rights to speak freely and openly to clients about their health care.

The same provision violates the clients' rights under the Fourteenth Amendment to obtain full and complete information about all available health care options. All persons, including pregnant women, have an alienable right to make a fully-informed choice about their health care in conjunction with confidential, unfettered communications with their providers.

The Missouri statute also limits the performance of abortions by public employees and on the use of public facilities therefor except where necessary to save the life of the mother. In doing so, the state has, through legislative fiat, subordinated the health of mothers to potential fetal life, thereby creating unconstitutional barriers to a woman's right to terminate her pregnancy for medical reasons.

ARGUMENT

I. THE MISSOURI STATUTE'S BAN ON THE USE OF PUBLIC FUNDS FOR THE PURPOSE OF COUNSELING A WOMAN TO HAVE AN ABORTION NOT NECESSARY TO SAVE HER LIFE VIOLATES THE CONSTITUTIONAL RIGHTS OF HEALTH CARE PROVIDERS AND THEIR CLIENTS.

A. Health Care Providers Have A Constitutionally-Protected Right To Fully And Freely Inform Clients Of Available Health Care Options.

Section 188.205 of the Revised Statutes of Missouri provides in part that "[i]t shall be unlawful for any public funds to be expended . . . for the purpose of . . . counseling a woman to have an abortion not necessary to save her life." MO. REV. STAT. § 188.205 (1986).

The United States Court of Appeals for the Eighth Circuit held this provision to be unconstitutionally vague, because, *inter alia*, health care providers could be "chilled into avoiding even speech that is normally afforded the utmost protection under the Constitution." *Reproductive Health Services v. Webster*, 851 F.2d 1071, 1078 (8th Cir. 1988) (footnote omitted). That conclusion is undoubtedly correct.

Public employees do not, by virtue of their employment alone, forfeit all of their constitutional rights to freedom of speech. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In no area is this right of free speech more fundamental and more worthy of protection than in the area of personal and confidential communications between health care providers and their clients. Without the provider's ability to speak to the client freely and openly about all available health care options, as well as their ramifications, the care rendered would be ineffective and inadequate.

This Court has repeatedly recognized and protected the communications between physician and patient concerning the possible termination of a pregnancy. In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443 (1983), for example, the Court stated that, in exploring the possibility of terminating a pregnancy, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." Similarly, the importance of fostering open dialogue between physician and patient, and ensuring that physicians can exercise their discretion and professional judgment, was specifically protected in the same context by this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762-63 (1986).

Those protections accorded the physician-patient relationship by this Court are equally critical to the confidential relationship between nurses and clients and to nurses' fulfillment of their professional responsibilities. A crucial element of a nurse's relationship with all clients, including a pregnant woman, involves the disclosure of all relevant information and the exploration of every medical option, given the state of the client's individual health. Indeed, often a client relies primarily on the nurse for this facet of her health care. In fact, this Court has recognized that health care providers other than physicians often are responsible for much of the counseling and advice given to clients. *See Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 447-49.

Neither physicians nor nurses can render effective health care while saddled with the limitations contained in Section 188.205 of the Missouri statute. The effect of that provision is to prohibit health care professionals from informing pregnant women of one option that may be significant to preserving their health—that of terminating their pregnancy. Not only is that prohibition professionally unethical, it is clinically inadequate and constitutes a denial of the provider's right to free speech in a context no different from the one recognized by this Court in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 444, and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 762-63.

Moreover, the point at which information supplied by the health care provider constitutes "counseling," within the meaning of Section 188.205, is neither readily discernible nor capable of a bright-line distinction. And, as this Court has stated in this regard:

> 'The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question op-

> erates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.' . . . We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms.

Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961)). Accordingly, the court of appeals' decision that Section 188.205 is unconstitutionally vague should be affirmed. In doing so, this Court should also make clear that all health care providers, including nurses, have a constitutionally-protected right to free speech.

B. Health Care Clients Have A Constitutionally-Protected Right To Receive Complete And Accurate Information About All Available Health Care Options.

The Missouri statute's stricture against the use of public funds to counsel a woman to have an abortion in a situation that is not life-threatening not only violates the free speech rights of health care providers, it also violates the clients' constitutional right to receive information essential to an informed decision about their health care. Recognizing that right, the court of appeals concluded that "[w]e can perceive of few obstacles more burdensome to the right to decide [whether to terminate a pregnancy] than a state-imposed blackout on the information necessary to make a decision." *Reproductive Health Services v. Webster*, 851 F.2d at 1080. ANA and NAACOG agree with the court's conclusion.

ANA's *Code for Nurses with Interpretive Statements* (1985) (pp. 2-3) is premised on "[t]he fundamental principle of . . . respect for the inherent dignity and worth of every client," regardless of the nature of the client's health problem. To that end, registered nurses are committed to the concept that:

> Truth telling and the process of reaching informed choice underlie the exercise of self-determination, which is basic to respect for persons. Clients should be as fully involved as possible in the planning and implementation of their own health care. Clients have the moral right to determine what will be done with their own person; to be given accurate information, and all the information necessary for making informed judgments; to be assisted with weighing the benefits and burdens of options in their treatment; to accept, refuse, or terminate treatment without coercion; and to be given necessary emotional support.

ANA's *Code for Nurses*, p. 2.

Every person seeking health care has the right to receive complete and accurate information from the provider about all available medical options in order to make a rational and informed decision about his alternatives. This right extends equally to women who are pregnant and who must decide whether to exercise their option to terminate that pregnancy. As this Court stated in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 (1976), "it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences."

Section 138.205 of the Missouri statute effectively precludes pregnant women who, through necessity or otherwise, rely on public health care providers from being able to make a truly informed decision about their health care for the simple reason that one option, abortion, cannot be fully explored and discussed. The court of appeals decided that this result was contrary to the Fourteenth Amendment to the Constitution of the United States. For the reasons set forth herein, that decision should be sustained.

II. THE MISSOURI STATUTE'S LIMITATIONS ON THE PERFORMANCE OF ABORTIONS BY PUBLIC EMPLOYEES AND ON THE USE OF PUBLIC FACILITIES THEREFOR CREATE UNCONSTITUTIONAL BARRIERS TO A WOMAN'S RIGHT TO TERMINATE HER PREGNANCY FOR MEDICAL REASONS.

Section 188.210 of the Missouri Statute states in part that "[i]t shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother." MO. REV. STAT. § 188.210 (1986). Similarly, Section 188.215 provides that "[i]t shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother . . . ." MO. REV. STAT. § 188.215 (1986). Thus, Missouri has prohibited all abortions in public facilities and by public employees except in those very limited situations where it is necessary to save the life of the mother As the court of appeals correctly found, such limitations, which effectively bar public access to abortions by women who may need to terminate their pregnancies in order to preserve their health, are unconstitutional because they constitute "unduly burdensome state interference with their [women's] right to decide . . . ." *Reproductive Health Services v. Webster*, 851 F.2d at 1083. *Amici* herein agree.

In doing so, the ANA and NAACOG do not contest the legitimacy of Missouri's interest in protecting potential fetal life. As this Court has recognized, however, that interest cannot be elevated, by legislative fiat, over at least equally-important concerns regarding the health of the mother: "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life *or health* of the mother." *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (emphasis added). *See also*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 768-69; *Colautti v. Franklin*, 439 U.S. 379, 400 (1979). Here, the state has subordinated the health of the mother in all situations that are not life-threatening, without consideration of the individual circumstances involved. This it cannot do.

All people, including pregnant women, must be free to exercise their constitutionally-protected right to make and effectuate choices affecting their health. Sometimes health considerations dictate, for any number of reasons, the decision to terminate a pregnancy. As difficult as that decision may be, a state may not impose impermissible barriers to a woman's right to make it and have it implemented in order to preserve her health. *See Colautti v. Franklin*, 439 U.S. at 387.

By prohibiting the use of public facilities and the participation of public employees in all abortions except those necessary to save the life of the mother, Missouri has created unconstitutional obstacles to the right of a great number of women to terminate their pregnancies in order to preserve their health. This, as the court of appeals properly found, it cannot do. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 768-69 (Court agreed that abortion-related restriction "was unconstitutional because it required a 'trade-off' between a woman's health and fetal survival . . ."); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 427 ("restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest"). Accordingly, the court of appeals' decision in this regard should be affirmed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: March 30, 1989

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FOR THE EIGHTH CIRCUIT

BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, COLORADO, MASSACHUSETTS, NEW YORK, TEXAS, VERMONT AND [redacted] AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Bd. of Educ. v. Pico, 457 U.S. 853 (1982)	11
Brown v. Bd. of Educ., 347 U.S. 483 (1954)	11
Brown v. Bd. of Educ., 349 U.S. 294 (1955)	8
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Harris v. McRae, 448 U.S. 297 (1980)	4, 17
H.L. v. Matheson, 450 U.S. 398 (1981)	4
In Re Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976)	7
Kugler v. Ryan, 682 S.W. 2d 47 (Mo. App. 1984)	20
Lynch v. Donnelly, 465 U.S. 668 (1984)	11
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Meyer v. Nebraska, 262 U.S. 390 (1923)	6, 11
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Nat'l Abortion Fed'n, v. Operation Rescue, No. 89-1189 AWT (BX) (C.D. Cal. March 15, 1989)	20
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	12
New York v. Bowen, No. 88-701 (2d Cir. argued Jan. 4, 1989)	2
New York State Nat'l Org. for Women v. Terry, 88 Civ. 3071 (S.D.N.Y. 1989) (1989 WL 5742)	20
Oakland Feminist Women's Health Center v. Thompkins, No. 276031 (Super. Ct. Cal. Aug. 16, 1985)	20
O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc., 64 A.D. 2d 894, 407 N.Y.S. 2d 903 (2d Dept. 1978)	20
Oregon v. Kennedy, 456 U.S. 667 (1982)	5

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Parkmed Co. v. Pro-Life Counseling, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dept. 1982)	20
People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257 (1972)	14
People v. Belous, 71 Cal. 2d 954, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970)	14
Phonetele v. AT&T, 664 F. 2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983)	5
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	4
Poe v. Ullman, 367 U.S. 497 (1961)	6
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	12
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Rogers v. Okin, 478 F. Supp. 1342 (D. Mass.) *aff'd in part, rev'd in part, vacated in part*, 634 F.2d 650 (1st Cir. 1980) *remanded sub nom. Mills v. Rogers*, 457 U.S. 29 (1982), *certified questions answered sub nom. Rogers v. Comm'r of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983), *remanded*, *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984)	7
Schulman v. New York City Health & Hosp. Corp., 38 N.Y. 2d 234, 342 N.E.2d 501 (1975)	20
Simopoulos v. Virginia, 462 U.S. 506 (1983)	4
Skinner v. Oklahoma, 316 U.S. 535 (1942)	12

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State v. Abortion Info. Agency, Inc., 69 Misc. 2d 825 (Sup. Ct. N.Y. Co. 1971), *aff'd*, 37 A.D. 2d 144 (1st Dept. 1971), *aff'd*, 30 N.Y. 2d 779, 285 N.E.2d 317 (1972)	18
Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977)	7
Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	*passim*
United States v. Carolene Prod. Co., 304 U.S. 144 (1938)	11
Vasquez v. Hillery, 474 U.S. 254 (1986)	5
Westchester Women's Health Org. v. Whalen, 475 F. Supp. 734 (S.D.N.Y. 1979)	20
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	8, 9, 10, 11
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U.S. Const. Amend. XIV	*passim*
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N.Y. Penal Law § 125.05(3) (McKinney 1987) ... 11, 15

OTHER SOURCES

Abortion Clinics Find Insurance Difficult to Obtain, Am. Bus. News, Feb. 8, 1985, at 20, col. 1 21

Alan Guttmacher Institute, *Abortion Services in the United States, Each State and Metropolitan Area*, 1984-1985 (S. Henshaw, J. Van Vort, eds. 1988) 16

Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience with Legal Abortion in New York State* (S. Henshaw, J. Van Vort, eds. 1980) 14, 17

Bus. Ins., Jan. 21, 1985, at 3, col. 2 21

Centers For Disease Control, Morbidity and Mortality Weekly Report, vol. 37, no. 47, "Abortion Surveillance: Preliminary Analysis–United States, 1984, 1985" (Nov. 25, 1988), U.S. Dep't. of Health & Human Serv./ Pub. Health Serv. HHS Pub. No. (CDC) 89-8017 ... 14, 16

Constitutional Aspects of the Right to Limit Childbearing, A Report of the United States Comm'r on Civil Rights (April 1975) 22

N. Davis, *From Crime to Choice: The Transformation of Abortion in America* (1985) . 20

Edmiston, *Report on the Abortion Capital of the Country: New York City*, N.Y. Times, Apr. 11, 1971 (Magazine), at 11 ..... 18, 19

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The Federalist No. 51, (J. Madison) (Mentor ed. 1961) 9

Fineman, Book Review, 55 U. Chi. L. Rev. 1431 (1988) 10

F. Frankfurter, J. Landis, *The Business of Supreme Court: A Study in the Federal Judicial System* 65 (1927) 9

M.A. Glendon, *Abortion and Divorce In Western Law; American Failures, European Challenges* (1987) 10, 21

Governor's Veto Messages (1972), *reprinted in* N.Y.S. Legis. Annual–1972 12

Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260 (Nov./Dec. 1984) 17

Harris, O'Hare, Patker, Nielson, *Legal Abortion 1970–1971–the New York City Experience*, 63 Am. J. Pub. Health 409 (1973) 16

Henshaw, Forrest, Blaine, *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119 (May/June 1984) 17

Henshaw, Forrest, Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (Mar./Apr. 1987) 17, 19

Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Geo. L. Rev. 789 (1985) 10

L. Lader, *Abortion II: Making the Revolution* (1973) 18

	Page
Lebolt, Grimes, Cates. *Mortality From Abortion and Childbirth*, 248 J. A.M.A. 188 (July 9, 1982)	14
J. Legge, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* (1985)	13, 14, 16, 17
Levane, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, 12 Cont. Drug Problems 63 (Spring 1985)	23
A. Morton, *Enemies of Choice: The Right to Life Movement and its Threat to Abortion* (1981)	18
Nat'l Comm'n on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws of the United States*, no. 722, 71st Cong., 1st Sess. (Jan. 7, 1931)	23
Newsweek, July 19, 1971, at 51	18
N.Y. Times, Sept. 29, 1988, § B at 11, cols. 4-5	22
N.Y. Times, Oct. 6, 1988, § B, at 18, col. 1	16
N.Y. Times, Feb. 10, 1971, at 45, col. 1	18
Patker, O'Hare, Nielson, Suigir, *Two Years' Experience in New York City with the Liberalized Abortion Law – Progress and Problems*, 63 Am. J. Pub. Health 524 (1973)	15, 16, 19
The President's Comm'n on Law Enforcement & Admn. of Justice, Task Force Report: The Courts (1967)	14, 21, 22, 23

	Page
R. Riddick, *Making Choices: The Abortion Experience of Irish Women* (1988)	15, 16
Schur, *Crimes Without Victims* (1965)	22
Schwartz, *Morals Offenses and the Model Penal Code* 63 Colum. L. Rev. 682 (1963)	21
Torres, Forrest, *Why Do Women Have Abortions?* 20 Fam. Plan. Persp. 169 (July/Aug. 1988)	17
Wessel, Segal, Book Review, 8 Prob. L.J. 349 (1988)	10, 21
J. Wilson, R. Carrington, E. Reid, *Obstetrics and Gynecology* (8th ed.1987)	17
H. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 3 (1969)	14, 15, 21, 22, 23

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

vs.

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, COLORADO, MASSACHUSETTS, NEW YORK, TEXAS VERMONT AND [redacted] AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

The Attorneys General of California, Colorado, Massachusetts, New York, Texas, Vermont and [redacted] submit this brief as *amici curiae* in support of appellees Reproductive Health Services, *et al*. They respond to appellants William Webster, *et al.*, and *amicus curiae* Solicitor General of the United States, who request this Court to overrule or to radically modify *Roe v. Wade*, 410 U.S. 113 (1973). *Amici* Attorneys General urge this Court not to reexamine *Roe* or, in the alternative, to reaffirm *Roe* as striking a proper balance between the fundamental constitutional privacy right of a woman to decide whether or not to bear a child and the state's compelling interests.

As the chief law enforcement officers of their respective states, and as representatives of state government, *amici* are charged with a number of duties and responsibilities which bear on the question presented. These include: (1) protecting the fundamental individual rights and liberties of the people of their state under the federal and state constitutions; (2) protecting the state's sovereign interests and role in our constitutional system; (3) protecting the health, safety and well-being of the people of their state; (4) enforcing state criminal and civil laws, including those that may regulate abortion; (5) enforcing state regulatory schemes involving health care and consumer protection; and (6) advising other branches of state government on the legality of state regulation of abortion, and defending any such regulation under *Roe* and its progeny.

Amici have a strong interest in the doctrine of *stare decisis*. It ensures stability in the law, prevents the relitigation of issues, and infuses citizens with confidence that laws will be interpreted and applied fairly, consistently, and objectively.

Amici also have a fundamental interest in protecting the most basic tenets of our constitutional form of government, namely, the reservation of certain powers and rights to the individual free from infringement by either the state or the national government, the allocation of powers not so reserved between the state and national governments, and the separation of powers among branches of government.

Because of their roles and responsibilities, *amici* believe they are compelled, and uniquely qualified, to address the question presented.[1]

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[1] Because of their involvement in two lower court cases challenging the validity of certain federal regulations promulgated under Title X of the Public Health Service Act of 1970, 42 U.S.C. 300, *et seq.*, *amici* Attorneys General of New York and Massachusetts, like the Solicitor General, also have an interest in the challenge to that part of the Missouri statute that forbids the expenditure of public funds "for the purpose of encouraging or counselling a women to have an abortion not necessary to save her life." Mo. Stat. § 188.205 (Vernon Supp. 1989). Solicitor General's Brief at 1-2, 25-29 [hereinafter S.G. Br.]. *See Massachusetts v. Bowen*, No. 88-1279 (1st Cir. argued July 28, 1988); *New York v. Bowen*, No. 88-701 (2nd Cir. argued Jan. 4, 1989). That issue is not addressed in this brief, however, because separate *amici curiae* briefs on the public funding issue are being submitted

(Footnote continued)

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113, this Court properly recognized that a woman's decision whether to bear a child is encompassed in the fundamental constitutional right to privacy. For the past sixteen years, the states and countless individuals have relied on the rights secured by *Roe* and its progeny in structuring their affairs and lives. There have been no changes in the law or society to justify a reexamination of *Roe*. *Roe* established a predictable, workable framework within which abortion regulations may be reviewed by the courts. An overturning of *Roe*, or the substitution of a more deferential "rational basis" or "undue burden" standard will not end the abortion debate, but simply create new problems.

In our system of government, it is the courts and not the state legislatures that are the proper arbiters of individual rights and liberties. Fundamental rights cannot be left to the vagaries of public opinion. While federalism is a cornerstone of our constitutional system, states may not experiment with rights that are so central to the personality and dignity of the individual as the right to choose whether to bear a child.

Retreating from *Roe* and permitting the states to determine the parameters of the right to choose abortion will significantly jeopardize the public health and welfare. Experience shows that women seek abortion in substantial numbers regardless of the state of the law, exposing themselves to great risk in the process. A recriminalization of abortion will thus drive abortion back underground, resulting in an increase in maternal mortality and morbidity and an overburdening of state health care systems.

Allowing states to recriminalize abortion will also undermine law enforcement efforts, since such laws are extremely difficult to enforce and will divert resources from protecting the public from other crimes. History teaches that the attempt to enforce unpopular laws which are widely disobeyed only undermines the integrity of the criminal justice system.

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by the Amer. Civil Liberties Union and the Nat'l Ass'n of Pub. Hosps., among others, in support of the appellees.

ARGUMENT

I. NO CIRCUMSTANCES JUSTIFY REEXAMINING *ROE v. WADE*.

Sixteen years ago the Court held that the constitutional right of personal privacy recognized in a line of cases beginning at least fifty years before, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. The Court reached its decision after considering the case with " special care"; the case was briefed and argued one term, and then reargued with extensive briefing (including by a variety of *amici curiae*) the following term. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983) ("*Akron*"). The Court has adhered to the principle announced in *Roe* in a multitude of cases in the ensuing years.[2]

The consistency with which this Court and lower courts have followed *Roe* reflects the extent to which the right to privacy in procreative choice has become an integral part of the law, and of the lives, affairs, and expectations of individuals in our society. Twice before within the last six years, this Court has been asked to reexamine and overrule *Roe*. Both times this Court rightly has refused to do so, citing "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*." *Akron*, 462 U.S. at 420 n.1. *See also Thornburgh*, 476 U.S. at 759. The Court again should refuse to reexamine *Roe*.

"Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). The principle

> ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion.

[2] *See Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) ("*Thornburgh*"); *Akron*, 462 U.S. 416 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975).

> [It] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) ("*Vasquez*"). *See also Phonetele v. AT&T*, 664 F.2d 716, 753 (9th Cir. 1981) (Kennedy, J., dissenting), *cert. denied*, 459 U.S. 1145 (1983) ("[W]e are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society"). Adhering to *stare decisis* makes it possible for citizens to "have confidence that the rules on which they rely in ordering their affairs ... are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Respect for this Court's judgments depends as much upon the perception that they are the products of impartial decisionmaking as that they are right. *See Oregon v. Kennedy*, 456 U.S. 667, 691-92 n.34 (1982) (Stevens, J., concurring); *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

Because of the important values served by *stare decisis*, a proponent of overruling a constitutional precedent bears "the heavy burden" of showing that "changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Thus, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The Court has identified a number of circumstances which can constitute "special justification". Among these are that the precedent is "unsound in principle", that there have been "changes in society or in the law", that the precedent is "unworkable in practice" and has led to inconsistent, unforeseen or anomalous results, or that it "disserves principles of democratic self-governance." *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("*Garcia*"); *Vasquez*, 474 U.S. at 266.

Roe is not unsound in principle or an anomaly on the constitutional landscape. *Roe* falls squarely within this Court's understanding that the liberty secured under the due process clause is a

"continuum which ... includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). The constitutional terrain occupied by *Roe* centers on a "zone of privacy created by several fundamental constitutional guarantees," *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), in matters of marital, familial, and personal privacy relating to child rearing, marriage, and procreation. As this Court stated in *Thornburgh*: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." 476 U.S. at 772. *See also Roe*, 410 U.S. at 152-53; *Doe v. Bolton*, 410 U.S. 179, 209-15 (1973) (Douglas, J., concurring); *Thornburgh*, 476 U.S. at 772-82 (Stevens, J., concurring). The *Roe* Court carefully considered the constitutional principles involved, the rationales of the many preceding marital, familial, and personal privacy cases, and other factors before it reached its conclusion.[3]

The changes in the law or in society necessary to provide the "special justification" needed to overcome *stare decisis* are wholly lacking here. To the contrary, *Roe* is such an integral thread in our legal and social fabric that principles of *stare decisis* are especially compelling. As noted above, *Roe* was the logical expression of a solid line of marital, familial, and personal privacy decisions beginning at least fifty years earlier. Moreover, the right to choose abortion has become an important and settled expectation of men and women alike. To overrule *Roe* now would call into question the entire line of privacy cases, beginning at least with *Meyer v. Nebraska*, 262 U.S. 390 (1923) and extending to *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and the parameters of the sphere of "liberty" under the due process clause. The "strong public interest in stability, and in the orderly conduct of our affairs,

[3] The Solicitor General argues that *Roe* represents a radical departure from older, more deeply rooted doctrine, as evidenced by the prevalence of state criminal abortion laws prior to 1973. S.G. Br. at 13. But the fact that a majority of states had criminal abortion laws on the books was addressed in *Roe*. In its careful analysis of then existing abortion law, the *Roe* Court concluded that most of these state laws were of relatively recent vintage, *i.e.* the latter part of the nineteenth century, 410 U.S. at 138-41, and that the primary concern underlying these statutes was not protection of unborn life, but rather protection of the health of the woman. *Id.* at 151.

that is served by a consistent course of constitutional adjudication" would thus be undermined. *Thornburgh*, 476 U.S. at 780-81 (Stevens, J., concurring).

Nor does *Roe* stand alone now. Since *Roe*, state and federal courts have founded a variety of decisions on *Roe's* privacy principles, for example, concerning the right to refuse treatment (including antipsychotic medication),[4] and the right to die.[5] These could all be called into question if *Roe* were overruled.

Roe has proven to be a workable, predictable framework within which governments can regulate abortion and courts can review such regulations.[6] While it is true that *Roe* has engendered many lawsuits, it is also true that the results have been fairly consistent and uniform. What appellants and the Solicitor General refuse to acknowledge is that the continuing litigation and debate about abortion arises not from any doctrinal or practical weakness in *Roe*, but rather from disagreement by some with the principle that a woman has a constitutionally protected right to decide whether or not to terminate her pregnancy. But, it "should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with

[4] *See, e.g., Rogers v. Okin*, 478 F. Supp. 1342, 1366-68 (D. Mass.), *aff'd in part, rev'd in part, vacated in part*, 634 F. 2d 650 (1st Cir. 1980), *remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *certified questions answered sub nom. Rogers v. Comm'r of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983), *remanded, Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984); *Guardianship of Roe*, 383 Mass. 415, 433 n.9, 421 N.E.2d 40, 51 n.9 (1981).

[5] *See, e.g., In Re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 424 (1977).

[6] *Roe* held that the woman's privacy right could not be interfered with absent a showing of compelling state interests, and that the regulations are narrowly drawn to serve those interests. 410 U.S. at 155. Those state interests are: (1) protecting the health of the pregnant woman, which does not become compelling until the end of the first trimester of pregnancy; and (2) protecting potential life, which does not become compelling until the fetus is considered by the physician to be viable, which usually occurs around the end of the second trimester. *Id.* at 162-63. Therefore, until one of these interests becomes operative, a woman, in consultation with her physician, may effectuate her abortion decision free from interference by the state. *Id.* at 163.

them." *Thornburgh*, 476 U.S. at 759, *quoting Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

Neither appellants or the Solicitor General can point to circumstances justifying the adoption of a new standard of review. As discussed in Point III, *infra*, returning the law to its pre-*Roe* status would engender a public health and law enforcement crisis. The alternatives proposed by the appellants and the Solicitor General are no better. Downgrading the privacy right recognized in *Roe* to a mere "species" of liberty protected by the due process clause, and entitled to minimal scrutiny under a rational basis test, would similarly allow states to adopt widely varying laws, with the same ill effects. The adoption of an intermediate test, whether it be the "unduly burdensome" test articulated by Justice O'Connor in her dissenting opinions in *Akron*, 462 U.S. at 452-66, and *Thornburgh*, 476 U.S. at 814-33, or the Solicitor General's new "unduly burdensome" standard under which "[t]he relevant question would be whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking into account all of the options available to her, including abstinence and contraception," S.G. Br. at 22 n.16, is similarly unacceptable. Such a test is inherently subjective, necessitating judicial value judgments about whether particular burdens are "undue." Individuals, government, and the medical profession all operate with the benefit of sixteen years of experience under *Roe*. Far from lessening litigation or dampening the controversy, a new standard would only increase litigation and fuel controversy.

Nor does *Roe* "disserve principles of democratic self-governance" through judicial usurpation of the role of the state legislatures. *E.g.*, Appellant's Br. at 18; S.G. Br. at 10, 20-24. Rather, as discussed in Point II, *infra*, *Roe* is a classic example of the Court fulfilling its "commission" to determine "when liberty is infringed." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943).

To overrule a decision so frequently reaffirmed, where nothing has changed but the members of the Court, also would undermine the Court's authority and legitimacy. *See generally Florida Dep't of Health*, 450 U.S. at 154 (Stevens, J., concurring). This is particularly true where the settled expectation of society is that a woman has a constitutional right to decide whether to terminate her pregnancy. Countless individuals and governments have relied upon the rights recognized by *Roe* and its progeny in ordering their affairs and lives. By overruling or eroding *Roe* the Court would unnecessarily cause substantial social and institutional injury and chaos and frustrate justified and settled expectations, as discussed in Point III, *infra*.

II. COURTS, NOT STATE LEGISLATURES, ARE THE PROPER ARBITERS OF WOMEN'S FUNDAMENTAL RIGHTS AND THE STATE'S COMPELLING INTERESTS.

Individual liberties, federalism, and separation of powers are the cornerstones of our constitutional system. *E.g.*, *The Federalist No. 51*, at 323 (J. Madison) (Mentor ed. 1961); *Garcia*, 469 U.S. at 568-69 (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.). Appellants and the Solicitor General try to weaken these cornerstones by arguing that the issue of a woman's fundamental right to choose whether to terminate her pregnancy is one of social policy best resolved by the political process of compromise in state legislatures rather than one of balancing competing interests under the federal constitution best resolved by the courts.

The judiciary, not the legislature, is the branch of government that interprets and applies the Constitution. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[7] The Court's role assures that the most fundamental aspects of people's lives — their personal sovereignty — are not interfered with by legislative bodies. *E.g.*, *West Virginia Bd. of Educ.*, 319 U.S. at 638:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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[7] *See also* F. Frankfurter, J. Landis, *The Business of Supreme Court: A Study In The Federal Judicial System* 65 (1927) (federal courts are "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States").

See also Garcia, 469 U.S. at 565 n.8 ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process.") (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.).[8]

Nevertheless, appellants and the Solicitor General argue that state legislatures are more competent than the Court to resolve the moral, religious, philosophical, social, political, and medical questions implicated by abortion regulation. Yet, there is no reason why state legislators are better suited to the task of determining the parameters of individual rights and liberties than the Court. To the contrary, the legislative branch may be a distinctly less reliable guarantor of individual rights and liberties than the courts.[9]

Moreover, it is well-recognized that the Court's duty to interpret and apply the Constitution does not "depend upon [its] possession of marked competence in the field where the invasion of rights occurs." *West Virginia Bd. of Educ.*, 319 U.S. at 639.

> True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century, is one to disturb self-confidence. . . . But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties ... withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40. Indeed, the history of the Court is filled with examples of instances where the Court carried out its duty despite such difficulties.[10]

While the complexities of abortion regulation undoubtedly make judicial resolution difficult, *see Roe*, 410 U.S. at 116, they do not relieve this Court of its constitutional duty. *Roe*, 410 U.S. at 116-17; *Thornburgh*, 476 U.S. at 771-72. Rather, the Court's duty reaches its zenith precisely when the issue, as here, is one of a "sensitive and emotional nature," generating heated public debate and controversy, "with vigorous opposing views" and "deep and seemingly absolute convictions." *Roe*, 410 U.S. at 116. For it is precisely then that majoritarian institutions such as state legislatures are the least reliable guarantors of individual rights and liberties. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483; *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). The danger of leaving this type of decision to majoritarian institutions is strikingly illustrated by Governor Rockefeller's comments in 1972 when he vetoed the New York Legislature's repeal of its 1970 abortion law reform:[11]

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[8] The Solicitor General's reliance on a recent book which critically compares American and European abortion regulations is misplaced. *See* S.G. Br. at 23-24, *citing* M.A. Glendon, *Abortion and Divorce in Western Law; American Failures, European Challenges* (1987) [hereinafter Glendon, *Abortion and Divorce*]. For example, West German constitutional treatment of the abortion question arises out of a civil law culture with fundamentally different conceptions of the rights of individuals vis-a-vis the state. *See* Wessel and Segal, Book Review, 8 Prob. L.J. 349 (1988). [hereinafter Wessel and Segal]. *See also* Fineman, Book Review, 55 U. Chi. L. Rev. 1431, 1433, 1438, 1440-43 (1988).

[9] *See* Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Geo. L. Rev. 789, 794 (1985) ("The judicial process may have its flaws, but it aspires to a degree of rationality, including analytical reasoning, that one does not associate with the legislative process. The limits of time, the pressures of lobbyists, the temptations of expediency, undue reliance on staff, and other distractions often have more to do with the final shape of legislation than any thinking about constitutional issues").

[10] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) (inclusion of Nativity scene in city's annual Christmas display in a park owned by a nonprofit organization does not violate First and Fourteenth Amendments); *Milliken v. Bradley*, 418 U.S. 717 (1974) (remedy which may be applied by federal court for single school district *de jure* school segregation); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty statutes of Texas and Georgia violated Eighth and Fourteenth Amendments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Arkansas' "anti-evolution" statute violates First and Fourteenth Amendments); *Brown v. Bd. of Educ.*, 347 U.S. 483 (separate but equal schools for blacks and whites violate Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law forbidding teaching of foreign language in school invades the liberty guaranteed by the Fourteenth Amendment). *See also Bd. of Educ. v. Pico*, 457 U.S. 853, 861 (1982) (referring to the "difficult terrain" which *Meyer*, *supra*, and *Epperson*, *supra*, traversed).

[11] *See* N.Y. Penal Law § 125.05(3) (McKinney 1987), permitting licensed physicians to provide abortions to consenting women less than twenty-four weeks pregnant.

> [t]he extremes of personal villification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Governor's Veto Messages, (1972), *reprinted in* N.Y.S. Legis. Annual-1972, at 423-24.

As chief law enforcement officers in their respective states, *amici* are interested in protecting the fundamental rights of the people. By respecting the role of the judiciary, the states help preserve a sphere of personal liberty for the people, free from encroachment by any government. *Amici* value and often advocate the virtues of federalism,[12] one of which is that states may serve as laboratories for experimenting with new social and economic ideas. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But there is a critical difference between a state experimenting within a sphere of power ceded to government by the individual and the state usurping those powers and rights reserved to the individual.

Thus, a state law infringing a fundamental individual liberty interest under the Fourteenth Amendment cannot be upheld on federalism grounds. *See New State Ice*, 285 U.S. at 279-80. After all, "[t]here are limits to the extent to which a legislatively represented majority may conduct ... experiments at the expense of the dignity and personality" of the individual. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring). Because "[f]ew decisions are more personal and intimate, more properly private, or more basic to human dignity and autonomy, than a woman's decision ... whether or not to end her pregnancy," *Thornburgh*, 476 U.S. at 772, the matter should not be a candidate

[12] *See, e.g.*, brief *amici curiae* of California, *et al.* in *Garcia*, 469 U.S. 528, 529.

for state by state experimentation and should remain within the province of the Court.

III. A REVERSAL OR MODIFICATION OF *ROE v. WADE* WOULD JEOPARDIZE THE PUBLIC HEALTH, SAFETY AND WELFARE AND UNDERMINE STATE LAW ENFORCEMENT EFFORTS.

Countless individuals have relied upon the rights secured by *Roe v. Wade* and its progeny in ordering their affairs and lives. The liberalization of abortion laws has brought out of the shadows what was once a furtive and dangerous procedure, making it possible for women to exercise procreative choice safely, with minimal danger to their lives and health. Experience teaches that women who want abortions will not be deterred by restrictive laws. Thus, reversal of *Roe* will not end abortion, but drive it back underground, with all of the attendant adverse public health effects. Returning abortion to the individual states will result in the emergence of a patchwork of laws,[13] and the imposition of a tremendous burden on those states which would continue to allow women to choose abortion in the face of decisions by other states not to do so. After sixteen years of constitutional protection, judicial invalidation of a right which directly affects a woman in the most private aspect of her life will foster a nation of outlaws illicitly seeking and providing abortion services. Law enforcement officers such as the *amici* Attorneys General will be placed in the position of having to enforce virtually unenforceable laws.

A. *Health Consequences of a Reversal of Roe v. Wade*

The consequences for maternal health in this country will be devastating if the Court reverses *Roe v. Wade*.[14] Women living in

[13] *See* J. Legge, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* 118-19, Table 7.1 (1985) (hereinafter Legge) (describing eight types of pre-*Roe* abortion laws). In addition, post-*Roe* state court decisions may impose state constitutional requirements on abortion. *See, e.g., Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981) (woman has right under due process clause of Massachusetts constitution to choose to terminate her pregnancy).

[14] No country except Rumania, which legalized abortion in 1957 but severely restricted its availability in 1966, has reversed or effectively reversed a liberalized

(Footnote continued)

states which severely restrict abortion will not cease to obtain or attempt to obtain abortions; rather they will find ways to circumvent restrictive laws, thereby endangering their health and safety.[15] Abortion-related deaths, injuries and illnesses will surge.[16]

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abortion policy. Following that shift, Rumania experienced a sharp increase in abortion-related deaths and infant mortality. Legge, *supra* note 13, at 58-59, 70, 152.

[15] The immediate effect of legalization was not to significantly increase the numbers of women obtaining abortions, but rather to guarantee that the number of abortions previously clandestinely obtained, were instead obtained under safe, legal medical conditions. *See* Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience With Legal Abortion in New York State* 17, 23 (S. Henshaw, J. Van Vort, eds. 1980) [hereinafter Guttmacher]. Other states' statistics are similarly revealing. *Id.*; *see also People v. Belous*, 71 Cal. 2d 954, 965-966, 458 P.2d 194, 201 (1969), *cert. denied*, 397 U.S. 915 (1970) (prior to California's passage of Therapeutic Abortion Act of 1967, between 35,000 and 100,000 criminal abortions were performed annually in California); *People v. Barksdale*, 8 Cal. 3d 320, 330-31 nn. 7 & 8, 503 P.2d 257, 265 nn. 7 & 8 (1972) (by 1970, approximately 116,749 legal abortions were performed in California – about the same number of abortions, adjusted for population growth, that occurred before legalization). Similarly, only a 10% rise was reported for Oregon. Guttmacher at 23. Nationwide, an estimated one million illegal abortions were performed annually in the years before *Roe*, two-thirds of which were on married women. *See* The President's Comm'n on Law Enforcement & Admin. of Justice, Task Force Report: The Courts 105 (1967) [hereinafter Task Force Report]; Centers for Disease Control, Morbidity and Mortality Weekly Report, vol. 37, no. 47, "Abortion Surveillance: Preliminary Analysis – United States, 1984, 1985," 713-14 (Nov. 25, 1988), U.S. Dep't of Health and Human Serv./Pub. Health Serv. HHS Pub. No. (CDC) 89-8017 [hereinafter CDC].

[16] Legalization of abortion significantly reduced abortion-related deaths and illness. Studies in California and New York showed that criminal abortion was the leading cause of maternal deaths, the most common victims married women with several children who attempted to self-abort. H. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 3 (1969) [hereinafter Ziff]. After abortion was legalized in New York State, deaths related to abortion declined sharply. Between 1967 and 1969, when abortion was illegal in New York, and 1970-1972, when it was legal, the average annual rate of abortion-related deaths fell by 51 percent. Legalization of abortion in New York State also reduced the number of women admitted for infected, incomplete and spontaneous abortions. *Id.* Similarly, following *Roe*, the number of abortion-related deaths nationwide dropped significantly. By 1982 the number of abortion-related deaths had dropped to 50 percent of those in 1972. Lebolt, Grimes, Cates, *Mortality From Abortion and Childbirth*, 248 J. A.M.A. 188, 191 (July 9, 1982).

Experience shows that poor and minority women will suffer the most.[17]

The adverse health consequences of a reversal of *Roe* would extend even to the residents of those states that continue to permit women to freely obtain abortions. As discussed below, the health-care systems of these states would be burdened by an influx of non-residents seeking to circumvent the restrictive laws in their own states. Moreover, limited state resources would be diverted to enforce laws protecting women from deceptive, health-endangering schemes that play on the desperation of women seeking to terminate unwanted pregnancies.

1. *States Where Abortion Remains Legal Can Expect An Influx of Out-Of State Residents Seeking Medical Services.*

An extraordinary burden will fall upon the states that continue to provide women with the right to choose to terminate their pregnancies. Such states can anticipate an influx of non-residents seeking the abortion or related medical services prohibited in their home states. New York State, for example, was flooded with non-residents seeking abortion services following its passage of a bill effective July 1, 1970 permitting licensed physicians to provide these services to consenting women less than twenty-four weeks pregnant. *See* N.Y. Penal Law § 125.05(3) (McKinney 1987).[18] Between

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[17] Studies during the 1960's in New York and California (before abortion was legal in either state), show that in New York twice as many abortion related fatalities occurred among nonwhites as among whites, while in California low income women were the most frequent abortion fatalities. Ziff, *supra* note 16, at 11. What was said in 1969 would be equally true in 1989: "This double standard, nurtured by present statutes, is incompatible with any notion of justice. It reflects poorly on the law's concern with the welfare of disadvantaged citizens at a time when millions of dollars are being spent to equalize the medical care available to all people in this country." *Id.*

[18] Patker, O'Hare, Nielson, Suigir, *Two Years' Experience in New York City with the Liberalized Abortion Law-Progress and Problems*, 63 Am. J. Pub. Health 524 (1973) [hereinafter Patker]. New York's experience between 1970 and 1973 is not unique; women throughout the world have attempted to circumvent abortion restrictions in their own jurisdictions. *See* R. Riddick, *Making Choices: The Abortion Experience of Irish Women* 11-14 (1988) [hereinafter Riddick]. Britain, for example, experienced an influx of foreign women seeking abortion services

(Footnote continued)

July 1970 and June 1972, 65.7% of the approximately 400,000 abortions performed in New York City were performed on non-residents.[19] This number dropped precipitously after *Roe*.[20] If the Court overturns *Roe*, an even greater number of out-of-state women can be expected to seek abortions in states that continue to allow it, given the settled expectations about legal abortion since *Roe* was decided, and its widespread acceptance.[21]

2. *The Burden on Health Care Systems*

The sheer numbers of non-resident women seeking abortions or related medical services in states where it remains legal will strain already overburdened health care systems.[22] Many out-of-

following its liberalized abortion act in 1967. In the early to middle 1970's, an estimated 33% of all abortions in Britain were performed on foreign women from countries prohibiting abortions. Legge, *supra* note 13, at 79; *see, e.g.*, Riddick at 11 (nearly 4,000 women from the Republic of Ireland, in which abortion is illegal, obtained abortions in England in 1987).

[19] Patker, *supra* note 18, at 524. Statistics for all of New York State are comparable to those for New York City. According to statistics compiled by the N.Y.S. Department of Health, between 1971 and 1972 a total of approximately 538,000 women obtained abortions, of whom approximately 327,000 — or 60% percent — were non-residents.

[20] Less than half the number of non-residents who obtained abortions in New York State in 1972 obtained abortions in New York State in 1973. Moreover, between 1974 and 1987, non-residents averaged merely 9.8 percent of the total number of women obtaining abortions in New York State.

[21] Nationwide, the number of reported abortions increased from approximately 745,000 in 1973 to 1.58 million in 1981 to 1.6 million in 1985. *See* Alan Guttmacher Institute, *Abortion Services in the United States, Each State and Metropolitan Area, 1984-1985* 16 (S. Henshaw, J. Van Vort, ed. 1988) [hereinafter Guttmacher 1984]; CDC, *supra* note 15. *See also* N.Y. Times, Oct. 6, 1988, § B, at 18, col. 1 (between 1977 and 1987, nearly 3 out of every 100 American women 15 to 44 had an abortion).

[22] This Court has held that a state where abortion is legal may not deny an abortion, or related medical care, to a non-resident. *Doe v. Bolton*, 410 U.S. at 200. During 1970-71, almost 1000 non-residents were treated at New York City hospitals despite hospital residency requirements. Harris, O'Hare, Patker, Nielson, *Legal Abortion 1970-71—The New York City Experience*, 63 Am. J. Pub. Health 409, 410 (1973). The influx of non-residents could be particularly problematic for a state like Massachusetts where abortion is legal under the state constitution's due process clause, *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E. 2d 387, *(Footnote continued)*

state women will likely seek abortions late in their pregnancies due to their inability to obtain proper counseling in their home states or a lack of resources.[23] Fear of prosecution will likely also contribute to health-endangering delays. As a result, abortion providers will be faced with an increase in the number of late, more complicated, and thus more dangerous abortions.[24] States will also have to handle the emergency medical situations posed by injuries and illnesses suffered by women who attempt to self abort or seek the services of illegal abortionists.

3. *The Increased Burden on Enforcement and Regulatory Agencies*

If *Roe* is overturned, it can be anticipated that profiteers in states that permit abortions will exploit the desperation of women seeking abortions or related medical services. For example, after Britain began permitting abortion, taxi drivers in London exacted fees for referring and transporting foreign women to abortion facilities upon the women's arrival in London.[25] Similarly, following the

and the state constitution has been interpreted to require public funding, *i.e.*, Medicaid, for abortions. *Compare Harris v. McRae*, 448 U.S. 297.

[23] Non-residents obtaining abortions in New York, for example, historically have been more likely to obtain abortions after twelve weeks than New Yorkers. Guttmacher, *supra* note 15, at 19. Inability to locate a provider and make arrangements to obtain an abortion are significant factors leading to delay. Torres, Forrest, *Why Do Women Have Abortions?* 20 Fam. Plan. Persp. 169, 174-75 (July/Aug. 1988). Delay also escalates costs, thereby resulting in even further delay. Guttmacher, *supra* note 15, at 19; *see also* Henshaw, Forrest, Blaine, *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119,126 (May/June 1984) (abortion fees are significantly higher for pregnancies past 12 to 14 weeks); Henshaw, Forrest, Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (Mar./Apr. 1987) [hereinafter cited as Henshaw].

[24] *See generally* J. Wilson, R. Carrington, E. Reid, *Obstetrics and Gynecology* 207 (8th ed. 1987); Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (Nov./Dec. 1984) (the risk of death from abortions performed at 16 weeks is 24 times greater than from abortions performed at 8 weeks or earlier). Courts have uniformly recognized that "time, of course, is critical in abortion," *Doe v. Bolton*, 410 U.S. at 198; *see, e.g., Akron*, 462 U.S. at 450-51.

[25] Legge, *supra* note 13, at 79.

adoption of New York's less restrictive abortion law, deceptive referral services multiplied in and out of the state.[26] Unaware of free referral services, including a clergy-run service which operated in twenty states, many women turned to profit-making referral agencies that promised not only referrals to reliable providers at the lowest cost, but transportation services and counseling, as well.[27] None disclosed the excessive portion of the fee the agency retained, or the availability of free referral services.[28]

Not only did the agencies realize exorbitant profits, but they often endangered the health of the women utilizing their services.[29] Personnel at referral agencies without medical training would essentially diagnose the woman – often through a telephone call – and then refer her to a provider, or alternatively, subcontract with a second agency that made the final arrangements with the providers.[30] The provider thus was often not informed of the woman's condition and sometimes was unprepared to assist her.[31]

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[26] *See generally* Edmiston, *Report on the Abortion Capital of the Country: New York City*, N.Y. Times, Apr. 11, 1971 (Magazine), at 11, 37-42 [hereinafter Edmiston]; L. Lader, *Abortion II: Making the Revolution* 164 (1973) [hereinafter Lader]; N.Y. Times, Feb. 10, 1971, at 20, 45, col. 1. The agencies advertised their services in various ways, including billboards, blimps and banners, on Florida beaches, and classified advertisements in local newspapers. Newsweek, July 19, 1971, at 51.

[27] Lader, *supra* note 26, at 164.

[28] A. Morton, *Enemies of Choice: The Right to Life Movement and its Threat to Abortion* 57 (1981) [hereinafter Morton]; N.Y. Times, Feb. 10, 1971, at 45, col. 1; Edmiston, *supra* note 26, at 42.

[29] Edmiston, *supra* note 26, at 42.

[30] *Id.* at 38. As a result of a lawsuit brought by New York's Attorney General, the New York courts found that one such agency was illegally engaged in the practice of medicine in violation of the New York Education Law, as well as illegal fee splitting. *State v. Abortion Info. Agency, Inc.*, 69 Misc.2d 825, 829 (Sup.Ct. N.Y. Co. 1971), *aff'd*, 37 A.D.2d 142, 145 (1st Dept. 1971), *aff'd*, 30 N.Y.2d 779, 285, N.E.2d 317 (1972).

[31] Edmiston, *supra* note 26, at 38. For example, a Michigan woman checked into a hospital near Kennedy airport in August of 1971 after payment of $900 to a referral agency advertised in a national magazine. The referral agency subcontracted the referral to a second agency but failed to advise the second agency that the woman required a saline abortion. Uninformed, the doctor performed an unnecessary hysterectomy. *Id.* at 38, 42.

Other women paid large fees to referral agencies only to be told by providers that the price was even greater than the payment already rendered.[32]

Although states which continue to allow women to obtain abortions can enact and enforce laws preventing fraudulent advertising and referral, an overturning of *Roe* would encourage such health-endangering chicanery.[33] In any event, notwithstanding the grave impact such schemes would have on the states that continue to permit abortion, they will have little or no ability to curb deception occurring outside their borders.

It can also be anticipated that a reversal of *Roe* will increase the demand for abortion services in those states that keep it legal, thus precipitating a proliferation of free-standing abortion clinics in those states.[34] To ensure the competence of these clinics and to safeguard the health and safety of the women relying on them, vigorous enforcement of regulatory requirements will be necessary.[35] Such increased regulation will significantly burden

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[32] *Id.* at 37, 42 (18 year old from Boston who had traveled to New York forced to sell blood, sleep in parks and beg after provider informed her that abortion would cost $275 more than she had already paid).

[33] *See, e.g.*, note 30, *supra* (discussing N.Y.S. Attorney General's enforcement of Education Law). It can further be expected that if *Roe* is reversed, states that continue to permit abortion will also experience an increase in deceptive advertising by clinics claiming to perform abortions, but which only provide antiabortion counseling, and do not so specify in their advertisements. *See, e.g., Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D.), *aff'd*, 391 N.W.2d 627 (N.D.), *cert. denied*, 476 U.S. 1108 (1986).

[34] *See* Patker, *supra* note 18, at 525 (in the first year abortion was legalized in New York City, most non-residents received services from proprietary hospitals. In the second year, most obtained abortions from free-standing clinics). Today, free-standing clinics are the major providers of abortions nationwide, with hospitals responsible for only 13 percent of the procedures performed in 1985. Henshaw, *supra* note 23, at 63. Nevertheless, New York City's experience between 1970 and 1971 suggests that municipal and state hospitals may shoulder some of the increased need. *See* note 22, *supra*.

[35] Review and assurances of providers' competence will be particularly important if *Roe* is overturned, since medical personnel employed in states that permit abortion, but who were trained in hospitals and other medical facilities in states that prohibit abortion, may not receive adequate training in abortion procedures.

(Footnote continued)

limited state health regulatory resources. Moreover, to the extent that current state health planning and regulatory decisions are now predicated on *Roe*, continuity and effectiveness in future enforcement would be extremely difficult.[36] Women's health and safety may thus be further jeopardized.

Finally, at the same time that an overturning of *Roe* will cause the number of non-resident women seeking abortions in states that continue to permit the procedure to escalate, so too could it trigger an escalation in violent and illegal activity aimed at the clinics in these states that continue to perform abortions. *Amici* welcome peaceful and constitutionally protected expression of diverse views but they fear their states becoming focal points for illegal activities, such as bombings, arson and blockades, that courts in many states have deemed necessary to enjoin,[37] that require the expenditure

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Lack of training can pose grave risks to women's health. *See* N. Davis, *From Crime To Choice: The Transformation of Abortion in America* 86 n.4 (1985); *see also id.* at 77.

[36] *See, e.g., Westchester Women's Health Org. v. Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by the Supreme Court); *Schulman v. New York City Health & Hosp. Corp.*, 38 N.Y.2d 234, 342 N.E.2d 501 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe v. Wade*).

[37] *See, e.g., New York State Nat'l Org. for Women v. Terry*, No. 88 Civ. 3071 (S.D.N.Y. 1989) (1989 WL 5742) (permanently enjoining antiabortion protestors from blockading clinic entrances and awarding $25,000 fines per day for violation of order, in addition to penalities to City of New York for increased costs for failure to notify city in advance of location of demonstration); *Nat'l Abortion Fed'n v. Operation Rescue*, No. 89-1189 AWT (BX)(C.D. Cal. March 15, 1989) (injunction); *Aradia Women's Health Center v. Operation Rescue*, No. C88-1539R (W.D. Wash. Jan. 10, 1989) (preliminary injunction); *Parkmed Co. v. Pro-Life Counselling*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dept. 1982) (enjoining 11 demonstrators' interference with access to a clinic); *O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (2d Dept. 1978); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987)(upholding injunction); *Moyal v. Thompkins*, No. 278465 (Super. Ct. Cal. May 16, 1986) (preliminary injunction against trespass, blocking access, harassment); *Oakland Feminist Women's Health Center v. Thompkins*, No. 276031 (Super. Ct. Cal. Aug. 16, 1985) (preliminary injunction against blocking access and harassment); *Finkel v. Birthright Center*, No. C-3266-83 (Super. Ct. N.J. Aug. 21, 1985); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. App. 1984); *Clinic for Women, Inc., v. Citizens for Life*, No. C83-2651 (Cir. Ct. Indiana, Marion Cty., Aug. 31, 1984).

of state funds to control, and that further jeopardize the health and safety of women.[38]

B. *The Burden On Law Enforcement Will Also Increase Where Abortion is Prohibited.*

The evidence from the pre-*Roe* period suggests that where abortion is illegal, substantial numbers of women seek the procedure in other states where it is legal, as discussed above, or procure illegal abortions or attempt the procedure themselves.[39] The latter alternatives resulted in a substantial number of maternal deaths and injuries in the pre-*Roe* period.[40] Compliance with new state laws severely restricting or prohibiting abortions may be expected to be even lower than before *Roe v. Wade* because in the intervening sixteen years women have been able to exercise control over their reproductive capacity.

While wealthier women may be able to seek legal abortions elsewhere, poorer women, a disproportionate share of whom are members of minority groups who do not have the option to travel or the luxury of private physicians, will risk death, mutilation, infections, sterility, and other serious complications at the hands

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[38] Bomb threats, arson attacks and blockades not only threaten the health and safety of clinic personnel and patients, passersby and neighbors, but have made it difficult, if not impossible, for clinics to obtain insurance coverage. *Abortion Clinics Find Insurance Difficult to Obtain*, Am. Bus. News, Feb. 8, 1985, at 20, col. 1; Bus. Ins., Jan. 21, 1985, at 3, col. 2.

[39] The experience in European countries, for example, demonstrates that the severity or leniency of a country's abortion law is unrelated to the frequency of abortion. *See* Wessel and Segal, *supra* note 8, at 353-54, Glendon, *Abortion and Divorce*, *supra*, note 8, at 14-15, 59-60. For example, irrespective of the legality or illegality of abortion, in the countries surveyed, women could obtain first trimester abortions. Wessel and Segal, *supra* note 8, at 353. In addition, the strictness of a country's law has little to do with rates of abortion. Thus the Netherlands, with a lenient statute, experiences a low rate of abortion, and Rumania with a very strict law, has a rate higher than the U.S. *Id.* at 353-54; Glendon, *Abortion and Divorce*, *supra* note 8, at 59-60.

[40] *See, e.g.*, Task Force Report, *supra* note 15, at 105-07; Ziff, *supra* note 16, at 6-8, 11; Schwartz, *Morals Offenses and the Model Penal Code*, 63 Colum. L. Rev. 682 (1963).

of illegal abortionists or at their own hands. Task Force Report at 105-07; Ziff at 6-9. The widespread demand for abortion will be met both by "some highly respectable physicians [who] regard the law as an injustice and want to protect their patients against incompetent abortionists," and by clandestine, swiftly operating, highly organized abortion "rings" or "mills" with people "ready to run the risk to earn the high fees." Task Force Report at 105; Ziff at 9.[41] Bans on abortion "tend to foster organized forms of criminality which, with alarming business efficiency and the use of systematic means of coercion, violence, and governmental corruption, continue to supply the persistent demand . . . with the loss of a substantial number of lives as a consequence." Task Force Report at 107.

Enforcement of restrictive abortion laws will be difficult for several reasons. Detection, surveillance, apprehension, and proof will be problematic because of the frequent absence of a complaining victim, the private, consensual nature of the crime, the federal and state constitutional privileges against self-incrimination,[42] and new abortifacients such as the morning after pill and R.U. 486.[43] Moreover, the reallocation of the resources necessary to attempt to enforce such laws will divert the resources of the police from protecting the public from other crimes, such as drug use and its attendant violence, and cause a "loss of morale and self-esteem among police who are obligated to engage in tasks which must seem to them demeaning or degrading or of little relevance to the mission of law enforcers." Task Force Report at 107.

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[41] The prevalence of abortion "mills" and "rings" once led police to consider criminal abortion the third largest illegal endeavor in the country, after only gambling and narcotics. *See* Schur, *Crimes Without Victims* 25 (1965), cited in Ziff, *supra*, note 16, at 5 n.30.

[42] Task Force Report, *supra* note 15, at 106; Ziff, *supra* note 16, at 8; Constitutional Aspects of the Right to Limit Childbearing, A Report of the United States Comm'r on Civil Rights, 94-95 (April 1975).

[43] *See generally* N.Y. Times, Sept. 29, 1988, § B, at 11, cols. 4-5 (describing drugs that induce abortion).

Given divided community opinion prevailing in many states, there may be a lack of uniform enforcement. Selective prosecution and inconsistent jury verdicts will undermine *amici*'s efforts to foster uniform, consistent law enforcement in their states. In addition, selective prosecution and inconsistent verdicts for violation of unpopular laws will foster "cynicism and indifference to the criminal law and its agencies of enforcement," Task Force Report at 106, and it will tend "to contribute to antagonism and resentment toward those who enforce the law." *Id.* at 105; *see also* Ziff, at 8-10.[44]

In sum, the heavy social costs of permitting states to recriminalize abortion would undermine the *amici*'s interests in protecting the public health, safety and welfare, and in preserving the integrity of state criminal justice systems.

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[44] Recent history teaches that laws regulating private behavior where no consensus exists create problems for those that have to enforce them. Finding widespread lawlessness and concluding that Prohibition was unenforceable, a Commission headed by George Wickersham, the U.S. Attorney General under President Taft, which included a former Secretary of War, a former state Chief Justice, a Circuit Judge, two District Judges, three practicing lawyers, the Dean of the Harvard Law School and the President of Radcliffe, wrote

> a law will be observed and may be enforced only when and to the extent that it reflects or is an expression of the general opinion of the normally law-abiding elements of the community, ... It is therefore a serious impairment of the legal order to have a national law upon the books theoretically governing the whole land, and announcing a policy for the whole land which public opinion in many important centers will not enforce.

Nat'l Comm'n on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws of the United States*, no. 722, 71st Cong., 1st Sess. (Jan. 7, 1931), *quoted in* Levane, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, 12 Cont. Drug Problems 63, 75-76 (Spring 1985).

CONCLUSION

For these reasons, the *amici* Attorneys General respectfully request this Court to decline to reexamine *Roe v. Wade*, or in the alternative, to reaffirm that decision.

Dated: New York, New York
March 30, 1989

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AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE *AMICI CURIAE* WOMEN WHO HAVE HAD ABORTIONS AND FRIENDS OF *AMICI CURIAE* IN SUPPORT OF APPELLEES

(Names of 2887 *Amici Curiae* and 627 Friends of *Amici Curiae* Set Forth in Appendix A)

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2. The Names of the Friends of Amici Curiae

APPENDIX B B1

Full Text of Letters of the Amici Curiae Quoted in the Brief

APPENDIX C C1

Full Text of the Letters of the Friends of Amici Curiae Quoted or Cited in the Brief

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NOW v. Scheidler, et al., No. 86 C7888 (N.D. Ill., filed Jan. 30, 1989) 11

People of California v. Stewart, No. M508197, slip op. (Cal. Mun. Ct. San Diego Cty., filed Feb. 26, 1987) 44

Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988) . . . 4, 62

Roe v. Wade, 410 U.S. 113 (1973) .4, passim

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 9, 64

West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1942) 10

STATUTES

Mo. Stat. Ann. §1.205.1 . . . . . 53, 62

Mo. Stat. Ann. § 188.029 63

Mo. Stat. Ann. § 188.205 63

Mo. Stat. Ann. § 188.210 63

Mo. Stat. Ann. § 188.215 63

LEGISLATIVE SOURCE MATERIALS

Bluebook, Women in the Work Force: Pay Equity: Hearing on S. 98-1050 before the Joint Economic Committee, 98th Cong. 2nd Sess. 9-14 (1984) 37

ADMINISTRATIVE SOURCE MATERIALS

43 Fed. Reg. 4231 (1981) 55

Bureau of Census, U.S. Dep't of Commence, Child Support and Alimony: 1985 Current Popluation Reports, Series P-23, No. 152 (1987). 39

Bureau of the Census, U.S. Dep't of Commerce, Money Income of Families and Persons in the United States: 1979-1980;

Current Population Reports P-60, No. 129, table 53 37

FBI, Uniform Crime Reports for the United States, (1987) 59

U.S. Commission on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children (1983) 40

U.S. Commission on Civil Rights, 1 Comparable Worth: Issues for the 80's, 200 (1984) 37

U.S. Dep't. of Commerce, Statistical Abstracts of the United States 1987 . . 57

Women's Bureau, U.S. Dep't. of Labor, Facts on Working Women No. 86-2 (1986). . . . 38

OTHER LEGAL AUTHORITIES

Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973) 6

S. Estrich, Real Rape (1987) 59

Law, Women, Work, Welfare, and the Preservation of Patriarchy, 131 U. Penn. L. Rev. 1249 (1983) 33

C. MacKinnon, Privacy v. Equality in Feminism Unmodified (1987) 55

Note, Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 NYU Rev. L. & Soc. Ch. 277 (1987-88) 44

Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979) 52

D. Richards, Toleration and the Constitution 268 (1986) 6

L. Walker, The Battered Woman (1979) . . 42

L. Weitzman, The Divorce Revolution (1985) 39

Williams, Deficiencies in Child Support: Consequences for Children and Implications for Courts, 12 St. Ct. J. 4 (1988). . . . 39

OTHER AUTHORITIES

ACOG Committee Opinion No. 55, "Patient Choice: Maternal-Fetal Conflict" (Oct. 1987) 45

Asch, Reproductive Technology and Disability in Reproductive Laws for the 1990's 59 (N. Taub & S. Cohen eds. 1988) 47

Atrash et al., Legal Abortion Mortality and General Anesthesia, 158 Am. J. Obst. Gyn. 420-424 (1988) 24

Burnhill, Intrauterine Contraception in Fertility Control 271 (Carson et al. eds. 1985) 56

Burros, Women: Out of the House But Not Out of the Kitchen, N.Y. Times, Feb. 24, 1988, at A1 34

Cates & Rochat, Illegal Abortion in the United States: 1972-1974, 8 Fam. Plan. Persp. 2 (1976) 24, 25

Cates et al., Legalized Abortion: Effect on National Trends of Maternal and Abortion-Related Mortality (1940-1976), 132 Am. J. Ob. & Gyn. 211 (1978) . . 17, 18

Cates, Legal Abortion: The Public Health Record, 215 Science 1586 (1982) . . 12, 13

Cruver, Husbands and Housework: It's still an Uneven Load, USA Today, Aug. 20, 1986, at 5D. 34

R. Dobash & R. Dobash, Violence Against Wives (1979) 42

Edelman, Maternal and Child Health Care: A Deepening Crisis, 1985 N.Y.S. J. of Med. 128 44

D. Finklehor & K. Yllo, Licence to Rape: Sexual Abuse of Wives (1985) 59

L. Genevie & E. Margolies, The Motherhood Report: How Women Feel About Being Mothers (1987) 33

C. Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982) 28, 29

Henshaw & Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158 (1985) 56, 58

Henshaw et al., A Portrait of American Women Who Obtain Abortions, 17 Fam. Plan. Persp. 90 (1985) 51

Hilberman, Overview: The "Wife Beater's Wife" Reconsidered, in The Gender Gap in Psychotherapy 213 (P. Rieker and E. Carmen eds. 1984) 42

Hofferth & Moore, Women's Employment and Marriage, in The Subtle Revolution: Women At Work (R. Smith ed. 1979) 34

Johnson, Contraception: The Morning After Pill, 16 Fam. Plan. Persp. 2661 (1984) 55

S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women (1983) 36

Kleiman, "The Last Taboo: Case on L.I. Pierces the Silence on Incest," N.Y. Times, Sept. 28, 1987, at A1 61

Kleinman et al., Use of Ambulatory Medical Care by the Poor: Another Look at Equity, 19 Med. Care 1011 (1981) 44

Kolder et al., Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192, 1194 (1987) 54

L. Lader, Abortion 2 (1966) 12

R. Langley & R. Levy, Wife Beating: The Silent Crisis (1977) 42

L.A. Times, Oct. 20, 1988 at __, ... 49

J. Legge, Abortion Policy (1985) 24

E. Messer & K. May, Back Rooms: Voices from the Illegal Abortion Era (1988) 12

H. Morgentaler, Abortion and Contraception (1982) 14

Morris & von Wagner, Interception: The Use of Postovulatory Estrogens to Prevent Implantation, 115 Am. J. Obst. & Gyn. 101 (1973) 55

National Abortion Federation, Incidents of Violence Disruption Against Abortion Providers (1977-88) 11

National Women's Political Caucus, National Directory of Women Elected Officials (1987) 9

N.Y. Times, Dec. 4, 1971, at 37 24

N.Y. Times, Mar. 15, 1989 at A16 40

N.Y. Times, May 8, 1962, at 5 24

S.L. Romney, et al., Gynecology & Obstetrics: The Health Care of Women, (2nd ed. 1981) 43

Rosenberg & Rosenthal, Reproductive Mortality in the United States: Recent Trends and Methodologic Considerations, 77 Am. J. Pub. Health 833 (1987) . . . 24, 25

D. Russell, Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment 180-94 (1984) 61

R. Schwarz, Septic Abortion 7 (1968) 12, 13

Spitz et al. "Third--Trimester Induced Abortion in Georgia, 1979 and 1980, 73 Amer. J. of Public Health 594 (1983) . . 52

Tietze & Lewit, Epidemiology of Induced Abortion in, Abortion and Sterilization 17

Torres & Forrest, Why do Women Have Abortions?, 20 Fam. Plan. Persp. 169, (1988) 32

D. Whitcomb, E. Shapiro and L. Stellwagen, When the Victim Is a Child: Issues for Judges and Prosecutors 4-5, 84 (1985) 61

INTEREST OF AMICI CURIAE [1]

> I chose an abortion.
>
> I write now, not because my experience was particularly grim - it wasn't and that's the point. I was able to get a safe legal abortion, unlike my maternal great-grandmother who aborted herself with a knitting needle. I got care...counseling... advice from clinic staff. My great-grandmother got none of these. Perhaps the worst part of her experience - the most trenchant lesson - is the silence surrounding it. My mother whispered the story to me late one night, still afraid L-278

A. The Amici Curiae

We, the amici curiae submitting this brief, are not organizations, religious groups or politicians. We are women. We are among the millions of American women who have faced an unplanned or problematic pregnancy and decided that having an abortion, legal or illegal, was the right

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[1]. The parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

choice for us, our loved ones and our lives. Some of us have given our names; others of us have not. Those of us who disclose our names sacrifice our privacy in order to preserve our liberty, and the liberty of all women to choose to have safe, legal abortions. Many of us helped to write this brief by writing the letters[2] which informed it and which are extensively quoted in it. These letters describe our experiences of abortion and our decision-

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2. The letters of the amici curiae are lodged with the Clerk of this Court. They are filed in categories. The first contains 568 letters written by those of us who have had an abortion and appear before this Court under our real names. The second contains 137 letters written by those of us who have had an abortion and appear under the pseudonym, Jane Roe. The letters as lodged will be referenced by these categories as "Letter" ("L-") and "Roe Letter" ("RL-") respectively. In the lodged letters, the category (L) is coded with sequential numbers and the category (RL) is coded "X" plus a sequential number. Letters quoted in the brief are reproduced in full in Appendix B.

making processes in choosing to have an abortion.

B. Friends of the Amici Curiae

We are individuals, women and men, who have not had abortions but wish to join the courageous women who have, and to explain to the Court how critically important it is to women, their loved ones, friends, colleagues, and the people who provide them with the health care they need, that abortion remain legal, safe and available. As the friends of the amici curiae, we have also helped to write this brief by writing about the impact upon our lives of the experiences of our loved ones and friends who had legal or illegal abortions.[3]

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3. The letters cited or quoted in this brief written by friends of the amici curiae ("FL-") are reproduced in full in Appendix C.

Together we urge this Court to affirm the decision of the court of appeals below, Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988), striking sections of the Missouri statute, which significantly restrict access to and the availability of abortion, and violate women's fundamental liberty and privacy rights. Moreover, we urge this Court to preserve for future generations the principles set forth in Roe v. Wade, 410 U.S. 113 (1973), and reaffirmed in subsequent cases.

SUMMARY OF ARGUMENT

For compelling physical, economic, social and moral reasons, women have sought and will seek to have abortions. Roe v. Wade stopped state interference in women's abortion decisions, thus ending the terrible health crisis created by the criminalization of abortion, and finally

affording women their first opportunity for true liberty. This Court wisely recognized that only a woman, in consultation with her physician, not a distant state legislature, can determine whether or not she should bear a child. To reverse or significantly modify Roe v. Wade, as appellants and their supporting amici curiae urge, would subject women again to profoundly intrusive and grossly punitive state action, contrary to the principle of individual rights embodied in the Constitution. As excerpts from the letters from amici will show, Roe v. Wade wisely placed the primary decision-making for abortion in the hands of women, the people best situated to make this decision.

ARGUMENT

Inevitably a woman's decision whether to bear a child or to have an abortion is a resolution of sharply competing demands. When a woman is confronted with that

decision, she not only considers her responsibilities for the well-being of the life she may bring forth but also examines her own life, health and essential well-being and the well-being of her spouse or significant other, her parents, her child[ren], and others close to her, all of whom "unlike the unborn child [have] begun to imagine a future,"[4] and whose lives will be drastically altered by the added commitment and responsibility that

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4. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 927 (1973). Ely acknowledged "that the mother, unlike the unborn child, has begun to imagine a future for herself strikes me as morally quite significant." Id. at 927. But Ely's analysis failed to grasp that "prohibitions on abortion encumber what many now reasonably regard as a highly conscientious choice by women regarding their bodies, their sexuality and gender, and the nature and place of pregnancy, birth and childrearing in their personal and ethical lives. The abortion choice is thus one of the choices essential to the just moral independence of women." D. Richards, Toleration and the Constitution 268, 231-81 (1986).

inevitably would result from her childbearing. Finally, she must weigh her obligations to the larger community and to her spiritual values. Each woman faced with this decision will weigh various considerations differently in new and unique circumstances.

Many women who believe that bearing a child would cause them to fail in deeply felt obligations to their own or other already existing lives decide against childbearing and consider themselves morally bound, indeed compelled, to act upon that decision. Whatever her decision, it is one that only the woman herself, aided by the advice of her physician, can make, given her unique position of knowledge and responsibility.

This Court in Roe v. Wade wisely responded to the reality of women's lives by recognizing that decision to fall within

the constitutionally protected zone of privacy:

> "This right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

With this simple acknowledgment, the Court addressed a woman's reality throughout the years of her childbearing potential and ensured a woman's right to liberty in the full sense that the right to "liberty" is understood under our Constitution.[5] It

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[5] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Subsequently this Court observed that protecting women's abortion decisions is critical to women's equality and that the woman's decisions falls properly within:

> [a] certain private sphere of individual liberty...kept largely beyond the reach of government... [which] extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision -- with the guidance of her physician and within the limits specified in Roe -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would

took a step toward correcting the extreme imbalance that was locked into our system of law and government by the systematic subordination and exclusion of women[6] and it recognized that the abortion decision was exactly the kind of decision-making that should be protected by the Bill of Rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental

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> protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

[6]. The exclusion of women from our legislatures has not been cured. See, e.g., National Women's Political Caucus, National Directory of Women Elected Officials 97 (1987) (15% women in Missouri state legislature).

> rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 638 (1942).

Appellants argue to the contrary that the decision whether or not to bear a child is best made by state legislators,[7] and implicitly stereotype women's decisions to have abortions as immoral, a matter of convenience or selfish. The reasons for which women have decided to have abortions soundly rebut Appellants' argument and it is appropriate for this Court to consider the issues as they really affect women's lives. As one amicus has written:

> So much of the dialogue, argument and confrontation regarding this issue...have [sic] seemed to take place in a vacuum...as a contrast to "real life, real people...." FL-240

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7. See Brief for Appellants; Brief for Amicus Curiae United States Supporting Appellants.

The integrity of each woman's decision will be respected and protected only by this Court's consideration of the reality of women's lives and its strong reaffirmance of Roe.[8]

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8. The intrusiveness and brutal indignity with which individuals touted as passively disobedient, see Brief for the Southern Center for Law and Ethics as Amicus Curiae in Support of Appellants, attack women's choice argues that women need the strongest possible protection of their privacy and liberty in connection with their determination whether or not to bear a child. See National Abortion Federation, Incidents of Violence & Disruption Against Abortion Providers (1977-88) (Number of Reported Incidents: 32 bombings, 42 arson attacks, 37 attempted bombings and arson attacks, 222 invasions, 220 incidents of vandalism, 46 assaults and battery; 65 death threats, 2 kidnappings, 20 burglaries, 162 incidents of hate mail and calls, 216 bomb threats, 675 pickets, blockades of 138 clinics).

See also, e.g., NOW v. Scheidler, et al., No. 86 C7888 First Amended Complaint (N.D. Ill., filed Jan. 30, 1989) (a pattern of extortion and conspiracy (including theft of 4000 fetal remains) in violation of racketeering and antitrust laws by Joe Scheidler, Randall Terry and others); NOW NYS et al. v. Terry et al., 697 F. Supp. 1324 (S.D.N.Y. 1988), appeals consolidated as No. 88-7873 (2d Cir. 1988); L-42, 47,

I. As the Experiences of Women Show, Roe v. Wade is a Wise and Just Decision and its Relevance Has Not Altered or Changed

Prior to Roe v. Wade, this country was in the midst of a medical, social and legal crisis caused by the illegality of abortion. Despite the fact that abortion was illegal or highly restricted in its availability throughout the United States before Roe v. Wade, women did have abortions, for compelling reasons. See generally, E. Messer & K. May, Back Rooms: Voices from the Illegal Abortion Era (1988). The numbers of illegally induced abortions in the United States in the 1960's ranged up to estimates of 1.5 million a year.[9] Women risked their lives and health in order to meet their

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306; RL-22.

[9] R. Schwarz, Septic Abortion 7 (1968); L. Lader, Abortion 2 (1966); Cates, Legal Abortion: The Public Health Record, 215 Science 1586 (1982).

inevitable need for abortion. These complex problems were hidden because the longstanding legal prohibitions against abortion, as well as the inherently private nature of the decision, silenced women and their friends.

A. Criminalization and Excessive Regulation of Abortion Endangered the Lives and Health of Women and Hurt Their Loved Ones

The conditions under which illegal abortions were performed were bad. It was estimated that "as many as 5,000 American women die[d] each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate, inasmuch as such deaths are mislabeled or unreported." R. Schwarz, supra n.9, at 7. See FL-17, 27, 33, 41, 50, 127, 166, 170, 172, 179. As these letter excerpts reveal, friends of amici curiae have not forgotten the women who died as a result of illegal abortions:

In 1965 I had to care for a 19 year old girl as she lay dying of infection following an illegal abortion. The fact that she denied having an abortion up to the time of her death and the tearful disclosure by her mother after her death underscored the fear these two people were experiencing.... FL-179 (nurse)

***

It was over! I want to shout. My closest childhood and young adult friend, whose abortion on her dining room table...with no sterilization and the crudest of instruments...is already dead. Why do I have to fight for her life again? FL-170

***

I have vivid memories of caring for a women who had used a caustic substance on herself.... She went into renal failure.... She did not survive! FL-127 (Nurse)

***

I lost my mother at the age of 7 years because at that time it was illegal to obtain an abortion even for medical reasons.... FL-41

Women who did survive illegal abortion were likely to experience health complications.[10] As these women recall, the illegal abortions were often extremely dangerous and painful:

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10. H. Morgentaler, Abortion and Contraception 110-11 (1982).

In December of 1969 I became pregnant and chose to terminate the pregnancy.... The abortion was performed on the bed with my legs resting on two chairs. I experienced an extreme amount of pain and was told that if I didn't shut-up he [the doctor] would leave and not complete the abortion. After he was finished I layed in bed for 18 hours unable to get up or eat. When I finally found the strength to get out of bed, I staggered into the bathroom, sat down on the toilet and passed out, only to wake up hours later and find out I had been laying against a steam hot water pipe and received second degree burns on my shoulder; scars I have to this day. Somehow I made the trip back home. Twenty four hours later I was in such extreme pain that I called a doctor. I was admitted to the hospital immediately and diagnosed with peritonitis, punctured uterus and colon. My doctor told the person who brought me in that he did not expect me to live. I spent 16 days in the hospital and had to have major surgery to have the damage done to me repaired.... L-296

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I was the first person in a family of 13 children to graduate from high school. I was just past my 20th birthday.... I was pregnant.... I was told that I shouldn't be afraid. "Don't worry. There is a guy in ... Ohio who is safe. All the mob guys take their girlfriends there...."

We arrived at dusk and pulled into an alley behind a very old house.... I remember only that the man had said,

"You will probably have some pain, but you'll be okay."

I waited, afraid of what was going to happen, and then the pain began. Hour after hour of the most intense pain I have ever experienced. Then the bleeding began, a hemorrhage so bad the memory of it still frightens me. The hours in the bedroom of my apartment, my roommate begging me to call a doctor, go to the hospital, call my mother, do something are still with me. But...I was afraid to do anything, because I was convinced that...I would go to jail....

Finally, the pain stopped and eventually the bleeding stopped, too. I returned to work, and within a few weeks realized I was still not well. My body was filled with infection. Still frightened about doing something illegal, I went to a doctor and told him that I was sick but did not tell him why.... He warned me that if I had any more heavy bleeding, that I must go to the hospital immediately because I was very anemic from losing so much blood.

Immediately after that visit, I did begin to hemorrhage again, and woke up in.... General Hospital with blood transfusions and IV, and the doctor bending over my bed with tears in his eyes, saying "Why didn't you tell me you had an abortion?" I looked back and answered very truthfully, "Because I thought you would put me in jail." Eventually I healed, went back to work, went on with my life, but kept the memory of my abortion buried in a dark and secret place.

That's my story. Even after all these years, tears spring to my eyes

when I think of how frightened I was, how young and desperate and how vulnerable.

I have spent a great deal of my life and my energy dedicated to keeping abortion safe and legal for women.L-267

A large number of illegal abortions were self-induced or performed by unskilled and untrained personnel working under dangerous septic conditions, unaccountable to professional guidelines and safeguards and unreached by ordinary government licensing procedures or other safeguards.[11] Medical procedures, record-keeping and referral techniques were guided by concerns about detection, not best medical judgment.[12]

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11. See generally, Tietze & Lewit, Epidemiology of Induced Abortion in, Abortion and Sterilization: Medical and Social Aspects 41, 54-56 (J. Hodgson, ed. 1981).

12. See Cates et al., Legalized Abortion: Effect on National Trends of Maternal and Abortion-Related Mortality (1940-1976), 132 Am. J. Ob. & Gyn. 211, 213 (1978) (mortality from induced abortions decreased after abortion legalized and safer legal procedures substituted for

The women received treatment which was often delayed under conditions of severe physical and emotional stress. The process was degrading. Follow up care was entirely lacking or inadequate. These dangerous and humiliating conditions existed precisely because abortions were illegal; they are graphically described by some amici:[13]

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more dangerous illegal procedures).

13. The amici curiae describe a wide range of experiences, many illustrating the horrible conditions existing when abortion was illegal or excessively regulated. L-1, 6, 9, 11, 12, 13, 15, 17, 20, 22, 29, 30, 31, 32, 33, 35, 40, 45, 46, 49, 52, 53, 54, 63, 65, 66, 68, 69, 70, 73, 74, 75, 79, 87, 89, 94, 96, 100, 101, 107, 111, 113, 116, 118, 125, 127, 128, 129, 130, 137, 140, 145, 150, 153, 154, 156, 161, 162, 164, 167, 169, 171, 181, 184, 186, 189, 190, 193, 200, 205, 206, 208, 211, 215, 217, 219, 222, 223, 225, 226, 228, 229, 232, 233, 236, 240, 241, 243, 247, 248, 257, 259, 260, 262, 263, 264, 267, 269, 274, 279, 280, 282, 287, 288, 291, 293, 294, 296, 298, 301, 303, 304, 305, 310, 312, 314, 315, 316, 320, 321, 324, 326, 327, 334, 335, 337, 338, 339, 340, 352, 354, 355, 358, 359, 360, 363, 365, 366, 367,

I am a 60 year old woman deeply troubled by the possibility that women's constitutional right to determine their own reproductive rights is being threatened and may be taken away....

When I was in my twenties I had an illegal abortion. There were no other options that I saw at that time. Because of the illegality, it was extremely difficult to find someone who would discuss how to find someone to help me. People were afraid. As a consequence, when I finally found a source I had gone beyond the time of a safe procedure. I lied to the "doctor" because I knew he wouldn't do it if I told him how far along I was.... He insisted I come by myself which I did. Is there any way I can describe my fear. He was unclean, he joked a lot, his hands were rough, his breath was bad. He forcefully approached me to have sex with him because "what harm would there be under the circumstance?" That, of course, explained his reason for insisting that I come alone. So, on top of the fear for my physical safety in that situation, the agony of decision about what I was doing, the need to keep this secret away from everyone I knew and face it alone, there was the disgust, repulsion and deep fear that if

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368, 370, 371, 372, 373, 374, 375, 376, 378, 382, 384, 385, 389, 393, 395, 396, 405, 406, 412, 413, 414, 417, 423, 430, 436, 442, 443; RL-4, 12, 19, 21, 37, 43, 45, 59, 60, 62, 65, 67, 70, 72, 75, 77, 79, 84, 85.

> I didn't do what he wanted he would send me away....
>
> I never want another woman to have to experience what I went through. My plea is that simple. L-130

See L-32 in Appendix B.

Finally, of course, many women who did not have access to legal abortions suffered the health risks and deeply scarring experience of forced childbearing.

> At the age of 19, through an accident and naivete, I got pregnant.... Having neither the money nor the nerve to face a back-alley abortion, I chose to have the baby....
>
> With some financial help from my parents, we had just bought a little one-room house in another town when we found I was pregnant again. The birth of twins, welfare supplementing my husband's meager income, a one-room house and shaky beginnings exploded a bad marriage....
>
> With help from Welfare and my parents.... I got a job in my field, went off AFDC, and have been a contributing member of society ever since.
>
> But this is not the happy ending to some fairy tale.... I have three children whose beginnings were the result of a slip-up, youthful carelessness and naivete, and a government that claimed control over my body....

> [T]he kids have not done well. Each of them has had run-ins with the law, one is on probation until her eighteenth birthday, all are substance-abusers, it appears none will graduate from high school, and there's a good chance they'll all be chronically unemployed for years to come.
>
> My twin daughters have had four abortions between them. For each, the first was at the age of fourteen....
>
> I love my children dearly, but I think they got a bad break, starting their lives in such difficult circumstances. L-318

B. Before Roe v. Wade, Women Were Punished for Having Abortions, Which Silenced All Women on This Critical Topic

Those amici curiae who recall the days when abortion was illegal, also recall the silence surrounding the topic. If a woman admitted having or needing an abortion, it was only to her most trusted friend or family member. To have an abortion or to aid someone in having an abortion was to risk arrest and prosecution or involvement in legal proceedings.

In late 1955, I was pregnant again. .... I wanted an abortion. But the political atmosphere of the fifties was different from the thirties [when I had had two earlier abortions]. There were crackdowns on suspected "abortion rings." Doctors and hospitals were being surveilled....

[After obtaining an illegal abortion performed by a doctor I became extremely sick and my husband took me to the emergency room at our health maintenance organization].

I was placed on a gurney to await a doctor. I knew that for a physician to diagnose and treat effectively, I must give him all pertinent information. I told him I had had an abortion, and as he could see, it hadn't worked too well. That admission was my mistake. I simply should have said I had miscarried. Now, suddenly, nurses and doctor left the room. They could not admit me, yet. I was very weak and hot and scared. About 45 minutes later two men in street clothes came in. They were deputies from the District Attorney's office, and proceeded to question me: who did it, where, when. I refused to answer, and they told me I had committed a criminal offense and could be "the second woman to go to... in California history" for this offense, unless I cooperated.... The deputies continued to alternately threaten and cajol [sic]. It wasn't hard for me to be silent; I was very sick. I was admitted to the hospital.... My lawyer came every day to confer, for the D.A. was pursuing my case and I was to be charged with a statutory offense....

For the next two months, men from the D.A.'s office came to the door, phoned, tapped our phone, and pressured both me and my attorney to "give in".... Finally my attorney... retained one of the best criminal attorneys in [the city] (a man I could never have afforded) in a "friendship" arrangement, who persuaded me that I must accept the D.A.'s proposition to be a State's witness. When I took the stand I could plead "the Fifth". I felt miserable about protecting myself with the Fifth Amendment. But my attorney said, "they're out to break what they think is a big abortion ring, and they think it's your man, and they aren't going to let go". So, I went to make a deposition.

The questions I was asked and the innuendos that were made were offensive, racist and sexual: "was the fee low in return for sex?"; "did he fondle you?"; remarks suggesting that my husband was not responsible for the pregnancy; and, of course, who, what, when and where. I simply "could not remember" any names or addresses.... Eventually I was subpoenaed as a witness in, [the criminal case against the doctor who performed the abortion] I was not on trial. I was only a witness. But I was nervous, and shaken when I had to face the "defendant" and the catheter.... The doctor from [the hospital] (also called as a witness) met me in the hall before the trial. He said he was "terribly sorry" that I had to go through all this. He had been a brand new staff member when I was brought into Admissions, and he simply was not sure of hospital policy. If only he had not

asked... Policy apparently, was not to ask! L-294

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This story is not unique. Other women were dragged through the public and private drama of prosecution for abortion. See L-568 (story set forth in Appendix B).[14]

3. Since Roe v. Wade, Abortion Has Become an Extremely Safe Procedure and Women Experience It Without Significant Trauma

As soon as abortion became legal, the procedure became extremely safe and has become increasingly so.[15] Treatment

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14. See also, N.Y. Times, Dec. 4, 1971, at 37, cols. 1-2 (Shirley Wheeler convicted of manslaughter following her abortion in Florida); N.Y. Times, May 8, 1962, at 5, col. 1-3 (Prosecution of Hunter College woman and Bronx N.Y. doctor for abortion); Crissman v. State of Texas, 245 S.W. 438 (Tex. Crim. App. 1922).

15. See J. Legge, Abortion Policy (1985); Atrash et al., Legal Abortion Mortality and General Anesthesia, 158 Am. J. Obst. & Gyn. 420 (1988); Rosenberg & Rosenthal, Reproductive Mortality in the United States: Recent Trends and Methodologic Considerations, 77 Am. J. Pub. Health 833, 834 (1987) (reproduction-related mortality rates for 1982 were as follows: abortion - 0.4 deaths per 100,000

conditions became humane and subject to proper follow up care.

The experience is no longer traumatic;[16] the response of most women to the

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procedures; contraceptives - 1.3 per 100,000 users; full-term pregnancies - 10.0 deaths per 100,000 full-term pregnancies); Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Fam. Plan. Persp. 86, 92 (1976) (illegal abortion death rate is approximately eight times greater than for legal abortions).

16. Many of the amici curiae included in their letters descriptions of how "safe", "clean", "caring" and otherwise supportive the medical treatment was that they received after Roe v. Wade. L-8, 24, 25, 42, 46, 53, 58, 61, 88, 89, 90, 95, 103, 106, 121, 122, 133, 155, 158, 160, 164, 170, 176, 185, 205, 207, 210, 214, 218, 229, 238, 246, 248, 250, 252, 269, 272, 278, 290, 295, 306, 328, 332, 333, 334, 353, 376, 402, 427, 429, 432, 440; RL-6, 10, 22, 34, 45, 54, 55, 73, 78, 86, 89, 93. Several of these women contrasted these good experiences with bad experiences they or friends of theirs had with respect to the medical treatment and the conditions under which it was received before Roe. L-53, 65, 68, 89, 113, 164, 248, 269.

experience is relief.[17] The crisis posed by criminalization of abortion for women's physical and mental health has ended. Moreover, this country no longer punishes or threatens to punish a woman who acts according to her conscience to end her pregnancy.

II. For a Woman, the Decision Whether to Bear a Child or to Have an Abortion is a Profound Judgment Reflecting Not Only Responsibility for Herself and to a Potential Life but Also to Loved Ones, to Community and to Spiritual Values; According to Our System of Limited Government, that Decision Must be Left to Her

> I have heard it said that abortion is just a convenience, especially for middle-class women. I assure you, pregnancy is no mere inconvenience. A

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17. E.g., L-17, 44, 61, 82, 101, 116, 121, 163, 175, 178, 183, 189, 206, 208, 216, 302, 311, 340, 369, 379, 423, 456, 459, 516, 558, 565, 567; RL-22, 32, 49, 53, 65, 69, 84, 107. See Brief of Amicus Curiae American Psychological Association in Support of Appellees (discussing studies demonstrating positive mental health effects of abortion and discrediting studies to contrary cited by some amici curiae supporting Appellants).

> pregnancy consumes a woman's body, energies and resources for nine months, many times with complications, sometimes at risk to the woman's life. After pregnancy, there is a child, life's most sacred responsibility, for eighteen years, for life. I am not well-to-do. I cannot offer my children the world on a silver platter, but I feel that I and every woman must have the right to offer her child the best chance for life that she can. Every woman must have the right to enter into this life-absorbing responsibility when she decides that she can. L-140

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> Since my abortion I've listened with interest to the controversy and I've even written to and talked with some of the "pro-lifers" to see if there was something I hadn't been told.... I've found that most of them leave out women's circumstances in their arguments.... As good as many of their intentions may be, their vision tends to be narrowly focused so that they forget to consider the true probable outcome of what they propose. Many forget to account for circumstances such as the life of an unwanted child, the equally "immoral" behavior of the men who made the women pregnant, and the unfortunate financial realities of parenthood in America. L-121

In deciding whether to bear a child or have an abortion, a woman thoughtfully considers the realities of motherhood, her

obligations to herself and her family, and the social and economic injustices which she (and her offspring) must face. Her assessment is highly contextual and personal. Futhermore, it is moral--deriving from her diverse duties and her ability to fulfill them, which only she can evaluate.[18]

Women's decision-making on such difficult matters has, however, rarely been appreciated or respected. Indeed it has been denigrated. This was particularly so when abortion was criminal. But it is also denigrated by laws such as those in Missouri which interfere with women's decision-making. As one researcher, studying moral decision-making by women with respect to abortion has said:

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[18] See C. Gilligan, In a Different Voice: Psychological Theory and Women's Development 65-105 (1982).

> The moral imperative that emerges repeatedly in interviews with women is an injunction to care, a responsibility to discern and alleviate the "real and recognizable trouble" of this world....
>
> Only when substance is given to skeletal lives of hypothetical people is it possible to consider the social injustice that their moral problems may reflect and to imagine the individual suffering their occurrence may signify or their resolution engender.

C. Gilligan, supra note 18, at 100.

These are considerations not within the competence of a government to judge in the abstract, or to regulate fairly.

A. Whether to Bear a Child or Have an Abortion is a Highly Contextualized Uniquely Personal Decision That Is Not Within the Competence of a Distant Government Entity to Make or Fairly Control

Appellants and amicus curiae United States argue that distant state legislatures should be permitted to impose their abstract judgments concerning abortion on women. This position ignores the critical fact that a woman's decision whether and when to bear a child is a uniquely personal private decision

requiring a highly specific analysis by the woman of her own situation.

Women who have made public their reasons for choosing abortion describe widely varying circumstances that compel their decision. Despite the differing circumstances one truth emerges: only the woman can best decide whether she is able to care for a new, completely dependent, life while continuing to respond adequately to already existing obligations and responsibilities. This is a profound moral determination; only the woman involved can make it.

Women express a variety of concerns in assessing their responsibilities including competing demands within the family,[19] lack

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19. E.g., L-1, 3, 6, 9, 10, 12, 15, 18, 24, 29, 30, 33, 36, 40, 42, 44, 45, 46, 54, 59, 64, 65, 66, 68, 69, 72, 74, 78, 80, 84, 87, 88, 89, 93, 94, 96, 98, 99, 101, 116, 125, 126, 129, 132, 133, 138, 140, 142, 144, 152, 156, 160, 168, 172, 173,

of adequate financial resources,[20] and

175, 178, 180, 181, 182, 183, 186, 187, 188, 189, 190, 198, 199, 201, 205, 213, 214, 215, 219, 221, 224, 226, 227, 228, 240, 242, 243, 247, 249, 252, 260, 263, 271, 277, 284, 287, 290, 291, 297, 303, 311, 313, 314, 317, 318, 321, 322, 325, 332, 334, 335, 342, 343, 346, 348, 352, 356, 358, 360, 362, 363, 368, 370, 373, 375, 380, 382, 384, 386, 388, 397, 404, 405, 409, 412, 416, 418, 422, 428, 434, 436, 437, 443, 447, 448, 449, 450, 452, 455, 460, 463, 466, 467, 471, 476, 483, 484, 489, 493, 501, 507, 508, 518, 521, 525, 526, 530, 531, 540, 549, 554, 556, 558, 562, 564, 565, 567; RL-2, 3, 4, 12, 27, 28, 29, 34, 37, 38, 39, 40, 41, 42, 47, 55, 57, 62, 65, 66, 68, 73, 74, 78, 85, 86, 102, 103, 106, 111, 117, 121, 127.

20. E.g., L-2, 10, 12, 17, 18, 21, 27, 31, 33, 36, 39, 40, 43, 46, 59, 60, 61, 67, 68, 69, 71, 72, 82, 84, 85, 98, 99, 108, 109, 112, 113, 116, 117, 118, 123, 124, 125, 129, 134, 135, 138, 140, 141, 142, 146, 152, 154, 160, 162, 164, 170, 171, 173, 174, 179, 182, 187, 189, 190, 191, 196, 212, 220, 240, 242, 243, 250, 259, 260, 261, 281, 284, 286, 288, 302, 308, 322, 324, 325, 331, 332, 335, 336, 339, 342, 343, 346, 353, 360, 368, 369, 370, 373, 374, 375 401, 405, 412, 415, 421, 422, 430, 432, 439, 440, 443, 450, 454, 455, 457, 459, 460, 462, 466, 472, 475, 478, 480, 483, 486, 496, 497, 499, 508, 511, 512, 522, 526, 535, 541, 542, 545, 549, 555, 558, 560, 562, 566; RL-1, 3, 12, 14, 15, 23, 29, 31, 32, 34, 40, 41, 42, 46, 47, 48, 51, 54, 58, 61, 64, 74, 75, 81, 82, 83,

existing health problems incompatible with pregnancy and childbirth.[21] Usually more than one factor is important.[22]

Women weigh these concerns, as well as the highly demanding responsibilities that accompany motherhood. Most of the women who have abortions choose at some time to become mothers, but they choose to do so at times when they are financially, physically and emotionally prepared properly to care for a child. Their assessment of when the

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106, 107, 111, 114, 115, 118, 119, 129, 131, 132.

21. E.g., L-15, 22, 50, 54, 63, 66, 90, 92, 93, 113, 117, 120, 138, 149, 150, 152, 153, 154, 174, 183, 186, 199, 203, 206, 208, 216, 218, 234, 245, 252, 259, 277, 281, 320, 333, 345, 357, 370, 380, 382, 386, 397, 400, 401, 404, 409, 421, 429, 441, 446, 458, 462, 472, 474, 476, 479, 486, 493, 497, 530, 541, 554, 561, 567; RL-14, 16, 23, 26, 32, 78, 84, 103, 121, 126, 127, 129, 130.

22. Torres & Forrest, Why do Women Have Abortions?, 20 Fam. Plan. Persp. 169 (1988) (survey discussing reasons women elect to have abortions).

time is and is not right is both caring and realistic.[23]

1. Only the Woman Can Determine How Best to Meet the Often Sharply Competing Demands Within Her Family

Mothering, although a source of deep joy when freely chosen, is also demanding, exhausting and stressful, beyond any other commitment.[24] Even women with spouses

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23. Over and over women who have had abortions say that anyone in favor of "life" must start first by addressing and changing the arduous conditions under which most women and their children live. See generally Law, Women, Work, Welfare, and the Preservation of Patriarchy, 131 U. Penn. L. Rev. 1249, 1249 (1983) ("federal labor and welfare policy 'resolve' the conflict between the traditional assumption that women cannot and should not work outside the home and the reality that they do, in ways that are systematically injurious to women and families")

24 See L. Genevie & E. Margolies, The Motherhood Report: How Women Feel About Being Mothers (1987) (Reporting results of comprehensive survey of 1,100 mothers randomly selected from 350,000 households nation-wide; reporting on experiences with childbirths, infancy, toddlerhood, and children with illness, disability or behavioral problems).

present in the home perform the vast majority of arduous homemaking duties[25] including child care.

For those women who are unprepared or unequipped through lack of financial or emotional support, education or skills to provide for support, immaturity, overextension by already existing family and work obligations, or due to health or

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25. One recent study indicated that on average, employed wives spend twenty-six hours per week on housework while their husbands spend just thirty-six minutes. Cruver, Husbands and Housework: It's still an Uneven Load, USA Today, Aug. 20, 1986, at 5D. See also Burros, Women: Out of the House But Not Out of the Kitchen, N.Y. Times, Feb. 24, 1988, at A1, col. 1 (86% of married women employed full time reported doing most or all household cooking, compared to 93% of married women who stay home); The Division of Labor, 6 Employee Rel. Weekly (BNA) 166 (Feb. 8, 1988) (university study found that men spent 1.6 minutes per day on housecleaning in 1986). Husbands do not significantly increase their participation in household tasks when their wives work outside the home. See, e.g., Hofferth & Moore, Women's Employment and Marriage, in The Subtle Revolution: Women At Work (R. Smith ed. 1979).

family crises, the experience of motherhood or added motherhood can be devastating.

> When I became pregnant for the second time three years ago my son was eight months old and my husband and I had not made a decision about a second child. Our first child was unplanned and I had had great difficulty adjusting to the changes being a parent brought into my life. I was not behaving irresponsibly either time I became pregnant - I was 31, and 32, respectively, I was married and I was practicing a reliable form of birth control that failed.
>
> With this second pregnancy I was forced to confront my true feelings about parenting and I knew introducing another child into a marriage that had been shaken by the unexpected arrival of a first baby could not withstand a second child. I went through a week of serious soul-searching, involving long discussions with my husband and a therapist. It was a difficult painful week but when I made my decision I knew it was the right one for all of us.L-34

Moreover, unexpected childbearing can exacerbate a severe family crisis:

> Two weeks after I discovered I was pregnant, my husband, who had suffered for years with an un-diagnosed illness, was found to have a malignant tumor. After two very expensive visits to psychiatrists I was given permission to

have a leagalized [sic] abortion at a local hospital. This was in 1960.

For the next 3 1/2 years...I was the only one who could interpret my husband's garbled speech. He died at the end of that time.

To have an abortion was the wisest decision I have ever made. I could not have been as helpful to my husband or my two children during the horrible time of this dreadful illness.... L-149. See also FL-242 (Counselor).

2. Only the Woman Can Determine Whether She is Financially, Educationally, and Emotionally Ready and Able to Assume Responsibility for a Child

For any woman contemplating having a child, her preparedness to support herself and her children is an important consideration. Many women reasonably fear that childbearing will halt education needed to achieve meaningful work and adequate pay or interrupt work,[26] thus

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26. See S. Kamerman, A. Kahn & P. Kingston, Maternity Policies and Working Women (1983).

creating a family financial crisis.[27] As one amicus explains:

> I have personally had an abortion.... I was twenty-five years old at the time, divorced with two small children, ages five and seven, and a senior in college.... I was putting myself through college with the help of my family, raising my children as a single parent with very little emotional or financial support from my extremely immature ex-husband; I was making grades good enough to consistently keep me on

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27. Even without children, women's economic circumstances are different than those of men with comparable skill and experience. See Bluebook, Women in the Work Force: Pay Equity: Hearing on S. 98-1050 before the Joint Economic Committee, 98th Cong. 2nd Sess. 9-14 (1984) (submission for the record by Dr. H. Hartmann, of report by National Academy of Sciences, Women, Work and Wages: Equal Pay for Jobs of Equal Value (1981)). If she works, she will have to have higher educational attainment to obtain comparable pay and advancement. See U.S. Commission on Civil Rights, 1 Comparable Worth: Issues for the 80's, 200 (1984) citing U.S. Bureau of the Census, Dep't of Commerce, Money Income of Families and Persons in the United States: 1979-1980; Current Population Reports P-60, No. 129, table 53 (The mean annual earning of a woman with a 4 year college degree is less than a male with only four years of high school).

the dean's honor roll and contemplating going to graduate school.

When I became pregnant I was terrified at the prospect of bringing another child into the world, knowing that I was already strained to the limit, both financially and emotionally with the two children I had. I felt certain that bearing this child would be a disaster for me, my educational plans, my children and possibly for the relationship with the father. After an incredible amount of soul-searching discussions with the father and with doctors and counselors... I decided to have an abortion. L-247

Many women find themselves divorced or single mothers with little income and without child support.[28]

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28. For example in March of 1985 in the U.S., there were more than 10.5 million families principally supported by women who were divorced, separated, widowed or never married. These families accounted for almost 17% of all U.S. families. Women's Bureau, U.S. Dep't. of Labor, Facts on Working Women No. 86-2 (1986). Of the 8.8 million women living with children under 21 years of age whose fathers were not living in the household in 1986, only 5.4 million, or 61%, had a child support agreement or court award for child support. Of the 4.4 million of them due to receive child support in 1985 only 48% received the full payment due. About 26% received only partial payment, and 26% received none of

I am a divorced professional woman, who is raising three children alone. I barely make it from paycheck to paycheck. My children are very healthy, happy and loved....

I have yet to receive any assistance of any kind in raising my children.

Most times, I feel like I am at the end of the ropes, juggling a career (I am forced to work 2 jobs to support my children, but one of them is a career), finances which are barely met, child-raising alone....

I chose abortion. I chose to limit myself to dealing with the too much responsibility I have now. All women should have the right to chose how much responsibility they feel they are able to handle. Especially since she is the only one she knows she can count on. L-2

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[A]t the time of the divorce, when I was in my late 30's, the children were 1 and 3. We were thrown suddenly into poverty as my ex-husband refused child

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the support due. The average amount of child support received by all women due payments in 1985, was $2,220. Bureau of Census, U.S. Dep't of Commerce, Child Support and Alimony: 1985 Current Popluation Reports, Series P-23, No. 152 1-3, 11 (1987). This averaged $109 per month per child, not even enough to support a child at the federal poverty level. Williams, Deficiencies in Child Support: Consequences for Children and Implications for Courts, 12 St. Ct. J. 4, 7 (1988); See generally L. Weitzman, The Divorce Revolution (1985).

> support. I had no job skills.... At my first job I earned $100 a month less than the child care cost. The job required me to work 70 hours a week (ass't. manager of a McDonald's). (My husband had disapproved of my working outside the home even though for most of the time we were married we had no children and he was away 14 hours every day.) Our life was a nightmare of fear and struggle after the divorce. L-160

Some women choose an abortion at a time in their lives when their obligations exceed their means and they must depend on welfare or on financial assistance from family or friends:[29]

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[29] Although most people who go on public assistance do so for a relatively short time, too-early childbearing can consign a woman and her children to long-term poverty with significantly reduced chances of escaping. U.S. Comm. on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children 5-14 (May 1983).

Monthly welfare payments vary from state to state but no state affords large support. As of January 1989,for a family of three headed by a mother who has no other income, Alabama provided $118 per month, Mississippi $120, California $633, and New York $539. N.Y. Times, Mar. 15, 1989 at A16, col.4 (Citing Family Support Administration of U.S. Dept. of Health and Human Services as source).

> In April of 1988, I obtained a legal abortion. I was twenty years old and faced with an unplanned pregnancy. I already have two sons that came along in my young life. Like most single parents, I live on Public Aid. I also live in one of the poorest regions of Illinois. I was very relieved that there was a safe and legal option to resolve my problem. I believe all women should have reproductive rights for their own bodies. L-212
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> My reason for getting the first illegal abortion had to do with the fact that in addition to living below the poverty level ($250 a month) with my three little children (eldest child: four and a half), I was no longer married. After a difficult divorce, my ex-husband had never respected the agreement that said he was required by law to pay alimony and child support. I was twenty five, we were living in Montreal, and I had no money to pay a lawyer, so I turned to my father for help. He told me that neither he nor my mother would help me, because they were ashamed of me. L-125

3. Only the Woman Can Determine Whether the Conditions Within Her Life or Family are Healthy Enough to Risk Having a New Child

Some women facing unplanned pregnancies are already dealing with troubled families,

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abusive spouses and extreme emotional distress.[30] Some of these women decide that they should not bring a child (or another child) into such an environment:

> In 1984 I became pregnant by accident. I was married to a man who had become a physically abusive alcoholic. We had one child, age 3, at the time. I didn't see any way out of the relationship for myself.... My husband was not then working.... I was the sole support for my family at this time and had virtually no help from my husband in any area of responsibility. I was emotionally distraught much of the time because I felt I was not providing the material or emotional environment that my child deserved, and because of the constant pressures of physical and emotional abuse.... I knew I could not add the work of caring for another child to my burden, it would have broken me..... With no joy in my heart but with the knowledge that I was certainly making the right choice I had an abortion. L-173

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30. See R. Dobash & R. Dobash, Violence Against Wives (1979); R. Langley & R. Levy, Wife Beating: The Silent Crisis 1977; L. Walker, The Battered Woman (1979). See also Hilberman, Overview: The "Wife Beater's Wife" Reconsidered, in The Gender Gap in Psychotherapy 213 (P. Rieker and E. Carmen eds. 1984) (documenting psychological impact of spousal abuse ("stress response syndrome") upon victim and transgenerational patterns for perpetrators and victims).

4. Only the Woman Can Determine Whether She Is Healthy Enough to Sustain a Pregnancy and Able to Obtain Adequate Prenatal Care

Many women have abortions because they suffer from health problems that can be exacerbated or made life-threatening by pregnancy.[31]

> Shortly after my husband and I were married, I suffered a nearly fatal bout with a rare and devastating disease, Guillain-Barret syndrome. During a slow recovery, we conceived our first child. Almost immediately I was back in the hospital with a recurrence of the most serious symptoms. As my condition rapidly deteriorated, the physicians attending me decided that an abortion would be necessary to save my life. L-245

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31. Although few in number, post-viability abortions occur in situations of acute, particularized need often involving the onset or worsening of certain diseases. See generally S.L. Romney, et al. Gynecology & Obstetrics: The Health Care of Women, 697-796 (2nd ed. 1981) (discussing diseases complicating pregnancy).

Obtaining adequate prenatal care is a major problem for many childbearing women.[32] Some women with limited or no access to prenatal care choose abortion because they decide that the risk to themselves and to the potential life they carry is too great.[33] Additionally, many

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32. Tragically some jurisdictions have attempted criminal action against pregnant women in relation to prenatal care. E.g., People of California v. Stewart, No. M508197, slip op. (Cal. Mun. Ct. San Diego Cty., filed Feb. 26, 1987). See Note, Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 NYU Rev. L. & Soc. Ch. 277 (1987-88).

33. In the U.S., access to health care services depends upon possessing health insurance or disposable income. Edelman, Maternal and Child Health Care: A Deepening Crisis, 1985 N.Y.S. J. of Med. 128, citing Kleinman et al., Use of Ambulatory Medical Care by the Poor: Another Look at Equity, 19 Med. Care 1011 (1981). Access is more limited for women of color. Id. (citing National Center for Health Statistics 1980 data). In 1985, prenatal care and uncomplicated delivery cost $3000-5000. Seventeen percent of American women aged 15-44 had no health care coverage and 36% whose annual family

women have received medical treatment necessary for their own health that may have endangered a fetus.

> In February 1985, I was treated for an exacerbation of Multiple Sclerosis with a very high dosage of Prednesone for three (3) weeks. Unfortunately, during that period, I unknowingly became pregnant, even though my husband and I were practicing a very reliable method of contraception. Inasmuch as corticosteroids are known to cause severe birth defects, especially during the first 6-8 weeks of pregnancy, I knew I would have to abort the embryo. RL-26

Some women are struggling with alcohol or drug abuse that they are unable to overcome at the time of pregnancy.[34]

> In February, 1982, I had an abortion.... I was 38 years old, married with two children. We were and are still a

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incomes were less than $10,000 had no coverage. Gold & Kenney, Paying for Maternity Care, 17 Fam. Plan. Persp. 103-04 (1985).

34 A woman who is alcohol or drug addicted and pregnant is entitled to have her liberty and privacy fully respected. See ACOG Committee Opinion No. 55, "Patient Choice: Maternal-Fetal Conflict" (Oct. 1987). See also note 32 supra.

typical suburban family - as far as the outside world can see. But life was not ordinary for us in 1982. I was (I am) chemically addicted to the drug alcohol. Beginning in October, 1981 I made my first feeble attempts at recovery from alcoholism.... I wandered in and out of AA meetings....

In the midst of this rollercoaster ride of addiction - in February, 1982, I realized I could be pregnant.... I was frantic, frightened, drained physically, emotionally, spiritually from my alcoholism. I could not manage my own life. The prospect of a baby was overwhelming!.... I chose to have an abortion....

I continued efforts toward recovery, and with the help of support of AA, I have not had a drink since April 13, 1982. L-216. See also L-152 (drug abuse).

5. Only the Woman Can Weigh Her Ability to Provide for a Child Whose Health May Be Seriously Impaired

Many women have faced the revelation that the fetus may be born with serious disabilities.[35] Here again, the woman must decide, ideally with the best available and

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35 See, e.g., L-3, 80, 138, 163, 185, 208, 214, 217, 231, 253, 271, 313, 320, 351, 381, 403, 410, 420, 426, 429, 471, 474, 556, 561, 564; RL-26, 51, 84, 86, 110, 123, 132.

least biased information and support, whether she can meet existing responsibilities and provide for the expected new responsibility.[36] In addition, some women decide that they cannot give birth to a child who they know would live a lifetime of tragic pain.

> I would never, never, never, in a million years, deliberately and knowingly bring another Tay-Sachs child into the world. The knowledge that I have the ability to spare another child the degradation that my cherished daughter is going through means everything to me. It would be a crime to put another child through the humiliation and pain that this cruel disease inflicts.
>
> At the same time, the hope of someday having a healthy child, and the knowledge that it can happen if we will only have the strength to keep trying, is one of the few things that is helping to keep me sane through the anguish of watching my child slowly die. If abortion were to be made illegal, I would have to give up that hope, as I would never take the risk of conceiving

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36. See generally Asch, Reproductive Technology and Disability in Reproductive Laws for the 1990's 59 (N. Taub & S. Cohen eds. 1988).

and having to bear another child with Tay-Sachs. L-351[37]

6. Only the Woman Can Determine Whether Moral or Spiritual Values Compel Her to Terminate Her Pregnancy

Many women believe that their religious or moral values impel them not to bring an unwanted child into difficult cirumstances in a hostile world.[38] Others choose a different mode of dedication and service rather than motherhood.

> [M]y pregnancy resulted from a failure of my birth control method,

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37. Tay-Sachs is a genetic disease occurring in infants and children. Children afflicted with Tay-Sachs disease, or one of the similar allied diseases, suffer slow degeneration, severe mental and physical impairment, resulting in their deaths in infancy or very early childhood.

38 E.g., L-27, 31, 35, 36, 38, 39, 40, 48, 51, 55, 56, 58, 71, 76, 78, 82, 83, 89, 91, 96, 98, 99, 101, 108, 114, 119, 121, 123, 124, 125, 131, 141, 142, 148, 151, 154, 157, 159, 162, 166, 1170, 172, 183, 189, 198, 206, 228, 270, 288, 308, 313, 354, 400, 424, 444, 454, 455, 460, 489, 497, 522, 529, 537, 542; RL-14, 28, 51, 61, 64, 67, 86, 87, 88, 97, 102, 104, 120, 131.

> which is supposedly more than 95% accurate.... I believe that taking the time out to have a child would have changed my life for the worse, whether I would have had the child put up for adoption or not.... I am thought to have a promising career ahead of me as a biomedical researcher. For those who wonder about possible Einsteins that could have been born, what about the female Einsteins that could have developed had their lives not been disrupted by an unplanned pregnancy. RL-53

7. Only the Woman Can Determine Whether She Should Bear a Child for Adoption When She is Unable to Assume Responsibility for Her or His Care

Adoption has been advanced by some as the cureall for abortion.[39] The pain of giving a child up for adoption can be overwhelming:

> In 1977 I had a safe, legal abortion, felt only a great relief at that time, and have never regretted that decision.
>
> In fact, I was particularly aware of how important that choice was. Because fifteen years earlier, in 1962, when I was a college student, I could not get a safe, legal abortion. I endured

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39. See L.A. Times, Oct. 20, 1988 at __, col. 1 (quoting Pres. Bush as opposing abortion and favoring adoption).

therefore a cruel, forced pregnancy and a forced surrender of my first child, a daughter, to adoption. I have felt only regret and will for the rest of my life... The pain of the loss of my only daughter is indescribable....

She disappeared into the unknown and I was never to know whether she was alive or dead. L-5

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At 17 years old I became pregnant. I made my choice alone out of confusion and shame. I chose to give my baby up for adoption.... I can only tell you that I could never go through it again and live....

[W]hen I faced the same situation earlier this year, I did not chose adoption. There was alot of soul-searching and memories from the adoption this time. I considered having the baby, but the reality of my financial situation made it impossible.... I don't think the court really understands some of these cruel truths. L-286

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Adoption was never an alternative for me. Personally, I feel absolutely emotionally incapable of carrying to term and then giving up the child. L-259

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This time, neither my husband nor I could face another baby.... I do not regret my choice. I am sorry I could not bear that child.... But the cost of having it would have been too high for me, for my husband, and perhaps for our older son. And nice middle-class ladies definitely do not put babies up for adoption. RL-27

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As an adopted child I know what choice is about. I still feel that abortion should be legal. FL-227

As the comments from amici curiae show, the responsibility of bearing a child or having an abortion is a woman's.

B. The Reality for a Pregnant Woman is That Potential Life is a Part of Her Body

The reality for a pregnant woman is that potential life is a part of her from the moment of conception until birth. This is the salient fact. Arguments as to whether life begins at conception, viability[40] or

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40. Contrary to arguments by some, the stage at which the fetus is potentially able to live outside the mothers womb with artifical aid has not changed in any significant way since Roe v. Wade. See Brief of Appellees; Brief of Amici Curiae Neurobiologists and Neonatologists in Support of Appellees.

It is estimated that less than 0.01 (one one hundredth of one percent) of all abortions are performed after viability. Henshaw et al., A Portrait of American Women Who Obtain Abortions, 17 Fam. Plan. Persp. 90, 91 (1985). One study suggests that even the 0.01 percent figure may be

birth, and labels used to describe potential life--a "fetus," an "unborn child" or a "baby" -- are, by contrast, abstract conceptualizations.[41] A woman is guided by the sure knowledge that the developing life is part of her body,[42] her profound physical burden until the day of birth. After birth the child remains a tremendous responsibility thereafter for

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too high. Spitz et al., Third--Trimester Induced Abortion in Georgia, 1979 and 1980, 73 Amer. J. of Public Health 594 (1983) (estimating 0.004 percent after examining the data).

See RL-78 (pregnant recently widowed woman in the military stationed in third world country received erroneous negative pregnancy test result in 15th week and had to return to U.S. for abortion in 22nd week).

41. See also FL-242 (Counselor: division of opinion on when life begins); FL-245 (Doctor: same).

42. See Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569, 1579-80 (1979), for an excellent summary of the physical burdens of pregnancy.

the woman -- a responsibility greater than any other known to human beings.

> When I was nineteen I became pregnant with my first child. I never thought of doing anything other than having the baby....
>
> 1 1/2 years ago I became pregnant again. Initially we were glad as we recognized the sacredness of life. But in time and through discussion I realized I was not ready to be the mother of two. I also felt my 13 month old son deserved my full attention and demanded it. At this point we fully understood the realities and stresses of parenting. The financial responsibilities create very high levels of stress and even our love for each other and our son didn't make it any better. After a heart wrenching decision we chose abortion. Not out of convenience or hate but out of love for the unborn child we knew we were unprepared to take proper care of. L-187

See also, e.g., L-181.

Any legislative determination that potential life begins before it can be sustained outside the womb will be abused.[43] Only the pregnant woman can

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43. Section 1.205.1, Mo. Stat. Ann. (Vernon Supp. 1989), has already been used to a woman's detriment in the State of

judge her ability to sustain the responsibility of childbearing. Even if in rare instances a woman feels she erred in her judgment, no one else could have judged better because no one else occupied her unique position of knowledge and responsibility.

C. For a Woman, To Choose an Abortion is Not Separate or Distinct from Any Other Conduct Protected By the Right of Privacy

Preventing conception is not completely within a woman's control for a variety of physical, economic and social reasons. Moreover, for a woman, contraception as a procedure is not sharply distinguishable

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Missouri as the basis for overriding a pregnant woman's elected treatment options and ordering an forced cesarean. See Deaconess Hospital v. Ilester McRoberts and Kevin McRoberts, No. 874-00172 Div. No.2 (Mo. Cir. Ct., St. Louis Cty., May 21, 1987). See Kolder et al., Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192, 1194 (1987) (criticizing court intervention).

from abortion as a procedure.[44] For this reason, a woman's right of privacy would be abrogated if women lost the right to choose an abortion.

A woman in an intimate relationship with a man in this culture normally will be expected by that man (and often by others as well) to engage in sexual intercourse with him[45] even though it is she, not he, who will bear the primary risks, costs and

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44. For example, not all contraceptives prevent ovulation or fertilization. Some prevent or interfere with implantation. See 43 Fed. Reg. 4231 (1981) (discussion of "mini-pill"); Burnhill, Intrauterine Contraception in Fertility Control 271, 280 (Carson et al. eds. 1985) (IUD function); Johnson, Contraception: The Morning After Pill, 16 Fam. Plan. Persp. 2661 (1984) (DES); Morris & von Wagner, Interception: The Use of Postovulatory Estrogens to Prevent Implantation, 115 Am. J. Obst. & Gyn. 101 (1973) (same).

45. See C. MacKinnon, Privacy v. Equality in Feminism Unmodified 93, 96-97 (1987).

burdens.[46] Some women never intended to become pregnant, but as a result of misinformation or lack of maturity, education, resources or access to contaceptives, either could not, or did not, take precautions.[47] Others had used

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46. Cf. Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law applied only to males upheld, in part, upon the reasoning that female sexual conduct deterred by prospect of pregnancy).

47 Henshaw & Silverman, The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients, 20 Fam. Plan. Persp. 158, 166 (1985) (in sample of reported abortion cases, non-use of contraceptive greatest for those who were young, never-married, poor, minority or less educated). Many of the amici curiae were minors when they experienced the unwanted pregnancy they describe. L-1, 27, 36, 53, 69, 85, 88, 98, 107, 111, 121, 128, 131, 132, 154, 155, 159, 162, 169, 178, 190, 202, 211, 222, 233, 250, 254, 262, 273, 274, 286, 287, 292, 302, 303, 305, 316, 317, 331, 339, 340, 348, 356, 357, 363, 365, 378, 379, 389, 395, 413, 416, 423, 428, 437, 448, 454, 456, 461, 469, 487, 497, 498, 499, 500, 504, 506, 510, 516, 520, 527, 538, 542, 550; RL-13, 19, 48, 54, 56, 60, 63, 74, 79, 94, 125, 128, 133.

contraceptives but because of difficulties with contraceptive methods, were changing or abandoning methods when they became pregnant.[48]

Many women never intended to be pregnant, took appropriate steps to prevent pregnancy,[49] and those steps failed[50]

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48 Henshaw & Silverman, supra note 47, at 165 (91% of women seeking abortions in 1987 had used contraception at some time; 18% prior users were pregnant within one month of stopping; 47% within three months).

49. In an effort to avoid unwanted pregnancy, some women opt for sterilization. See L-270 in Appendix B. This strategy is not available to all women because many desire to delay childbearing, not forestall it altogether, Henshaw & Silverman, supra note 47, at pp.164-65.

In 1982, 27% of all women over age 15 were sterile, 25.7% of whom were surgically sterile, 17% for contraceptive purposes. U.S. Dep't. Commerce, Statistical Abstracts of the United States 1987 (Table No. 99 citing 1982 U.S. National Center for Health Statistics). Almost 37% of the remaining population used non-surgical contraception, 9.2% were seeking pregnancy or were post partum pregnant, and 26.9% were not using contraception (and of those approximately 72% were sexually inactive). Id.

because all forms of artificial birth control are defective. Many of the amici curiae, had on the occasion of their unwanted pregnancy, used contraceptives that failed.[51]

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50. Henshaw & Silverman, supra n. 47, at 166-67 (over half of the women who had abortions in 1987 were using contraceptive during month of in which they became pregnant).

51 Including, e.g., an I.U.D., e.g., L-1, 9, 19, 77, 78, 90, 113, 136, 138, 174, 198, 241, 246, 249, 252, 257, 270, 290, 359, 369; a contraceptive pill, e.g., L-164, 174, 204, 376; a diaphragm, e.g., L-48, 53, 87, 150, 156, 226, 229, 254, 270, 306; a sponge, e.g., L-67; a condom and foam, e.g., L-115, 144, 222; or the cervical cap, e.g., L-142. See L-7, 23, 25, 31, 40 (vasctomy), 43, 49 (contraceptive failed 3 times), 52, 55 (seven times), 59, 68, 69, 72, 74, 86, 101, 102 (age 50), 105, 108, 132, 133 (three times), 137, 170, 172 (sterilization), 177, 179, 182, 183, 192, 210, 218, 227, 239, 294, 315, 356, 364, 375, 401, 404, 426, 438, 451, 453, 454, 455, 456, 466, 467, 470, 479, 480, 482, 483, 486, 491, 496, 507, 508, 512, 513, 514, 522, 528, 529, 534, 535, 537, 540, 541, 544, 545, 549, 552, 557, 558, 560, 562, 564, 567; RL-1, 7, 8, 10, 14, 15, 22, 23, 25, 26, 27, 32, 34, 36, 39, 41, 45, 46, 48, 50, 51, 53, 57, 64, 68, 69, 70, 71, 79, 81, 82, 83, 85, 87, 88, 92, 95, 97, 99,

Finally some women become pregnant because of forced sex. Given the likelihood of conception in the absence of contraception, these tragic circumstance do result in unwanted pregnancies. Amici curiae describe unwanted pregnancies resulting from rape by a stranger, friend ("date rape") or husband ("marital rape").[52] See L-28, 44, 75 (former nun

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101, 102, 103, 107, 112, 113, 118, 120, 123, 126, 129, 131, 133.

52. The FBI has estimated that in the United States in 1987, one forcible rape occurred every 6 minutes (91,000 occurrences reported). FBI, Uniform Crime Reports for the United States 6, 13-15 (1987). Rape is a crime frequently unreported and difficult to report because it is stigmatizing. Additionally, marital rape is unreported because it is not illegal in most states. See, e.g., D. Finklehor & K. Yllo, Licence to Rape: Sexual Abuse of Wives (1985) (Estimating 10-14% of all married women experience marital rape; majority of states have not abolished marital rape exemption). See generally S. Estrich, Real Rape (1987).

raped by her priest-confessor), 113, 131[53] 243, 244, 251, 301, 302, 352, 383, 416, 487, 524, 526, 535. RL-58, 60, 92, 94, 133. FL-5, 30, 53, 67, 122, 242, 264.

> In 1977, I became active in the antiabortion movement....
>
> In 1980, I found myself pregnant as a result of a forced sexual encounter...I realized that my life was also a "human life," and that I knew I simply could not bear a child from such an ugly experience!
>
> I went to a clinic in my city (one which I had even picketed at one time), and I had the abortion there....
>
> Since my abortion (quite some time later), I became a born-again Christian.... I find my faith in Christ strengthens my pro-choice commitment. Jesus Christ tells me as a Christian to "judge not, that ye be not judged" (Mt. 7:1).... L-28

Some friends of amici describe the abortion experiences of young women who were the

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53. One amicus describes a brutal rape and the demeaning circumstances that she suffered to end the resulting pregnancy. See L-131 in Appendix B.

victims of incest. See FL-5, 53, 61, 122.[54]

It is grossly intrusive, demeaning, unreasonable, unfair and unduly burdensome to condition the right of any woman pregnant due to any form of forced sex to have her reasons for wanting an abortion scrutinized or to be required to "report" the forced sex as a precondition to ending her unwanted pregnancy.

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54. By 1985, there were 113,000 reports of child sexual abuse annually, the vast majority of them involving parents and other family members. Kleiman, "The Last Taboo: Case on L.I. Pierces the Silence on Incest," N.Y. Times, Sept. 28, 1987, at A1, col. 1. Unreported cases far outnumber those that are reported. See generally D. Whitcomb, E. Shapiro and L. Stellwagen, When the Victim Is a Child: Issues for Judges and Prosecutors 4-5, 84 (1985); D. Russell, Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment 180-94 (1984) (16% of randomly selected women had been victims of incestuous abuse, 64% of whom experienced forced vaginal penetration.)

For all women, the option of abortion, without government interference,[55] is vital; without that option, other guarantees of freedom in our Constitution are meaningless.

CONCLUSION

Women's privacy and liberty interests constitutionally protected by Roe v. Wade would be substantially infringed upon by the provisions of the Missouri statute at issue. Reproductive Health Service v. Webster, 851 F.2d 1071. As outlined at

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55. But see Brief of the United States, at 22-23 n.16, suggesting that it is reasonable to make a women submit to "the... question... whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking all of the options available to her, including abstinence and contraception." Id. at p.22. Obviously, this approach invites both grossly punitive statutory provisions that will undoubtedly spring from stereotypes, not the reality of women's reproductive lives, and intrusive systems of mini trials upon the "reason" that each woman is experiencing unwanted pregnancy.

length in the Brief for Appellees, section 1.205.1 (1) (life begins at conception) provides the basis for coercive treatment of pregnant women. See note 43 supra. Sections 188.029 (fetal viability tests for fetuses of twenty weeks or more gestational age) 188.205 and 188.215 (prohibitions on use of public funds and facilities) and 188.210 (prohibitions on work of public employees) will lead to delay, lack of information, misinformation and lack of health services, all of which increase health risks for women. These provisions increase the cost and diminsh the availability of services and thus present substantial impediments to those most in need of services.

The option of abortion, as the letters and statements of amici curiae make clear, is fundamental to women's lives, liberty and their pursuit of happiness. Amici

curiae and their friends urge this Court to reaffirm its original holdings in Roe v. Wade and subsequent decisions[56] upholding women's reproductive choice, and to affirm the decision of the court of appeals below.

56. Thornburgh v. ACOG, 476 U.S. 747 (1986); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Respectfully submitted,

March 30, 1989

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** Amici curiae also thank New York Attorney Carole Cleaver for her dedicated assistance in preparing this brief.

APPENDIX

APPENDIX A

Here follow the names of the 2887 amici curiae, women who have had abortions (including 849 Jane Roes) and their 627 friends. This is a random list; the position of the names bears no relation to the sequential order of the lodged letters.

NAMES OF AMICI CURIAE

Ann Davis Melbye, Elizabeth M. Nikoloric, Christine Molnar, Sharon A. Wimpy, Eugenie Seidenberg Delaney, Alice Z. Lawrence, Susan Laurence, Mary L. Donnelly, Mary Bengtson-Almquist, Marilyn Magnuson, Diane E. Gow, Kathie Rogers, Kathy Lenington, Elaine Stansfield, Betsy Morrison, Melanie A. Cloghessy, Caren Cronk Thomas, Julie Lehnis, Sara-Jane M. Cohen, Dana K. Ellis, Andrea Boroff Eagan, E. Jean Oton, JoAnn Castillo, Rebecca Stone, Paula McKenzie, Jada Wright, Amy J. Amoon, Virginia Tornes, Terrye Witte, Sherri L. Anderson, Judith M. Allen, Lisa M. Kushner, Phyllis C. Edwards, Randy Rutkin, Kay J. Stenberg, Beth F. Cohen, Vickie Algarin-Randle, Kathy K. Astor, Nancy Goldhill, Deborah L. Bacon, Michele Wilson, Belinda Etezad, Claudia Cleaver, Dr. Sarah N. Papier, Andrea M. Smith, Nancy Newton, Beatrice A. Beeson, Faye K. Daly, Mollie Moore-Sullivan, Vicki Sotak, Marg Chandler, P. M. Roper, Leslie A. Allen, Lucille Purdy, Susan Dudley, Pauline A. Roberts, Lori V. Battistoni, Gail C. Feldman, Ph.D., Pamela Chilton, Natalie G. Delvaille, Roberta Piell, Adrianne C. Bodensteiner, Marla R. Netzer, Elizabeth White, Wilma T. Young, Julie Ann Allender, Beth J. Wickler, Ann F. Crowe,

Renee N. Chelian, Mary Gillmor-Kahn, Susan L. Goldring, Ursula Le Guin, Susan A. Taylor, Susan Woodin, Linda S. Winslow, Pat Moshimer, Janet G. Clark, Nicole Ballardini, Mary D. Rendall, Mabel L. Eisner, Dorothy Haymes, Kathryn Lowery, Sharon Reed-Miller, Bernice W. Smith, Barbara Griffith, Margaret L. Hofmann, Edith Butler, Nansea A. Levy, Susan D. Hill, Angie King, Jessie Hillinger, Mignon F. Souto, Diane B. McCarthy, Ilse Asplund, Cari Vallo, Michal Reed, Ann E. Holmes, Margo Adrienne Master, Felicia C. Wicker, Gwen Williams, Robin L. Magee, Kate Lehn, Laurie Naranjo, Jane E. DeNeefe, Lee Gardner Dewey, Doris Espy, Ileen Self, Virginia R. Baim, Laura Israel, Jody Sova, L. Jean Rowe, Olive Karen Stamm, Esq., Sara K. Krusenstjerna, Eleanor Arkowitz, Anne D. Ehrlich, M.D., Elizabeth B. Conant, Nicolette Noyes, Wynne E. Smith, Lyra Halprin, Rosalind Stark, Christel S. Carlson, Nicolette R. Elko, Eleanor Breese, Ellen ~~Cohen,~~ Ethel E. Bishop, Arlene Halfon, Linda Henry, Janet M. Osborn, Teresa M. Goetz, Margaret Nell Webb, Marilyn Schaeffer, Annie Osburn, Elizabeth M. Proctor, Frances T. Shalent, Ann Davis Melbye, Barbara T. Chang, Barbara Kraft, Sharon Weisman, Mrs. Blanche Twyman, Heather L. Grimshaw, Betty Ackermann, Dorothy C. Gunter, Beverly Richert, Linda Shapiro, Suzanne Huston, Marjorie B. Zucker, Ph.D., Paula B. Weingarten, RN, Barbara Katz, Judith A. Schroeder, Leslie Kim Smith, Jane Husman, Meredith Cahn, Sharon Mullane, Kathleen R. Urch, Kerie Hitt, Leslie M. Clark, Sara Horowitz, Tineke Ritmeester, Ph.D., Lisa Hoffman, Mary E. Jennings, Luba Fineson, Lore Feldman, Bertha K. Bowerman, Jean Lynam,

Anita Beamon, Mona M. Clark, Felicia Value, Ann M. Mallouk, Rhonda Rossman, Judy Cosdon, Maxine S. Seller, Andrea L. Ross, Carolyn Buhl, Sara B. Deringer, Gail Judd, Janet Gotkin, Carla S. Gibbs, Carol Ann Peterson, Mary Alice Wanamaker, Frances V. Martin, Judith Roth, Mary Jean Haddin, Jean S. Gross, Lorri Bauder, Sheerah R. Roache, Susan R. Necheles, Katie Cushman, Fanny Jay, Syd E. Rosen, Annette Rotter, Maurine M. Ruddy, Sandra Davis, Joanne Goldwater, Suzanne Freeman, Cheryl L. Payne, Vita Henderson, Lillian G. Gordon, Barbara LeBey, Joan Meyers, Malani Sternstein, Mary Whalen, Connie Mitchell, Darla Dawn Turpen, Anne F. Taylor, Penny Fujiko Willgerodt, Sue Roselle, Sadja Greenwood, M.D., Donna Nasoff, Lisa Marie Strzelecki, Cynthia C. Ramseyer, Ruth D. Jacobson, Rebecca J. Bernhard, Florence E. Moore, Chrisanne Gordon, Sheila Wood, Linda Brown, Peggy Pridemore, Joanne Katz, Jeri K. Ernst, Stephanie Tournas, Shannon Wegele, Laura L. Hitchcock, Karen Deaver, Ethorne LaBarr, Jasmine Ellen Wolf, Nancy C. Bowen, Susan A. Griffel, Carol L. Campbell, Maria Patrick Oakley, Julie L. Moore, Pamela Dennis Thomas, Coleen Murphy, Tammy Jo Abbott, Millicent Kaufman, Marilyn Davis, Jan L. Palchikoff, Emily Hancock, Pauline Gardiner, Amy Goldsmith, Melissa Madden, Iris Hale, Alice Alexander, Justine Schiffer, Sharon Richer, Lisa Johnson Waugh, Christine Soto, Willa Williams, Onna Spohn, Deborah R. Slepian, Terry A. Jones, Pamela Hoey, Karen Raylene Mellos, Elizabeth Arthur, Elizabeth Seton Stone, Robyn Kramer, Cara Lou Wifler, Susan Morton, Wanda Martin, Mareen Hoerle , Linda Weiss, Ellin London, Ann Riley Owens, Lisa Fontes, Virginia L. Senders, Lori J.

Ingram, Lin Lawrance Chase, Mary O. Wright, R.N., Lucy C. Metting, Silvana & Marie Pretel, Jane L. Timmermans, Vera Lucile Mundy, Leslie Byers, Ruth Anderson, Stacey Rose-Blass, Fay Anderson, Ed.D., Renee Rose Shield, Andrea Thrasher, Bonita Siler, Judith Grossman, Hilda Steckel, Laurie C. Urias, Beverly Johnsen, Sarah T. Mack, Phyllis C. Hall, Nancy H. Coffin, Mary L. Litman, Linda Kolker, Lisa DuPont, K. Johnston, Tiffin Shewmake, Linda L. McCulloch, Linda L. McCulloch, Carole Riggin, Ms. Angela H. Mohr, Thelma B. Moody, Marsha Dale, Lori L. Wichhart, Helen J. Keever, Roberta Branagan, Catalina Hall, Geraldine Misner, Janice Vondrasek, Anna Gullette, Celia S. Miklos, Lenore Walton, Gayle Schucker, Susan B. Jones, Janice Harris, Jane Jinks, Patricia Clay Grooms, Nancy K. Weled, Gail Ashburn, Jennie Stevens Marsh, Gina Burrell, Donna M. Clark, Betty B. Moser, Margaret N. Poxon, Julie Burke, Barbara M. Young, Jenefer Ellingston, Barbara A. White, Marky Deese, Claudia Cleaver, Kathleen Feinblum, Louise Eweus, Susan Brown, Pauline Lynch, Catherine F. Goldman, Lisa M. Hummel, Mary E. Hudson, Holly Fernandez, Myra Brown Gorelick, Emilie N. Junge, Judith Seigel, Christine Tyner, Ruth Ellen Lindenberg, Susanna S. Cuyler, Lil Friedlander, Lori A. Black, Judith Bell, Jacqueline Perry, Victoria Dedek, Susan Satterfield Burtoff, Sara C. Hill, Bobbe Banks Salkowitz, Linda Harroun, M.S.W., Claudia F. Coffee, Jane Ising, Deborah Lewis, Barbara Finesmith, Frances G. Block, Pamela Johnson, Phoebe Frosch, Mary Reynolds-Parra, Robin Cash, Alyson Smith-Bradford, Jessica Schiffman, Kimberly L. Mitchell, Susan J. Phillips, Susan Grimes, Patricia L. Cunningham,

Patricia Miller, Susan E. Curan, Suzanne Wallis, Amy Blum, Edna Mayer, Manya B. Warn, Lynnda Cramer, Jane S. Speyer, Marla Felcher, Pearl F. Shipman, Florence Waber, Susanne Carlson, Dianne E. Nelson, Deborah Higdon, Constance Schlesinger, Elizabeth A. Good, Angela Cali, Marilyn Dreampeace, Nancy J. Rosson, Nansie Van Der Hout, Janice Hayri, Elissa Raiten, Carolyn Judd, Sara Meric, Susan Boyes, Joan Hertzberg, Leslie Hartley Gise, MD, Mrs. Joel M. Segal, Barbara Winslow, Natalie A. Uzoff, Jennifer Welker, Theresa Ferguson, Cindy Heath-Simon, Janet VanDeusen, Joanna Ward, Sonia I. Schneider, Angela Anthony, Virginia T. Sheen, Jill Medvedow, Lynne Schroeder, Rose E. Pinkas, Mary Osborn Black, Sylvia Roussi Kennedy MD, Ilene J. Dale, Ruth M. Glick, Ph.D., Rena Smilowitz, Gabrielle O'Brien, Tamar E. Abrams, Yvonne Singer, Elaine Burton, Marge Mulhall, Ann A. Cruse, Judith A. Gray, Roberta B. Hutner, Jill C. Roese, Frederika Ann Robinson, Monica L. Parish, Joan Garrity, Christine E. Johnson, Annette L. Ravinsky, Carol Moore, Jane Lindsay Miller, Virginia Childs, Susan A. Smith, Adrienne Kavelle, Jean McFarland, Patricia Lazar, Arlene Ferguson, Marlene S. Eshelman, Ms. Jerri Ann Moore, Marian Galbraith, Jamie Fischman, Melissa J. Mendell, Elizabeth C. Berigan, Barbara Engel, Laura Moody, Nancy Bretz, Virginia C. Eskridge, Lisa Whaley, Ruth A. Campbell, Jeanne Lewison, Arlene P. Cayer, Geraldine Tarbutton, Alice Marie Holland, Elizabeth G. Whaley, Judith Shure, Margaret L. Sullivan, Anne Moriarty, P. Kaiman Rayner, Beverly Barrett, Elisa Goldberg, Nancy J. Watson, Tina M. Balsamo, Shannon Wood, Susan L. Rose, Laura B. Woltz, Georgia Christgau, Jackie Pardon,

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APPENDIX B

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Letters of the Amici Curiae
Women Who Have Had Abortions

The texts set forth herein[1] in numerical order are the complete transcriptions of letters quoted in part in the brief of Amici Curiae women who had had abortions. Letters of amici curiae cited but not quoted in the brief are lodged with the Court.

I.
Letters of Named Amici Curiae

LETTER-2

I am a divorced professional woman who is raising three children alone. I barely make it from paycheck to paycheck. My children are very healthy, happy, and loved.

At one point in time, I found myself pregnant by a close friend. He said he would support whatever decision I decided to make. I have not only heard that before, but was also married to the man who said it. I have yet to receive any assistance of any kind in raising my children.

Most times, I feel like I am at the end of the ropes, juggling a career (I am forced to work 2 jobs to support my children, but one of them is a career), finances which are barely met, child raising alone and a reasonable facimile of a social life. I was unable to handle another responsibility at this point in my life.

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1. The texts are reproduced with the punctuation, spelling grammar, etc., in the original letter.

I chose abortion. I chose to limit myself to dealing with the too much responsibility I have now. All women should have the right to chose how much responsibility they feel they are able to handle. Especially since she is the only one she knows can she can count on.

***

LETTER-5

In 1977 I had a safe, legal abortion, felt only a great relief at that time, and have never regretted that decision.

In fact, I was particularly aware of how important that choice was. Because fifteen years earlier, in 1962, when I was a college student, I could not get a safe, legal abortion. I endured therefore a cruel, forced pregnancy and a forced surrender of my first child, a daughter, to adoption. I have felt only regret and will for the rest of my life. I can describe having an abortion. The pain of the loss of my only daughter is indescribable.

There is no comparison between the loss of a fetus to an abortion and the loss of my real baby girl to adoption. She disappeared into the unknown and I was never to know whether she was alive or dead.

No woman should live in a society where she can be forced to get pregnant, or be forced to complete a pregnancy and surrender her child to anyone else, or be forced to have an abortion or be forced to raise a child, or be forced (or forced by coercion) to do anything with her reproductive self she does not choose to do. Each woman should be free to make a personal, private decision about how she will use her reproductive self.

***

LETTER-12

This is in response to the letter asking for the experiences of women with abortion, legal or illegal.

In 1941, I was already married. I was teaching school; my husband had been fired without explanation or recommendation from his job and could not find another job. I found myself pregnant; my diaphragm had failed - to this day, I don't know why or how. A pregnant woman was unthinkable in a teaching position. So the prospect was no income, no job for either of us, and no money in the bank, no feasible doubling up with parents or friends. There was only one solution and it was illegal. There was no one I could tell or appeal to. I was frantic and had to go on smiling as if nothing were wrong. One friend knew someone who knew someone who had had an abortion and eventually I got a telephone number, only to learn that the doctor was away on extended vacation. When, in desperation, I asked my doctor if he knew of an abortionist, he refused even to talk without the presence of my husband. After I had brought my husband to see him, he decided he couldn't talk without the consent of my <u>father</u> whom he had known for many years. Only then did he give me a name of a man he had heard was reliable, but if he butchered me it would be legal for my doctor to try to put me together again. Nice. My father wouldn't consider the matter without telling my mother who, we all knew, would become hysterical. Which she did. I would never have told her for that very reason. It was awful.

So amid the anguished cries of my mother, with a painfully large amount of cash in my pocketbook, I went to the office of a strange man at a strange address and prayed for the best. I had been a law-abiding citizen and this deception and illegality was almost as painful to me as the procedure itself. I was fortunate that the man did a good clean job under an anaesthetic. I rested an hour and then sneaked out the back door, and took a taxi home. Friends dropped in that afternoon and even to them I made no mention of what I had just been through.

And how did I feel? Relief, <u>relief</u>, <u>RELIEF</u>. Emerging from several weeks' nightmare, I could hardly believe I was home free. Did I ever regret the abortion? Never for a moment.

The tone of this letter 48 years later may give some indication of the emotions I did feel. Outrage! I was 26 years old and self-supporting. I was married (If I had been unmarried I would probably have committed suicide. Women did in those days.) A wife <u>was</u> expected to have intercourse , wasn't she? I was using the available contraceptive correctly. And I was acting in the most responsible way I knew. The decision about my body that should have been mine alone had to be OK'd by husband, doctor, father. How humiliated, how trapped can one be?

Two years later, under happier circumstances I had a much-wanted boy and then a much wanted girl. For God's sake don't let abortion become illegal again.

***

LETTER-28

I signed the attached form permitting you to use my name for court suits that you are filing regarding abortion. I am also giving you permission to use my name in court.

You asked if I would tell my story in regard to abortion - here it is.

In 1977, I became active in the anti-abortion movement. By 1978 I had been elected [to a national office of a national anti-abortion group]....

In 1980, I found myself pregnant as a result of a forced sexual encounter. All my "pro-life" beliefs flew out the window when I realized that my life was also a "human life", and that I knew I simply could not bear a child from such an ugly experience!

I went to a clinic in my city (one which I had even picketed at one time) and I had the abortion there. Strangely I had no misgivings afterward, and no guilt (I had assumed I'd become suicidal.) I was surprised by how easy it was, both physically and emotionally.

Now, 9 years later, I am solidly pro-choice. Whereas before I was "pro-life" because of a set of beliefs (how fragile those beliefs were!), I am pro-choice now because of a very personal experience. I have found that beliefs formed through experience are almost always the best!

Since my abortion (quite some time later), I became a born-again Christian. Strangely (to most people, anyway), I find my faith in Christ strengthens my pro-choice commitment. Jesus Christ tells me as a Christian to "judge not, that ye be not judged"(Mt. 7:1). I think that all who pass judgement on women who have abortions

should take His words to heart. I feel strongly that God put me into the situation where I was faced with an unbearable pregnancy, in order to teach me that I must never judge another person until I have been in their situation. I learned my lesson very well.

When I was "pro-life", I had no knowledge of what illegal abortions were like before 1973 - if I had known, I doubt I would have been a "right-to-lifer". But I didn't know, and now, I have been reading quite a bit about what women had to endure before Roe v. Wade. I pray to God that we will never have to return to those evil days! I was only 15 when abortion was legalized, so naturally I don't remember what it was like then. But now that I do know, and now that I know what my own experience has taught me, for me there is no turning back.

I am not worried for myself; I an married now (and I have been for 6 years). If abortion is outlawed again, my husband and I are well-off enough financially that I could afford to fly across the country to get an abortion if I should need one again. My concern now is not for myself; it is for all the women who cannot afford to travel to another state (or another country) if abortion is outlawed in their own state. And of course, if they are desperate enough, they will take an old coathanger and perform a "do-it-yourself". And they will die.

Knowing what I do now, I will fight to defend safe and legal abortion with all the strength I have. That is the Christian thing to do, as far as I am concerned.

***

LETTER-32

I had an illegal abortion in 1959. This may be a rather rambling story, but abortions in 1959 were rambling stories. The way one found an abortionist in those days was to call friends and acquaintances and see if they knew anyone.

After a number or phone calls, I reached a male friend who said his girlfriend was pregnant and also wanted an abortion, so if I found anyone I should let him know. Eventually I found someone, who was presumably a doctor and who came to your house to perform the abortion. I called my friend's girlfriend, Mary, and we arranged to have the doctor perform both abortions the same day -- hers first at her home and then mine.

The male doctor and his male companion arrived at the house around 7:00 P.M. They told me to boil some water (!) and clear off the dining room table. I spoke with both of them for a few minutes. The doctor smelled of liquor and was slurring his words. I asked his companion if he were drunk and he said "No, we just had a couple of drinks before dinner." I asked them to leave and not return.

The next day I called Mary to see how her operation went. She said OK, except that she noticed the doctor had grease under his fingernails. When she asked him why a doctor wold have grease under his fingernails, he said, "I'm not a doctor-- I'm a mechanic." She went ahead with it anyway. Incidentally, she was a former Miss .... and the doctor/mechanic called her regularly for a date. She had to threaten him with the police to get rid of him.

I later asked my friend who had recommended this doctor if he knew the doctor was actually a an auto mechanic. He said yes, he did, but he did good work and had learned his trade from "an old colored lady in North Carolina".

I eventually did find a doctor to perform the abortion.
He had an office on ... Avenue. The whole thing was slimy and sleazy and is still very vivid in my mind.

The bottom line is that women will always have abortions. If it becomes illegal again, they will go back to the alleys, the coat hangers and the auto mechanics for them. I hope to God that Roe v. Wade is never overturned.

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LETTER-34

When I became pregnant for the second time three years ago my son was eight months old and my husband and I had not made a decision about a second child. Our first child was unplanned and I had had great difficulty adjusting to the changes being a parent brought into my life. I was not behaving irresponsibly either time I became pregnant - I was 31, and 32, respectively, I was married and I was practicing a reliable form of birth control that failed.

With this second pregnancy I was forced to confront my true feelings about parenting and I knew introducing another child into a marriage that had been shaken by the unexpected arrival of a first baby could not withstand a second child. I went through a week of serious soul-searching, involving long discussions with my husband and a therapist. It was a difficult

painful week but when I made my decision I knew it was the right one for all of us.

I recently heard that right to life advocates are trying to implement a study on post-abortion depression. The day I had my abortion was one of great relief and thanks that I had the freedom to make a choice, that my destiny, the quality of my life and that of my family was something I could control.

This is the one political issue for which I will go to the streets to express where I stand.

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LETTER-53

Although I have had an abortion, and consider the freedom I enjoyed to choose that option a blessing, I would like to relate the experience I had with a friend, before Roe v. Wade gave all of us that freedom and the right to protect our bodies and lives.

This experience happened when "Helen" and I were in high school in Virginia. It was about 1969.

Helen was in love with "Tom," and she became pregnant. She was 17. The only thing they could think of to do was to try and find a doctor who would help them illegally. Helen's parents were very strict, and didn't approve of Tom and how serious their relationship was. Helen and Tom didn't have the thousands of dollars it would have taken to go to New York and have a D & C in a hospital. That was about the only legal way we knew of at that time.

Through word of mouth, Tom heard of a doctor in Washington, D.C. who would provide injections that he said would cause a miscarriage. Three shots, a week apart,

were required. Each shot cost about $50. They decided to try it. I gave them all the money I had to help.

The "doctor" said the shots were sheep placenta. God only knows what they were. They made Helen very sick, but she stayed pregnant.

Tom heard about another "doctor" who would perform an abortion. We went to his office, somewhere in a bad part of D.C., late at night. His "office" was a bedroom in his house. God knows what kind of equipment he had there, or how clean the place was, or what kind of training he had. I'll never forget sitting in his living room, listening to Helen scream. When it was over, he insisted that we leave immediately, without giving Helen more than 15 minutes to rest and recover. She was white as a ghost, and in great pain.

The doctor gave her no post-procedure instructions, no mention of a follow-up appointment, nothing. If I remember correctly, it cost about $500, which Tom borrowed from his parents on some pretext or another.

A few days later, Helen was still bleeding, and she felt awful. She finally went to her family doctor, and he discovered the abortionist had punctured her uterus.

Helen recovered, married Tom, and later learned that they could never have children because of the damage done by that butcher.

While this experience was horrible and tragic, I'm sure it wasn't all that extraordinary. It was just so damn unnecessary, and should never be allowed to happen to anyone ever again.

My own experience was far more ordinary, and I'll always be thankful for that.

I had the good fortune to have an accidental, unwanted pregnancy when I was an adult, and abortions were legal.

Somehow my diaphragm failed me, and I became pregnant while I was in college.

I was able to go to an immaculate clinic, with a caring and skilled staff. I was provided with counseling - both before and after - and with information, a phone number to call 24-hrs-a-day in case of complications, a follow-up examination, and a wonderful nurse to hold my hand. And the cost was something I could afford.

Thank you for all you are doing to make sure the horror stories don't become commonplace again.

P.S. I'd rather my name not be used, because it could hurt me in my profession. but I authorize you to use it anyway, because the threat is so serious that freedom of choice might be diminished. I feel a responsibility, as a result, to stand up and be counted.

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LETTER-63

I hope you will send my letter on to the Justices of the Supreme Court of the U.S.A.

My experience with the abortion I had in 1952 was a positive experience. The worst aspect of the abortion was having to leave the U.S, my 4 sons, and spend a great deal of money which we could ill afford in order to go to Panama where the operation could be done safely and legally. One way or another I was bound and determined to have that abortion. My reason for being so adamant about it was that my brother was born with a cleft lip and my third son was

born with one too plus a cleft palate. I nearly went out of my mind waiting for the birth of the 4th child. There is no way I would have been sane by the end of a fifth pregnancy. I would have been of no use to my children or my husband in that condition. It was an easy decision to make.

You should also know that wonderful as my 4 sons are, I have had no regrets and never wondered about what that fetus was or would have been as I'm sure I would have done if given up for adoption. Having the abortion was like having an unwanted wart dispatched.

I only wish there had been Roe vs. Wade back in my day of decision, but I rejoice that others can now make their own choice. Please don't take that inalienable right away from women of our country.

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LETTER-80

This letter is being written in support of PRO-CHOICE.

At the age of 34 I had to face that choice. After seven years of marriage, my husband and I were told our first born would have a degenerate I.Q. chromosomal syndrome, being born with an I.Q. of 40 or less and continuing to degenerate. (I had had an amniocentesis.)

We knew we could never afford the necessary life-long care, not could we bare the thought of a child of ours living in an over-crowded, loveless institution or home. Many friends in our community called in condolence, even one telling us of her divorce due to an institutionalized child; and how she wished she had had a CHOICE "in

those dark ages" prior to legalized abortion rights.

Having been an elementary teacher for twelve years, I knew the struggle children with at least average I.Q. must go through to succeed. I could never bring a child with less into the world.

My husband and I went through the procedure hand in hand, shedding tears together, but our life goes on now with a very healthy baby boy who is now six years old and will not be a burden to tax payers or society.

It is very easy for the in-experienced to philosophize on any given subject, so please listen to those of us who <u>have</u> experienced this very personal CHOICE, and let it continue to be a woman's choice.

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LETTER-121

I am angered that a minority of very vocal fanatics are now making me feel that it is necessary for me to put on the public record one of the most private, difficult, important, and far-reaching decisions in my life. However, I feel that I have no choice in this matter because women's lives, the quality of those lives, and women's legal personhood are at stake.

First I'd like to tell you a little bit about who I am because I am not just a statistic and because I might not fit your stereotype of a woman who would have an abortion. Most importantly, I'm alive thanks to safe, legal abortion. Furthermore, I don't think I could ask for a happier life, although some would say I should be in constant grief due to my abortion.

I'm a college student, often on the Dean's List, studying to become a German teacher. At least, those are my plans right now, but I have so much going for me and so many options that I'm not sure if that's what I'll do. I enjoy my education immensely and I plan to continue it beyond a bachelor's degree.

Besides being a student, I'm also a journalist. I've edited my high school newspaper, written for my college paper, and for a year I was a paid freelance writer for the ... of ... county. I'm also an active volunteer. I've spent many hours working with children, especially gifted students who need extra encouragement and attention, through YWCA/YMCA programs since my first year in college and I currently lead one of those programs.

I have a boyfriend whom I love very much and intend to marry after we both graduate. He is studying to be a history teacher. We recently celebrated our 5-year "anniversary". Some of the things I enjoy are running, traveling, weightlifting, photography, and cooking. Other interests I pursue are animal rights (I'm a vegetarian), music, and the Pro-Choice movement.

I have a wonderful and fun family. We've had our problems in the past but we generally get along well. My mother is a nurse in a ..., my father is a computer scientist, my younger brothers are students, and my older sister is married with two young children and a house painting business.

I personally don't think a twenty year-old could ask for a better life than mine. I like to believe that the pursuit of happiness is an important and unique

principle upon which my country was founded and I wish more Americans were able to enjoy the fruits of this philosophy as much as I have so I do what I can to help.

When I was fifteen I had an abortion. I had been somewhat ignorant about the workings of birth control. I wasn't totally ignorant, but most of my information came from peers. So when my father took away my birth control pills (an unfortunate, misguided reaction to a rebellious teenager by a frustrated father), I wasn't very alarmed and I didn't cease having sex with my boyfriend. I planned to get more pills as soon as I could (which wasn't easy, not being able to drive), but in the meantime I thought it would be easy to predict my days of fertility. That's what I'd picked up from friends. And besides, when you're fifteen years old you don't really believe you could become pregnant any more than you believe you could die tomorrow.

For a couple of weeks I suffered from morning sickness and I was tired all the time. I was so nauseous that sometimes I couldn't attend school. My mother guessed what was wrong some time during those weeks and confirmed her guess by snooping through my purse and finding the receipt for my pregnancy test. Needless to say, we didn't have the perfect mother-daughter relationship.

When I found I was pregnant, I was in disbelief. I told my boyfriend right away. He was fourteen years old. We were very scared and we discussed what we should do. Neither one of us believed that the fetus was a human life yet and we were sure we weren't ready to be parents (just as sure as we had been when we bought my birth

control pills). One of my biggest worries was what his parents' reaction would be. I believed we wouldn't be able to see each other again if they found out. I also worried about my parents' and grandparents' reactions and the reactions of people at school. I felt, with good reason, that my family had enough problems without my adding this to them. And, as little as I liked school at that time, I was worried about the future of my education. So our decision was that I should have an abortion. I had considered some other options, namely suicide or running away and giving the baby up for adoption. I actually made a list of pros and cons of suicide. But there was no way I would've been able to pull off either of those two options and I'm glad I didn't try to. My boyfriend and I decided we wouldn't tell our parents about it and we would get money from selling things we owned.

As it turned out, my mother discovered our secret. She was angry but mostly concerned, and I think she felt somewhat guilty. She asked me what I wanted to do and didn't really try to sway me one way or the other. She told my father I was pregnant and he wouldn't talk to me for a long time, which was something he had never done before. I felt very guilty, like I'd let everyone down.

My mother took me to get the abortion and paid the $250.00. My boyfriend wasn't allowed to come along although I wanted him there. My mother was very non-judgmental. Just once I remember she told me "You don't have to do this if you don't want to," but I assured her that I really did.

At the clinic I met women of various circumstances. Some were teenagers but

most seemed to be older than me. One woman was married with one son. She told me she was pregnant because her birth control had failed, but she and her husband had planned to have only one child. They couldn't afford to give a second child a quality life. She had already been planning to have a tubal ligation when she became pregnant. Several other women were there because they had tried the new "sponge" method of birth control which was being vigorously advertised on T.V. at the time. Obviously it was not reliable.

I received a great deal of counseling at the clinic. I was told about the procedure and its risks and about effective birth control. Furthermore, people there made sure more than once that I had thought my decision through. They were very thorough about this. No mention was made of a "baby" growing inside me, as is apparently done at certain fake abortion clinics. Instead words were used which would not insult my belief system. However, I knew about the controversy surrounding the topic and the argument that abortion is murder. This argument had never been convincing to me or my boyfriend or my parents because it is based on certain religions rather than science and I had not been brought up with any of these particular religions.

For me, the abortion was mercifully almost painless and the two-week recovery period was without any serious problems. I had only been about eight or nine weeks pregnant at the time. Afterwards, I was distraught and doubtful at times, but not nearly as much as I had been before my abortion, and mostly I just felt relieved. I felt freed from the trap I'd been in,

glad to be alive, and ready to make a new start.

Since my abortion I've listened with interest to the controversy and I've even written to and talked with some of the "pro-lifers" to see if there was something I hadn't been told. But without exception I've found their opinions to be based on their religions rather than verifiable scientific facts. Furthermore I've found that most of them leave out women's circumstances in their arguments and some seem to have an unspoken desire to use forced pregnancy and labor (or unsafe illegal abortions as the alternative) as a punishment for what they consider to be the immoral behavior of women. As good as many of their intentions may be, their vision tends to be narrowly focused so that they forget to consider the true probable outcome of what they propose. Many forget to account for circumstances such as the life of an unwanted child, the equally "immoral" behavior of the men who made the women pregnant, and the unfortunate financial realities of parenthood in America. Many of these people try to reduce the issue to a simple one, but I know from experience that it is not.

About a year ago I thought I might be pregnant again. I told my boyfriend and he took me to get a pregnancy test. I'm on the pill but I know that no form of birth control is 100% effective. We discussed the possibility and decided that we would probably have a baby and give it up for adoption if I was pregnant. That option makes more sense at this time in our lives than it did when we were younger for several reasons. First we have stronger support systems to see it through now than

we would have had then, in terms of the strength of our own relationship, close friendships with others, and healthier, more supportive families than we had had. We see adoption as a way to give happiness to a childless couple, but unlike before it wouldn't be a disruption of our lives and families at a crucial time. Also, it would pose less of a threat statistically to my health and life to go through pregnancy and labor at 19 or 20 than at 15, physically as well as psychologically. Finally, if we decided for some reason that we could not bear to give the baby up for adoption, we would be in a considerable better position to provide a life for her or him without jeopardizing our futures, our relationship, or the well-being of the child. It turned out that I was not pregnant again, which was a relief to us.

But I know that this may happen some day. A woman can't stay on the pill indefinitely because it poses risks to her health which aren't entirely understood even now. I know I'll have to switch birth control methods some time in the next few years and unless scientists come up with something revolutionary my new method will probably be something less reliable than the pill.

If I do face another unwanted pregnancy, married or not, I will need to be free to decide what to do about it without the interference of my government or religious fanatics, based on all of the circumstances surrounding me, my pregnancy, my health, and my family at that time. I cannot foresee now what those might be, but I can't imagine who would possibly be more qualified than me, aside from God, to assess all of those circumstances

surrounding my situation and to make a decision about my body and my future. Thank you.

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LETTER-123

My name is .... I am 26 years old. I am married and have two children. I had an abortion when I was 19 years old. It was before I had my two children now. I was not married. The reason I had the abortion was,

1. I was not working. I didn't have a car are any kind of insurance. I felt that I could not afford to have a child. If I would have had the child, I would have had to go to a charity hospital. (Are had it in the street) I could not have gone to work. I would have had to draw food stamps, welfare, wic, and low income houseing. Which you the taxpayer would have had to pay. I didn't feel that you the tax payer should pay for my mistake.

2. I didn't want to marry the father just to help pay for having the child when he nor I wanted it.

3. I believe I was to young to care for a child when I couldn't care for myself.

4. I don't believe my family should have to pay for my mistake.

I also considered adoption, but after having two children I do not think I could have given my child away after brith. Having a child is a very emotional and physical experience. I believe that you are anyone else should no't have the right to force me are anyone to have a child. That person may not be emotionally ready to have a child. Are you going to be there to help take care of this child for the rest of its life?

I personally feel that a fetus is not a life until it is born from the mother. I do not believe it is considered a life at the time of conception. Because it can not live with out the mother. This is suppose to be a free country, What happen to freedom of choice?

I would like for you to stop and think how much money it would cost you the tax payer, for all the hospital bills, food stamps, welfare for unwed mothers, wic progam, and many more progams, to care for these unwanted children which most people can not afford.

I would have had the abortion even if it was illegal. It would have been just a litte more difficult.

Please do not change the law.

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LETTER-125

I am the 58 year old mother of five adult offspring, and the ex-wife of two men, one of whom fathered three, and the other of whom fathered two, of my children. All of my five babies were delivered by Caesarian section. I am also the grandmother of seven grandchildren.

Back in the 1950's, when abortion was still a word that you whispered behind your hand; and when having an abortion could land you in jail for years, I had two illegal abortions. They were horribly painful, both physically and mentally.
As a result of the first abortion, (1955) I suffered a crippling infection on the Caesarian scar located on the inside of my uterus; this was the result of an excessively zealous overscraping on the part of the person who performed the abortion. I would not stand up straight

nor walk easily for a year after this experience. Also, my early attempts to find an abortionist who didn't want to have intercourse with me as part of the procedure, led to my being severely traumaatized. In addition, there were deep psychic scars which I incurred as a result of being indirectly encouraged to feel that I deserved to suffer for killing a three month old fetus.

In the second abortion, I nearly died while still lying on the table, just after the procedure had been completed, due to an injection of penicillin to which I am lethally allergic. The abortionist didn't have the medical expertise to have anticipated such a possibility, and he had not consulted me.

I chose to have both illegal abortions (the procedure was Dilation and Currettage) without any anesthesia, because of my fear of complications which might possibly kill me. As it was, if I hadn't been awake to croak out the word "adrenalin" after that lethal shot of penicillin, I would have died immediately.

My reason for getting the first illegal abortion had to do with the fact that in addition to living below the poverty level ($250 a month) with my three little children (eldest child: four and a half), I was no longer married. After a difficult divorce, my ex-husband had never respected the agreement that said he was required by law to pay alimony and child support. I was twenty five, we were living in Montreal, and I had no money to pay a lawyer, so I turned to my father for help. He told me that neither he nor my mother would help me, because they were ashamed of me.

When I discovered that I was pregnant, I went to my doctor, who was one of the top obstetrical surgeons at the ... hospital; he had delivered my third living child. He made it clear to me that under the circumstances, (including his awareness of earlier physical abuse that my husband had inflicted on me and on our children), he felt that an abortion was indicated, but that he could not possibly perform it, or even discuss the matter with me any further until the abortion was completed by "somebody else". He gave me a number to call, and told me that he would be able to take care of me "right after it has been started".

There followed a very bad time. When I walked into the office of the man whose number my own doctor had given me, the first thing I saw, piled up on all the shelves and on the floor in the corner as well, were hundreds of bottles filled with clear fluid in which were floating fetuses and embryos. This man told me that he was a pathologist. He immediately asked me to pay him the cost of the abortion: $250. I did so. He then told me to remove my underpanties, and he stood watching me and laughing.

After an extremely painful pelvic examination, in which he tried to play with my clitoris, I sat up and jumped off the table in shocked protest. He then showed me his engorged penis, while he insisted that we could have intercourse together until I aborted. Or if that didn't suit me, I could put his penis in my mouth while pumping a plastic dildo in and out of his rectum. If I chose the latter alternative, he told me he would be willing to refund the $250 cost of the abortion. After a

physical struggle, I broke free, ran out of the door and down the steps. I was so distressed that it wasn't until I was on the bus that I realized I was minus both my underpanties and my $250.

Although this seemed awful to me, an even more awful part of it was that when I called my own doctor back (the one who had given me the number of the "pathologist"), he refused to listen to me. I said I wanted to tell him what had happened, because I was sure he didn't realize....The doctor became extremely angry, and shouted at me that by my telephoning him I was endangering his professional career. In a scathing voice he said "I've done all I can do for you at this time. There are LEGITIMATE babies waiting to be born. Is that clear to you?"

I said yes, in a small voice, and hung up the phone. There were legitimate babies waiting to be born, so that meant there was no time for illegitimate fetuses to be disposed of. My feeling of guilt was surpassed only by my sense of outraged helplessness. In all of this, there were still three little mouths to feed, hundreds of diapers to change and launder, and many family and household details to be arranged, just as if nothing else was happening.

The next evening, a friend brought me fifty quinine tablets to swallow. They were supposed to cause immediate abortion. After two days of vomiting and intense stomach pain, my basic situation remained the same: I was still pregnant.

The following week, I went to my boss who ran a pharmacy. I told him what I needed. He told me he knew of an abortionist, but it would cost me $500. He loaned me $250

and my boyfriend borrowed the other $250. My boss said to me, "Now, remember: these guys are all alike. They want your NOOKIE! Keep your eye on what you want: an abortion. Stay calm!"

I then went to the office of a man who would arrange the abortion. He locked us into his office together and suggested to me in a whisper that if I did not want to pay money for my abortion, he knew of a number of "young, handsome, professional men" who would be willing to perform various sexual acts (with me) in front of "a small, high-class audience" and "a famous photographer". He swore that this would make me abort the fetus within a day, and it would cost me nothing.

Wordlessly, I handed him the envelope with $250 in it. I then told him that I wanted a "simple" abortion. He laughed and told me I was crazy. Then he said I was to meet a man on a certain corner at seven that evening. The man's name was "Mister Smith", and he would drive me in his car to a place out of town where he would perform the abortion. I would pay Mister Smith the other $250. He would drive me home after the abortion.

"Mister Smith" performed the abortion without anesthesia on a kitchen table in a cabin somewhere in the Laurentians. His wife assisted him. The operation itself was excruciatingly painful. To help me control my screaming, Mister Smith's wife gave me a wet towel to bite down on. I stared at a painting by Rembrandt, which adorned a calendar on the wall. Mister Smith insisted on showing me the aborted fetus. There was such a large amount of blood that I fainted. He drove me home, and I spent the night curled around my

precious children, praying to God to keep them safe from harm, because I had proved that I certainly could not.

The following day I went to my o.b. at [the hospital]. He gave me permission to have an appointment with him now that the abortion had been "done". After he examined me, he told me that although the fetus had been successfully aborted, the Caesarian scar on the inner side of my uterus had been cut, and scraped raw. It had already become badly infected.
After he treated me for the infection, I felt obliged to tell my obstetrician what had happened. He said he would not listen to me, that he didn't want to know about it. He told me: "It's over now, Don't think about it again. Ignorance is bliss."

He also told me that it was his conviction that if a woman becomes pregnant with "an unwanted child" whom she tries to abort, she deserves to have a bad time. "As we say in Quebec, ABORTION IS ILLEGAL FOR A VERY GOOD REASON!"

I have had plenty of time to think over what he said to me then, and I disagree profoundly with his appraisal of the situation. I have concluded that abortion ought to be legal for a number of very GOOD reasons. In my own case, by the time I managed to get an illegal abortion, it wasn't just the lining of my uterus that had been cut and scraped and scarred; it was my soul. And in the long run, it was the members of my living family who suffered the consequences of my guilt and shame and exhaustion, for I became a mother whose terror and depression often overcame her ability to be loving and happy, or even her desire to be living. No matter how I tried to think differently, my having had

an illegal abortion meant that I had not only suffered, but I had endangered the life of my children's mother (the life my living children depended upon): MY life and THEIR life, but I had also committed murder in the eye of The Law. After the abortion, I was unable to walk for several months. For many years longer than that, I was unable to govern my brood with confidence, or to live my life with pleasure or gratitude.

*(Of course, Montreal is in the Province of Quebec, which is extremely Catholic. Even the poorest of the poor among French Canadian families are encouraged to have as many babies as they can, presumably to build the strength of The Church by helping to increase its membership. In Quebec, abortion is still as dire a sin as suicide. Many women who are the mothers of large, obedient Catholic families, have lost most of their teeth and hair by the time they are thirty, and in a small town in Quebec, for example, one is considered to be unfaithful if one hasn't proffered at least 6 or 8 new little Church members to the Catholic family. When i lived in Montreal, there were signs that said, "Birth control is against God's Law!")

My second abortion took place in the USA. in 1962. By then, I had been married to my second husband for several years. We lived in Washington, D.C. I had already given birth to my fourth Caesarian-born child, and I became accidentally pregnant a few months after I had stopped nursing him. This pregnancy was the result of unsuccessful contraception. When my husband gave me time, I always used a diaphragm with spermicide jelly. (My husband refused to use anything, believing

that it spoiled his pleasure, and that it was solely the woman's business to protect herself from "getting herself pregnant".) We both felt that it was far too soon for me to have another baby. My health was fragile at that time, and the obstetrician told me that my uterus might rupture if I tried to have another baby so soon after the last. <u>But even with this admonition, it was illegal for my doctor to abort my pregnancy</u>. Lacking any sensible legal alternative, I chose to have an illegal abortion. I was given the name of an abortionist in Manhattan. The abortion was performed by ... whose office and fingernails and assistant were all filthy dirty. After the abortion, which was a very painful and slow process, I nearly died from a "surprise" injection of penicillin to which I am lethally allergic. I hemorrhaged, my throat began to close, and as I swelled up, my blood vessels popped like fireworks. I managed to call out for adrenalin, which they eventually administered. My recovery from this experience was slow and difficult, and lonely.

I began to dread and to loathe sexual intercourse. This new attitude of mine caused my husband to begin to look elsewhere for his pleasure. I felt victimized: I was "Damned if I did, and Damned if I didn't."

I also had a legal abortion, in 1965. This was when I was again pregnant: far too soon to safely deliver again after my fifth child was born. (Note: My uterus did in fact rupture when I was later pregnant with my sixth child, which I lost. Both my uterus and ovaries were removed at

that time. The doctors had no difficult choices in performing that operation.)
In order to obtain the legal abortion, I was required to be certified by two psychiatrists as mentally and emotionally unstable and "suicidal". (The certification process was humiliating; one of the psychiatrists told me I was suicidal and needed "prolonged help", which he gave me over the next seventeen years for two hours every day, six days a week, always with the threat that I might kill myself if I didn't depend on him and his treatment...at last I managed to realize that at over $200 a day, I was paving his terrace, sending his children, and probably paying for his wife's new mink coat!) It was not a stabilizing realization.

The legal abortion was performed by my obstetrician at the ... Hospital. I went into the hospital the night before; my doctor's attitude was practical and matter-of-fact. The procedure itself was done with sensitivity to my emotional as well as physical condition, which allowed me to recover quickly and without added stress. Sodium pentathol was administered during the D and C, and afterwards, I was given an antibiotic for infection and codeine for pain. When I went home, 24 hours later, I was in good condition considering the fact that I had just undergone an abortion. And even though I was sad, I most definitely did not feel like a murderer!

I felt sympathetic support from the doctor and from the nurses. There is always a sadness that goes along with any kind of procedure that takes away the possibility of a new life. But what makes the difference is attitude.

In choosing to have abortions, I was choosing to remain strong and healthy for my family.

But by putting my life at risk in order to avoid taking on more that I could cope with, I ended up feeling like a murderer. At least with a legal abortion, I felt that I could be protected from the kind of abuse or harm I had experienced with the illegal ones.

Recently, I read an article which said that over 40,000 babies die of starvation every day, in the Third World. Can it be a morally superior choice to bring so many new, hopeless little lives into the world to suffer from hunger and die of starvation without ever knowing life's happiness? If saving so many lives from misery and futility were to be considered a function of abortion, then it could be seen as a compassionate choice rather than a crime against life.

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LETTER-130

I am a 60 year old woman deeply troubled by the possibility that women's constitutional right to determine their own reproductive rights is being threatened and may be taken away. It is almost hard to believe that there is even a possibility that this could happen after so many of us fought to achieve this fundamental right. I know, of course, that the threat is very real and I urge you to abandon this path of thinking.

When I was in my twenties I had an illegal abortion. There were no other options that I saw at that time. Because of the illegality, it was extremely difficult to find someone who would

discuss how to find someone to help me. People were afraid. As a consequence, when I finally found a source I had gone beyond the time of a safe procedure. I lied to the "doctor" because I knew he wouldn't do it if I told him how far along I was. We all hear the stories about "what it was like." They are true. He insisted I come by myself which I did. Is there any way I can describe my fear? He was unclean, he joked a lot, his hands were rough, his breath was bad. He forcefully approached me to have sex with him because "what harm would there be under the circumstance?" That, of course, explained his reason for insisting that I come alone. So on top of the fear for my physical safety in that situation, the agony of decision about what I was doing, the need to keep this secret from everyone I knew and face it alone, there was the disgust, repulsion and deep fear that if I didn't do what he wanted he would send me away.

It is not my intention to describe the physical procedure, the discomfort, the sounds that I will always remember. That isn't the point. It was something that I did and I am not sorry. Sad, yes. Sad that it had to be, sad that it had to be such a traumatic experience that will always be a part of me, sad that there was so much agony and turmoil trying to find help.

I never want another woman to have to experience what I went through. My plea is that simple.

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LETTER-140

I am writing today to share my experience with abortion in the hope that

it might, in some small way, help the Supreme Court understand why it is so important that abortion remain safe, legal and affordable.

In 1964, I was a nineteen-year old wife and mother of an infant daughter. My daughter, born five weeks premature, had been diagnosed soon after birth with a congenital heart defect. She would need open-heart surgery as soon as she was strong enough.

When our little girl was a year old, I became pregnant as a result of a contraceptive failure. I tried very hard during this time to image caring for a second child. We considered our finances, our emotional resources and support system. We sadly had to admit that our marriage was already under incredible strain. It seemed impossible to have another child without doing irreparable harm to our existing family.

Abortion was not legal. After several weeks of searching, I found someone who would perform the procedure, but his fee was more than we could afford. Beginning to feel desperate, I tried several times to abort myself. Before I could do myself any more harm, the doctor, unlicensed in the U.S., agreed to reduce the fee to whatever we could afford after hearing our situation. I was fortunate. I watched a neighbor rushed to the hospital after she tried to abort herself.

Since that time, my daughter has had two successful heart operations, graduated from college and is a healthy productive woman. She also has a sister born in 1977.

I have heard it said that abortion is just a convenience, especially for middle-class women. I assure you, pregnancy is no

mere inconvenience. A pregnancy consumes a woman's body, energies and resources for nine months, many times with complications, sometimes at risk to the woman's life. After pregnancy, there is a child, life's most sacred responsibility, for eighteen years, for life. I am not well-to-do. I cannot offer my children the world on a silver platter, but I feel that I and every woman must have the right to offer her child the best chance for life that she can. Every woman must have the right to enter into this life-absorbing responsibility when she decides that she can.

I strongly support thorough sex education for young people, contraceptive research to develop safe, inexpensive birth control, and safe legal, affordable abortion. I hope the Court will as well.

LETTER-149

Two weeks after I discovered I was pregnant, my husband, who had suffered for years with an un-diagnosed illness, was found to have a malignant brain tumor. After two very expensive visits to psychiatrists I was given permission to have a leagalized abortion at a local hospital. This was in 1960.

For the next 3-1/2 years I spent most of my days at ... I was the only one who could interpret my husband's garbled speech. He died at the end of that time.

To have the abortion was the wisest decision I have ever made. I could not have been as helpful to my husband or my two children during the horrible time of this dreadful illness, had I also been©R responsible for a baby.

I have never regretted my decision. I had no physical or mental ill effects. I have never had any feelings of guilt. It was a decision of survival as far as I could determine.

It is all too easy for anti-abortionists to judge as long as the unwanted pregnancy is not theirs. When or if the problem becomes theirs personally, they will quickly be on the pro-choice side!

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LETTER-152

In the summer of 1982 I had a legal abortion. I was twenty-seven years old and living with the man I later married. I was using birth control, a diaphragm, but nonetheless, I became pregnant. My mate and I discussed the options, and he basically told me that whatever decision I made, he would support.

I chose abortion because both my mate and I were abusing drugs at that time, a fact I am not proud of, but one that must be considered in the decision to bear and raise a child. Our financial situation was disasterous, we were in debt from hospital bills from surgery my mate had had on a bleeding ulcer and from a recent IRS audit. We were both working, but it was barely enough to take care of the bills and our drug habits.

Our health was poor, as was our emotional state. The thought of bringing a child into an environment of fighting and turmoil associated with drug abuse was inhumane to me. I didn't believe adoption to be a viable option, as I didn't think that I could give birth to a healthy baby.

Choosing abortion was a tough decision, one I hope I never have to make again, but

I am thankful that the option was open to me. My husband and I are drug-free now, financially solvent, and plan to have a child in the near future.

People who don't have options often do desperate, dangerous things. I implore you not to take the right to abortion away from American women. We alone are responsible for making choices concerning our bodies' reproductive systems.

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LETTER-157

My name is .... I left home when I was 17. I found myself pregnant when I was 18. I was the mother of one at 19. At 20, the mother of two. Given my Catholic upbringing, it was completely out of the realm of possibility to choose anything other than having a child and if the father was willing, to marry. I married a boy no more ready to be a father and husband than I was ready to be a wife and mother. Neither of us attended college and had barely any idea of how to support ourselves. The marriage lasted on and off for eight years. During most of those years we went hungry and were under the incredible pressure of basic survival. We had children as children and had to figure out fast how to grow up. It's not as simple as sink or swim, and the emotional and psychological damage that is wrought cannot ever be undone. I experienced two nervous breakdowns during those years, with scars I live with to this day. I had made the decision to have children when I was totally unprepared economically, physically, emotionally, morally, spiritually, and psychologically. And why? Simply because I had been programmed to

believe it was the "right thing to do". The critical thinking never entered into it, I did what I was supposed to do. It changed the course of my life forever.

I had always been opposed to abortion vehemently, never thinking it through myself, just condemning those who believed in it. It was easy to feel a rather smug, self-satisfied righteousness to be on "God's side" and dismiss the voiced concerns of women who found themselves faced with painful options. During one of the several separations I had with my former husband, I found myself pregnant. I could not just blindly assign my fate once again to someone else's beliefs. I was forced to confront my beliefs and make my own decision. After grueling soul searching, I chose abortion. Had that option not been available to me I know, given the state of my emotions from all I had been through, I would not be here today writing this letter.

The world is full of neglected, abused children. We see and hear about them every day. What is the sense of adding to their numbers by limiting a woman's options over he own body? If this legislation is overturned, would any of us be able to face any of the resulting unwanted children, poor, neglected or abused and say well, at least you're alive? The "gift of life" can mean shockingly little when your life is never free from poverty and abuse.

Please, let us as a society make our choices wisely.

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LETTER-160

Yesterday, I called Mass Choice because I am more and more frightened that the

choice to end an unplanned pregnancy, which was of critical importance to me and my two children on two separate occasions (when the birth control I was using failed to protect me), may become unavailable to other women.

I also chose, during the course of a sixteen year marriage, to have two children (mentioned above) by artificial insemination as my husband was unable to father children. The children are now 12 and 14.... They are healthy, attractive, straight A adolescents with the normal problems of adolescence.

However, at the time of the divorce, when I was in my late 30's, the children were 1 and 3. We were thrown suddenly into poverty as my ex-husband refused child support. I had no job skills and had never dated. At my first job I earned $100.00 a month less that the child care cost. The job, required me to work 70 hours a week (ass't. manager of a McDonald's). (My husband had disapproved of my working outside the home even though for most of the time we were married we had no children and he was away 14 hours every day.) Our life was a nightmare of fear and struggle after the divorce.

Twice during those years immediately following the divorce, during the course of a relationship we hoped would lead to marriage, I became pregnant. I recognized the signs immediately. I was terrified. Thankfully, a friend told me about [an abortion clinic]. (It saved my life and my children's lives. An illegal abortion would have had to be my choice were not abortion legal and available through the Center at a reasonable cost. They provided counseling on birth control as well. (It

wasn't until after the second abortion two years later that I had an I.U.D. implanted. It has proved effective and safe for me in the 9 years since).

The Center was a port in a terrible storm. To have been forced to carry the pregnancy to term and then give the baby up for adoption, as Bush has suggested, would have destroyed my children's and my life. I'm from a well-educated, upper middle class background, for me personally welfare is not an option. All my children would learn from that is "how to be on welfare" instead of "how to work your way out of a difficult situation."

It's been eleven years since the divorce. I'm forty-eight. I haven't even dated for a couple of years. My focus is on the children and completing my Ph.D. in Applied Behavioral Systems Theory. The children and I live in a house I was able to buy last summer. We're happy. We made it. But just barely. In those first years our situation was so fragile. I have, now, enormous empathy for other women who suddenly find themselves fighting to keep their family together in a sudden poverty they themselves did not cause. Not having the free choice for a necessary abortion at such a time would, in many cases, be a virtual death sentence for the family. The strength of feeling I have in this is born of my own struggle.

I was thankful to the medical profession for giving me two children I would not otherwise have had. To me they are miracle children.

And I am thankful to the medical profession for providing a safe, immediately available abortion, twice in my life.

I chose to have two children.
I chose not to have two children.
I was luck to be able to choose.
I fervently hope you will not take away the choice from other women.

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LETTER-173

Please use this letter in any way it can be helpful in filing friend of the court briefs or in any other way it can be useful to the cause of continuing freedom of reproductive choice for all women in the United States. I am willing to have my name associated with any use of it.

In 1984 I became pregnant by accident. I was married to a man who had become a physically abusive alcoholic. We had one child, age 3, at the time. I didn't see any way out of the relationship for myself at that time. My husband was not then working. He had left his step-father's company and I believed (correctly) that his chances of working steadily were dim because of his behavioral problems. I was the sole support for my family at this time and had virtually no help from my husband in any area of responsibility. I was emotionally distraught much of the time because I felt I was not providing the material or emotional environment that my child deserved, and because of the constant pressures of physical and emotional abuse. The thought of bringing another child into that environment was more than I could bear. I knew I could not add the work of caring for another child to my burden, it would have broken me. Although I had enjoyed my first child as a baby and had been more delighted than burdened with night feedings and constant

care, I did not want to think about what kind of a person I would become with the added demands on me. I was also afraid of physical harm to myself and the developing fetus, and fear that I could become a "welfare mother" unable to support my family. With no joy in my heart but with the knowledge that I was certainly making the right choice I had an abortion.

Two years later I found the strength to divorce my husband and am now living a much better life with my one son in all regards. We are self-sufficient and stable. I am even able to plan for his education. I don't know what would have happened in our lives had I not been able to obtain a legal, and therefore affordable, abortion. If the right to safe, legal abortion is denied it is not denied to those who can afford to go out of the country or to pay an exorbitant fee for a "D & C" to a doctor willing to act illegally. It is only denied to those who are least able to bear additional financial and emotional burdens. They must seek unsafe, degrading abortions or risk losing their self-sufficiency and direction in life which also robs their living children of the opportunity to grow up and benefit from the other rights and opportunities available to americans which allow most of us to lead useful, productive, satisfying lives.

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LETTER-181

As you are all well aware, it is the interpretation of the law, not the law itself, that bestows its bite or its blessing. Abortion is the same. For each woman who has had an abortion, there is a

different interpretation of the experience, ranging from relief to sorrow, and sometimes a woman's feelings include the entire spectrum at once.

This is why, to me, abortion means ambivalence.

I have had two abortions. The first brought me a sense of relief after I became pregnant near the end of a relationship, and knew there was no future with that man. There was nothing about my situation at the time that seemed healthy for a child to be born into. It was not an easy decision, but I was grateful for the fact that my own struggle was exactly that - my own struggle - and that I did not also have to endure the persecution of taking an action that was illegal. However, I must say, if it were illegal at the time, I would have made the same choice.

The second time I had an abortion I had been married eight months. My husband and I had decided before we were married that we wanted children, but my unplanned pregnancy seemed like a prison sentence to him. He wanted me to have an abortion. I did not want an abortion, but I decided to have one because I felt that having a child at that time would have driven a wedge between us. I was in deep emotional and spiritual pain over this decision because I loved my husband dearly and I loved the child inside me. However, it was my decision at the time to choose to nurture our relationship until the "right" time to have children.

I realize now there is no "right" time. I was divorced last year after waiting eight years for the right time to come. Sometimes I feel the depth of regret about my abortion, wondering about that child,

loving that child. Sometimes, however, I feel that I must have known, intuitively, that it was better not to have children with this man. The years with my husband revealed he had a violent streak that was unpredictable and frightening. When we decided to divorce he said he realized he was afraid of having children because he didn't want to inflict his turmoil on them.

To me, abortion means ambivalence. Life means ambivalence. Life does not fit into neat and permanent packages. The choice to have an abortion should and will always remain one of the most difficult decisions a woman could make. But because it is fraught with conflict does not mean it should be taken out of her own personal realm of choice.

I have made decisions which only I am responsible for making. The wisdom or foolishness of past decisions becomes clearer with age. I have not permanently judged either of my decisions as wise or foolish. Some days one feeling prevails, some days another. What persists is that I made the choices and I am responsible for those choices, and responsible for my feelings about those choices. Making a choice and living with it is the weight of life that we all must learn to bear. Learning to bear this weight, and to learn from our mistakes, is the passage into adulthood which is fundamental to a healthy society. Otherwise, citizens are mindless, without accountability.

A friend of mine who is a loving father and a Fundamentalist Christian feels that abortion is murder. I agree with him. Where we differ is that I admit that

sometimes the taking of life is necessary. Not right. But sometimes necessary.

I believe a fetus is human and has a spiritual identity. And I believe that the weight of life that we must learn to bear as adults sometimes includes the taking of life. It is the conscience or lack of conscience with which the taking of life is committed that has consequences for our society. The arguments about euthanasia, our guilt over Viet Nam, - these are extensions of our ambivalence about the taking of life. And we should never take it away easily. But still we know that sometimes the taking of life is necessary. In euthanasia, it is sometimes necessary to preserve the dignity and the quality of the life that has been lived; in abortion, it is sometimes necessary to prevent the birth of a life that would be lived without quality, because the mother knows that she does not have the spiritual, emotional or material resources to provide to that child at that time. To dictate that in such an instance she should give birth and give the child up for adoption is to sentence the mother to another cruelty. She should be able to decide for herself if she can bear or should bear the weight of that very private burden.

Instead of legislating to restrict people from the weight of personal decisions, shouldn't we rather encourage a society where people understand the complexity of life, and bear the responsibility for their choices? Perhaps we want to legislate against abortion because we are afraid of bearing the weight of our decisions. Perhaps it is because we are afraid of death.

I pray that you all, in your hearts, choose to listen to the stories of women of conscience, like me, who believe that life is sacred AND that the difficult decision to have an abortion or to give birth must rest with individual women.

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LETTER-187

I happily write this letter in support of every person's right to choose when they will have their children.

I have faced several such decisions in my life.

When I was nineteen I became pregnant with my first child. I never thought of doing anything other than having the baby. The baby's father, now my husband, first thought of abortion but that quickly gave way to acceptance and joy at the arrival of our son.

In the past 2 1/2 years since his birth, we have understood what it is to struggle. Neither of us have college degrees and we both feel very strongly about not using the welfare system. We have had to do the best we can for ourselves and our son. What we have had is love.

1 1/2 years ago I became pregnant again. Initially we were glad as we recognized the sacredness of life. But, in time and through discussion I realized I was not ready to be a mother of two. I also felt my 13 month old son deserved my full attention and demanded it. At this point we fully understood the realities and stresses of parenting. The financial responsibilities create very high levels of stress and even our love for each other and our son didn't make it any better. After a heart wrenching decision we chose abortion.

Not out of convenience or hate but out of love for the unborn child we knew we were unprepared to take proper care of.

I did not enjoy my abortion. I don't see how anyone could. I do not plan to have another. It was one of the most physically painful experiences of my life but I feel deep in my heart I made the right choice for the baby and for myself and my family.

I think we as women and/or mothers do have the right and the insight to know what is best for our unborn babies and for ourselves. Let's remember how we all speak of "women's intuition."

At my abortion experience there were others who chose the same place and day to release their babies. Almost all were obviously under 18 and most were with their mothers. I am glad to know our young women have a safe choice. They have the choice to wait until they feel they are ready to be good mothers and able to provide the kind of security necessary for a child to grow up healthy. They have a choice to live out their dreams, even though they've made a mistake. Would we really send them back to the enslavement of unwanted pregnancy, financial hardship and shattered dreams? Don't we want more for their children than lives on welfare, in poverty. Don't we want all of our children to have every opportunity for education instead of forced enslavement to a welfare system that cannot support human life? I think anyone who thinks that with a little effort these women can remove the ball and chain of poverty isn't living in the real world.

I was lucky enough to have the love and support of my man standing by me, but how many teenagers have that? I realize

teenage pregnancies are only a portion of the abortions that happen these days, but teenage abortions are what is relevant to my experience.

I recently became pregnant again and I am now choosing to have our second child. The stresses are all still there but I feel like the last 4 years of my life have matured me enough to handle them.

I have no college degree. I have no way, on my own, of making enough money for my children and I to survive. I understand these realities the realities the young women of this country face at the thought of illegalizing abortion.

If we want our country to have on coming generations of children that are bright, healthy and capable we must allow women and men the right to choose when they will become parents and not force them unnecessarily into lives of poverty and shattered dreams. We owe our children that much at least.

I would like to thank all of you there at NARAL for all you are doing to speak out for the women and unborn children of this country.

Keep up the good work!

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LETTER-209

I had an illegal abortion in 1966. My parents went with me. We were lucky. The person who performed the procedure was competent and considerate. My father was a 4-year WWII vet. stationed in North Africa. He told me a few years ago he was never more afraid in his life than when we went to New Jersey for that illegal abortion.

I was 19, attending a city college, and unprepared to marry, to be a mother, to

continue with the pregnancy. The fear, isolation and horror my whole family experienced should not be repeated for my children or their friends. The decision about what to do in a crisis pregnancy belongs to the woman involved and her conscience. It does not take a sperm + ova to create new life - it takes a sperm, ova and a woman's uterus. If that woman does not want to support that growth for whatever reason, she is the one who should decide what to do about it.

I now work as a sexuality educator and birth control advocate. If people want to prevent abortions, let them get serious about contraception, about b.c. options, research etc. The facism involved in the anti choice movement enrages me. I will testify, appear in public, use my name, do whatever to keep up the struggle for women's right to choose.

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LETTER-212

My name is .... In April of 1988, I obtained a legal abortion. I was twenty years old + faced with an unplanned pregnancy. I already have two sons that came along in my young life. Like most single parents, I live on Public Aid. I also live in one of the poorest regions of Illinois. I was very relieved that there was a safe + legal option to resolve my problem. I believe all women should have reproductive rights for their own bodies.

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LETTER-216

One morning late last fall, I listened in disbelief to the news that the Attorney General had asked the Supreme Court to

review a case that might overturn Roe vs Wade. I cried - cried at the thought of so many women suffering so much if this threat really came to pass. The tears were quickly followed by anger and fear. The anger and fear have not diminished.

I feel qualified to comment on this possible reversal and free to be outraged. In February, 1982, I had an abortion. It is a decision I have never regretted. I thanked God then and still for my right to have had a choice seven years ago.

In 1982, I was 38 years old, married with two children. We were and are still a typical suburban family - as far as the outside world can see. But life was not ordinary for us in 1982. I was (I am) chemically addicted to the drug alcohol. Beginning in October, 1981 I made my first feeble attempts at recovery from alcoholism. Having finally accepted the fact that I needed help with a problem that was making life a living hell, I wandered in and out of AA meetings, listening but not hearing, trying but failing - time after time. The months passed. I became more and more fearful that I wasn't capable of recovery - I was going to die from a disease - the progression of which only I could halt. But I couldn't stop drinking for any substantial length of time. For some reason, I kept attending AA meetings-they provided the only hope.

In the midst of this rollercoaster ride of addiction - in February, 1982, I realized I could be pregnant. I called a doctor who quickly verified the pregnancy with a blood test. I was frantic, frightened, drained physically, emotionally, spiritually from my alcoholism. I could not manage my own

life. The prospect of a baby was overwhelming! There are those, no doubt who might think, "she's pregnant...now she'll see it's time to pull herself together!" And they would know nothing of the forces of addiction! I chose to have an abortion. Now much is known about Fetal Alcohol Syndrome. In 1982, this was not a topic of discussion. My doctor, who knew I had a drinking problem did not mention it. He assured himself that an abortion was what my husband and I wanted, and it was performed. It had been 6 days since I called him. I was 4 weeks pregnant. The fact that legal abortion was available meant it could be performed early - which meant more safely and certainly with less emotional trauma involved.

I believe my decision was the right one at the time - for me - for my family.

I continued efforts toward recovery, and with the help and support of AA, I have not had a drink since April 13, 1982.

It makes me furious that women in similar situations might soon not have the choice that was given me. Any woman who wants to terminate a pregnancy must have good reasons - for her. Who is to judge anyone else's emotional or physical capabilities for bearing and caring for another life. No one but the woman herself.

I am resentful that our right of choice has become a political football- politicians conveniently switching their stand on the issue according to the loudest voices. First for it, then against it. I wonder - how do they really feel? There are so many tragic circumstances when abortion is so obviously in order - how can

they be against it and have any sense of humanity?

I am resentful, too, that many of the groups so opposed to abortion also oppose efforts to educate the public, especially the young, about birth control. And, will I someday be told that I can no longer use an IUD because it doesn't necessarily prevent conception - only the egg's implantation in the uterus? How far could the government take this issue?

I thank all those who are fighting once again for our right of choice. I hope the Supreme Court hears our voices. We won't be silent - ever.

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LETTER-245

Shortly after my husband and I were married, I suffered a nearly fatal bout with a rare and devastating disease, Guillain-Barret syndrome. During a slow recovery, we conceived our first child. Almost immediately I was back in the hospital with a recurrence of the most serious symptoms. As my condition rapidly deteriorated, the physicians attending me decided that an abortion would be necessary to save my life. After consultations with highly respected specialists in the fields of neurology, obstetrics, and internal medicine, the decision was made to do the abortion in the first class hospital where I was a patient. Immediately my condition improved so that I could convalesce over a period of many months.

Later, my husband and I were blessed with four planned children. They are all grown and all are active in their respective professions: medicine, medical research, ecology, and English teaching at the college level.

Without the abortion, which I never regretted, my husband and I would not be celebrating forty years of happy marriage, and the country would have lost four outstanding professional men and women, our children.

THE CHOICE OF REPRODUCTION MUST BELONG TO THE WOMAN, AND NOT TO THE POLITICIANS. ONLY THE WOMAN AND HER DOCTOR CAN MAKE THE BEST DECISION.

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LETTER-247

I am writing in response to your letters of January 19 and February 16, 1989 calling for individuals to write of their own experiences with abortion for possible inclusion in a friend-of-the-Court brief in the case of Webster v. Reproductive Health Services. I can think of no more worthwhile way to spend my time than to provide you with such a letter. I only hope that it will reach you in time to be considered for inclusion. I would be honored to participate in this historic case of such great importance to women, and indeed, to all people in this country.

I have personally had an abortion. It was pre-Roe v. Wade in 1970 at the ... Medical Center. The law in ... at the time stated that the only allowable circumstances in which a woman might have a legal abortion were in cases of rape or incest, or when carrying the pregnancy to term would be dangerous to the life or health of the mother.

I was twenty-five years old at the time, divorced with two small children, ages five and seven, and a senior in college. I had for two years been living with a man with whom I was in love, but were uncertain as

to future plans in terms of marriage. I had at that point made significant progress in turning my life around after an inappropriate and disasterous teenage marriage. As mentioned above, I was putting myself through college with the help of my family, raising my children as a single parent with very little emotional or financial support from my extremely immature ex-husband; I was making grades good enough to consistently keep me on the dean's honor roll and contemplating going to graduate school.

When I became pregnant I was terrified at the prospect of bringing another child into the world, knowing that I was already strained to the limit, both financially and emotionally with the two children I had. I felt certain that bearing this child would be a disaster for me, my educational plans, my children and possibly for the relationship with the father. After an incredible amount of soul-searching, discussions with the father and with doctors and counselors at the ... Medical Center, I decided to have an abortion. I was lucky in that the medical personnel at the Med Center were incredibly enlightened in that they chose to interpret the existing ... statute as including the "mental health" and emotional well-being of the mother. Part of the law required that the woman be seen by two physicians who would sign an affidavit allowing the woman to have the abortion. The Med Center had set up a procedure wherein the two required physicians were picked from a group of sympathetic psychiatrists, whose job it became to determine that the women in question were "healthy" enough to withstand the stress of the abortion, rather than

having to prove that they were too unhealthy to bear a child. I was most impressed with the reasonableness, genuine concern and enlightenment that prevailed.

I should say that I was resolute enough in my decision that I would have proceeded with the abortion, even if I had not been so fortunate to find myself in the hands of such caring people. I might have followed in the footsteps of my sister-in-law who some years earlier had gone to Juarez, Mexico for an abortion, wherein she suffered a brutal and unsanitary abortion, from which it took her many months to recover physically, and from which I don't think she ever recovered emotionally.

I also want to say that I got good follow-up care after the procedure, a D & C; again, both physically and emotionally. (The doctors who had signed for me to have the abortion warned me that I might experience post-abortion depression, and in fact, I did.) I heeded their advice and sought support from a mental health professional. I mention this to emphasize that there is nothing about abortion which is taken lightly by the women who choose to have them. The decision to have an abortion is at best the least of several bad scenarios; the procedure itself, although safe and fairly simple (now) is still unpleasant, and it is inevitable that there will be post-abortion discomfort. After all, the woman has suffered a loss and grieves for that loss, no matter how sensible the decision. The charge made so frequently by anti-choice folks that women who choose abortion do so carelessly and often for the sake of convenience are out of touch with reality and operate at a level where they see things only in terms

of black and white and their own stilted version of morality, with no understanding that most human behavior takes place in the "grey areas."

I have never been sorry I made the decision that I did; I know it was the right one for me at the time. My life, and the lives of my children, would have been significantly different and more difficult had I been forced to bear that child. I am glad that I had the courage to go through with what needed to be done, and I am very glad that my circumstances were such that I was supported in my decision and given excellent health care.

I should also mention that I did go on to graduate school, that I married the father, raised my children to adulthood, and have been a productive and politically-active member of society. (I did, in fact, lobby for the National Organization of Women in the ... Legislature in 1986 and was dismayed to find that it was necessary to spend the better part of my time in that position fighting the anti-choice forces.)

I know, because of my personal experiences, that this right of ours, to choose whether or not to carry a child to term, is so basic and fundamental, that it is among the most crucial issues of our time, and that the decision of the Supreme Court in Webster v. Reproductive Health Services will have an immense impact on our society. After all, if we as women, are denied the right to control our own bodies by the government under which we live, have we any rights at all?

Thank you for the opportunity to be a small part of this historic event. I, along with millions of other enlightened Americans, a growing majority, as you know,

await the results of this case with the greatest anticipation. Keep us the good fight; my thoughts and prayers are with you!

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LETTER-259

I've had two first-trimester abortions, in 1979 and 1980. I was barely 20 and 21 years of age, respectively.

I became pregnant the first time two months after being diagnosed as thyroid deficient. Some symptoms of hypothyroidism are menstrual irregularity and sterility. I had practiced no birth control for years before this, and didn't believe that thyroid supplements would REALLY make me fertile; after two "clockwork" menstrual cycles, I conceived. I didn't believe I was pregnant, I thought it was stress. I was nauseous, sure, but ALL DAY LONG and not enough to vomit. Plus, the local clinic gave me a negative test. The second one came back positive.

Here are the circumstances surrounding my first pregnancy: I was a dishwasher in a little health food cafe, making less than minimum wage as a part-time worker; so was the father. Between us we took home maybe $90 a week. If we hadn't received free meals from the restaurant, we would have gone hungry. We had been living together about a month. I had a car: it was broken. I was 20, he was 24.

I was utterly unprepared, emotionally or financially, for the responsibility of raising a child. No question: I would have HAD to go on welfare. There would have been no way I could have continued working. I over-reacted punitively when my DOG misbehaved; I was afraid I would abuse

a child. Childrearing is a lifetime commitment; I wasn't secure enough in my relationship with the father to count on his support through that. I wouldn't marry him out of necessity, though he claimed to be willing to marry if that was what I wanted. His stand was he found the idea of fatherhood attractive, but he would ultimately respect and support my decision, because he felt the decision was mine to make.

Adoption was never an alternative for me. Personally, I feel absolutely emotionally incapable of carrying to term and then giving up the child. If I was going to go through all that, I may as well just keep it. Also, I would have to live with the thought that s/he might show up on my doorstep 20 years later. I've known women who have given children up for adoption and it is a hell that haunts them forever.

So the abortion was scheduled. We pawned the father's guitar and borrowed some money from my mother. She flew out from L.A. to offer moral support. She was very supportive throughout the procedure and afterward.

The clinic was a good one. I was pre-counseled and told what to expect during the procedure, and emotional after-effects (i.e., "post-partum blues"). I remember I cried a little during the abortion--big, fat, quiet tears rolling back into my ear--because I felt that I had failed the father (talk about social conditioning!).

Primarily, though, I felt RELIEVED. I was glad when it was over, and I was glad I didn't get stuck in the welfare system. I might have been stuck in a lousy marriage

with kids that I didn't want. No one wins in that situation.

I beat myself up pretty bad over getting pregnant. I should have been on birth control. I felt that having this sort of "accident" was the worst form of irresponsibility. Plus, there were other people effected; the father, our families.

Having an abortion was, to me, a responsible way of handling what I felt to be an irresponsible mistake. All the alternatives had been rolled around and considered for a long time. Granted, a lot of it was before the fact: "What would I do if I got pregnant?" Pregnancy to me was something I feared, but felt would not happened to me.

The second abortion occurred a year later, shortly after the relationship mentioned above dissolve. I'd quit taking the thyroid supplements, and figured I'd been off them long enough to be sterile again, and went off birth control pills. I became involved in a brief and futile relationship with an old boyfriend, and wound up pregnant. By the time I found out, he was gone. I was an emotional wreck over the failure of the previous relationship, barely able to take care of myself.

I was sad the first time; this time, I was angry. I was angry with myself about being so stupid as to make this mistake a second time, and have to go through it again. "Fool me once, shame on you--fool me twice, shame on me." I was pretty much alone for this one; my mother was again supportive. Fortunately, this time I had insurance, so I scheduled a tubal ligation along with the abortion. This might sound a bit extreme...but even now, eight years

later, I feel I made the right decision, all the way around.

One thing I want to make clear: It seems that some anti-choice people think in the general terms that women who have abortions view them as some form of laissez-faire, after-the-fact birth control. Nothing could be farther from the truth, and anyone who thinks abortion is an easy decision is sadly mistaken. It is a difficult decision, and often a secret one.

Having the LEGAL CHOICE to make that decision is VITAL, however; I know I would have pursued illegal abortions if I'd had to. The information was readily available, and absolutely frightening; potentially poisonous herbal remedies (for example, large quantities of pennyroyal); people who would perform kitchen-table abortions with a turkey baster and a piece of rubber hosing; such extreme treatments as douching with household cleansers or lye-based drain opener. This appalling information is not pulled from books or newspapers; people I've known have volunteered these alternatives.

I am grateful to have been able to legally make the choice to have an abortion. I ultimately control my own body, one way or another, legally or illegally.

We must never go back to the days of back-alley, coat hanger abortions. Women should not have to pay the ultimate price of giving up their lives because of unwanted pregnancies.

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LETTER-261

I had an abortion in England during my Junior Year Abroad. I was alone, scared,

and very unhappy that I could not carry the pregnancy to term. I wanted to. I love children - I know I could be a responsible parent. I couldn't carry the pregnancy to term because I had no one - no one - to help me. No money, my education was not complete, my boyfriend was sleeping with someone else... I was so miserable. I knew I was pregnant, even though I had two negative pregnancy tests. The third was positive. I knew I wanted to have an abortion. I consider having an abortion an important decision - we are, after all, talking about a potential life. But deciding to carry the pregnancy to term is a much bigger decision - we are, after all, talking about a child, a person with needs, an undisputedly living human being.

In order to have an abortion, I had to get two doctors say that my mental health was in jeopardy. I was humiliated. They asked me where my boyfriend was. It is impossible to get pregnant without a "boyfriend." The place I had the abortion was sterile, ugly. I was put under general anaesthesia, which made me very sick. I was all alone, and I kept thinking - I wish I was home, at my local Planned Parenthood.

I didn't feel "proud" of my decision- my pride came later. At the time I was mad that I didn't live in a world that loves children - if there was free medical care, affordable childcare, acceptance of non-traditional families - I would have wanted that pregnancy. My mother was "anti-abortion" (now she is pro-choice) so I had some guilt about that - disappointing her.

It hurt physically - what a joke, the idea that women have abortions for "convenience." We have abortions because we have unintended pregnancies, because our

society has not created effective birth control. I was using a diaphragm when I got pregnant.

I share this story in hopes it will help other women. I said I wasn't proud at the time. Now I am. I made a responsible, loving decision. It would have selfish to give birth then. I would never have given it away.

I loved being pregnant. I wasn't sick, but I felt different. The fetus, my fetus; however, was not a living human being. My pregnancy was mine, my abortion was mine, and my body was and is mine. Thank you for sharing my story with the Supreme Court.

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LETTER-267

One day in the early 70s, I picked up a copy of MS Magazine. In that issue was a list of women's names who had had illegal abortions. With tears streaming down my face, I read each one those names over and over and realized that I was not alone in the world. In memory of those women who published their names so many years ago, I am telling my own story of what it was like when an unplanned, unwanted pregnancy put women outside the law.

I was the first person in a family of 13 children to graduate from high school. I was just past my 20th birthday, I had a good job, I thought I was in love, I was young and pretty. Suddenly, I felt as though all the good parts of my life was coming apart at the seams, because I was pregnant.

Stunned, confused and frightened, I told the man I was involved with of my situation. There was never any question of marriage, but I heard the word that I had

only heard whispered about - abortion. I became even more frightened, for my experience with abortion was only horror stories of women who died on kitchen tables with knitting needles and coat hangers as surgical instruments.

However, when I voiced these fears, I was told that I shouldn't be afraid. "Don't worry. There is a guy in ..., Ohio who is safe. All the mob guys take their girlfriends there." Somehow that made sense to me, after all abortion was a crime, so why shouldn't criminals know the best place to go?

And so, I found myself in a big automobile heading towards an unknown fate in .... I sat between these two men who talked of sports and gambling, one was the man I thought myself in love with, the other was a convicted murderer, the one who knew the man in ....

We arrived at dusk and pulled into an alley behind a very old house in a dark part of town. I left the car and walked alone into a small room with a table. I remember a black man with frizzy white hair, I remember seeing an old calendar with 1937 on it, and I remember nothing else. It is gone from my conscious memory, buried deep in my subconscious where I can't get to it. Somehow the trip back to Pittsburgh was made, and I remember only that the man had said, "You will probably have some pain, but you'll be okay."

I waited, afraid of what was going to happen, and then most the pain began. Hour after hour of the most intense pain I have ever experienced. Then the bleeding began, a hemorrhage so bad the memory of it still frightens me. The hours in the bedroom of my apartment, my roommate begging me to

call a doctor, go to the hospital, call my mother, do something are still with me. But, I did nothing, I was afraid to do anything, because I was convinced that if I told what I had done, I would go to jail. I was outside the law, and there was no help for me.

Finally, the pain stopped and eventually the bleeding stopped, too. I returned to work, and within a few weeks realized I was still not well. My body was filled with infection. Still frightened about doing something illegal, I went to a doctor and told him that I was sick but did not tell him why. To my shame, he tested me for venereal disease. When those tests came back negative the doctor arranged for me to got to the hospital for a D & C the following week. He warned me that if I had any more heavy bleeding, that I must go to the hospital immediately because I was very anemic from losing so much blood.

Immediately after that visit, I did begin to hemorrhage again, and woke up in ... Hospital with blood transfusions and IV, and the doctor bending over my bed with tears in his eyes, saying "Why didn't you tell me you had an abortion?" I looked back and answered very truthfully, "Because I thought you would put me in jail." Eventually I healed, went back to work, went on with my life, but kept the memory of my abortion buried in a dark an secret place.

That's my story. Even after all these years, tears spring to my eyes when I think of how frightened I was, how young and desperate and how vulnerable.

I have spent a great deal of my life and my energy dedicated to keeping abortion safe and legal for women. My own memory of

the way it was in the dark days of back alleys, criminals, and illegal abortions have convinced me that to take away a woman's right to choose is putting women right back in that very same alley in ..., Ohio where I came very close to losing my life.

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LETTER-270

I am writing to express my concern that a women's right to choose her own life is being threatened.

I am a 32 year old woman who has made the conscious choice to not have children. The primary reason behind my choice is the knowledge that there are too many people in this world - and that this fact is at the root of all the ills now facing humankind. I could not, with conscience, bring into this world another hungry mouth that would further strain the limited resources of this planet.

At the age of 28 I had my tubes tied. It took me 6 years from the time I first made that decision to the time of its realization. The reason it took so long is because I could not find a doctor who could accept that because I was single, and so young I could know my own mind.

During that time I had several unwanted pregnancies. Not because of promiscuity, or carelessness - but because of the lack of the effectiveness of the birth control methods available to me. I refused to tamper with my body by using the pill - it is still unknown what all the long term risks are. I became pregnant while using an IUD - (that puts me in a high statistic group.) I also became pregnant, twice, while using the diaphragm method. I know that I never should have been fitted for

one in the first place - my body shape and size makes it impossible for my cervix to be adequetly covered and hence I cannot be effectively protected with one. Because of my convictions I could not and would not allow these pregnancies to come to term. They were terminated through legal abortion. I do not regret my choices.

I have always been proud to be a citizen of a country that safeguards an individuals right to make personal choices in their life. I have friends who live in Mexico, and the physical suffering and humiliation they were subjected to in carrying out their convictions is appaling. In countries where abortion is illegal, the abortions are not stopped, but a womans health is threatened, both physically and emotionally. If we allow this to happen in our country there will be butcher shops. A woman should not be forced by law to be subjected to such ill treatment.

I do not believe in using abortion as a method of birth control. But I can attest to the reality that a woman can become pregnant while doing everything in her means to prevent it. If abortion had been illegal, I would have gone the illegal route, and I would have been forced to.

I chose a permanent birth control. Not all women are willing to make that sacrifice. No woman should be forced to be a mother. Motherhood should be a choice, consciously taken when the woman is ready and willing to take on the immense responsibility of raising a child - at the time when she can give her child love and emotional support. The government should not be given the right to make that choice for her.

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LETTER-278

I became pregnant when I was 19 years old. I was troubled and concerned, but not confused and manipulated, as anti-choice activists would like to describe me. I knew what I wanted to do. I chose an abortion.

I write now not because my experience was particularly grim--it wasn't, and that's the point. I was able to get a safe, legal abortion, unlike my maternal great-grandmother who aborted herself with a knitting needle. I got care, I got counselling, and I got advice from clinic staff. My great-grandmother got none of these. Perhaps the worst part of her experience--and the most trenchant lesson--is the silence surrounding it. My mother whispered the story to me late one night, still afraid (?) that the words would haunt.

This is the message I most wish to convey: We cannot be silent. I am sympathetic with those who encourage conscientious choice, whether the choice is for or against an abortion. I am intolerant of those who would keep abortion--and they would be keeping abortion--a silent matter while many of them scream for capital punishment.

There is an ironic twist (at least one) in all of this. I became pregnant while I was a student at DePauw University--Vice President J. Danforth Quayle's alma mater and my own. It is ironic that I write now to contest the policies of a man who--according to DePauw tradition--is supposed to share a certain moral sense with me. I see now, as I began to see then, when I was 19 and pregnant, what the conditions of

that moral sense are for J. Danforth Quayle and so many others like him.

I contest those conditions proudly.

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LETTER-286

I am writing this letter because of my beliefs and experiences with the reproductive issue. If a woman's choice for or against abortion is to be decided in a court of law, then they need to understand what makes a woman face these choices.

My name is Anna, and I am 24 years old. I have a high school education and two years of college, uncompleted. I come from a divorced family and I have had five stepfathers. However, it was my mother who always worked and supported by sister and me.

At 17 years old, I became pregnant. I made my choice alone out of confusion and shame. I chose to give my baby up for adoption. I went through an adoption agency in Atlanta, who sent a representative to South Carolina where I lived at the time. She took me back to Atlanta, where I was completely isolated from everyone I knew. To sum up those long months, or to make anyone understand the loneliness, the exaggerations they told me, as well as the things they never told me would be impossible without living through it. I can only tell you that I could never go through it again and live.

What kept me going was the belief in what I was doing was right. But sometimes it's not enough when you worry whether or not your child is healthy and happy. It doesn't stop that hollow feeling in your

womb, or the feeling of being used and discarded like an incubator.

I hope that I'm not being misunderstood, I am not bitter. It was the right choice at the time. However, when I faced the same situation earlier this year, I did not chose adoption.

There was alot of soul-searching and memories from the adoption this time. I considered having the baby, but the reality of my financial situation made it impossible. The nightmares of my own childhood haunted me. I could never put my child through that. So, when the technician at the hospital told me the fetus had a very irregular heartbeat, I knew my choice. A woman in my situation can't afford hospital care, how could I support a child with special medical needs? It is also impossible to have someone adopt a baby that is not healthy. I don't think the court really understands some of these cruel truths.

In summary, I would like to say this: If Roe vs. Wade is going to be overturned, then there is going to have to be more Federal aid to pregnant women, a watchdog committee on adoption agencies, and even more medicaid or socialized birth facilities. However, I don't believe that those who would overturn Roe vs. Wade have made any considerations to this effect. If they did, I feel they would be more concerned for the children who live now without homes, food or in need of medical care. This "holy crusade" is a farce without attending to those children first.

Please feel free to use any part of this letter in your prepared brief. I have no objections. Thank you for reading my letter, and standing up for my rights.

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LETTER-294

I am 70 years old, married for 49 years, mother of four, grandmother of eight; and I have had three abortions, all before Roe v. Wade.

I was reared by my single mother, a feminist and Margaret Sanger advocate, who informed me about birth control so early in my life that I cannot remember just when it was. I used a diaphragm from the age of seventeen until menopause. My husband and I planned each of our four children with great deliberation. I was disappointed when I had a miscarriage, and the space between two sons became three years instead of two as planned. All this is by way of explaining that I never considered abortion as a desireable method of birth control. But...on three occasions I gambled and lost by neglecting to use my accustomed contraceptive.

In 1937 I was in college and in love with a ... student, an affair approved by our respective parents (in fact, his physician father had fitted me with a diaphragm) but marriage was never contemplated. So, when I became pregnant, abortion was the only consideration. My mother, a social worker, knew of a retired woman physician who performed abortions in her home. My "boyfriend" and I went there together one afternoon. The "procedure" took place in an upstairs "surgery", quickly and with little pain. The doctor told me I would abort in about a week. Her procedure did not include a curettement. I paid $15.00 to this doctor who did abortions on principle, not for money. I walked out of her house with my

friend, much relieved. We would go on with our student lives. I aborted the fetus in a week, with little warning, in a gas-station restroom. I recall THIS as the most disturbing and humiliating part of the experience.

In 1940 I married my present husband, a second marriage for each of us. We returned from a trip to Mexico, and I was pregnant. Once again I had neglected to use birth control. I went to the same woman physician who had performed my abortion three years earlier, and went through the same procedure for the same price. I remember feeling embarrassed for my negligence. I knew she was a firm believer in birth control, and felt intelligent young women need not repeat their mistakes. However, this time I did not abort in a week. I began to feel sick, developed a fever, and one night found myself crawling on my hands and knees to the bathroom, only half aware. My husband was frantic. We had come to live in the small town where he was reared, where his father was a minister and president of the Board of Education, and where he now taught school. He knew of no physician who would admit me to a hospital. But my sister-in-law had "heard" of a doctor who had performed abortions, and had lost but regained his licence. I don't remember how we found him, but he was able to admit me to the community hospital. He performed a proper curettement. I was in the hospital two days. There was no question of illegality because this physician was not the one responsible for the "abortive" abortion. He could clean up someone else's mess, and save my life, but he could not legally do a proper abortion in the first

place. I do not recall the doctor or hospital fees, but for a teacher making less than $1,400 a year, I know it was a burden. All this pain, humiliation, expense and family distress would have been unnecessary if abortion had been legal. In a small town anonymity is rare, and gossip is recreation. And "breaking the law" is no recommendation for a teacher and minister's son. However, my husband and I were not to face such stress again until four children and 16 years later.

In 1942 we had a daughter, the first of four planned children. Her brother was born in 1944. My husband was drafted six months before the end of WWII. That, plus its aftermath, changed our lives and family plans. I went to work as a teacher. My husband went to graduate school and earned a doctorate in psychology. I returned to fulltime "homemaker", and we had another son in 1950. We planned to have our fourth and last child in 1952, but I started to miscarry, and had a D&C on doctor's advice; a simple uncomplicated procedure (as an abortion can be). Our third son was born in 1953. We now had the children we wanted, loved, and could afford to care for emotionally, psychologically, and financially.

In late 1955, I was pregnant again. Although my husband was quite willing to have another child, I was not. I had decided on the size of my family; I knew what I could cope with without stress, I was almost 37 years old, and I was happily involved with my teenagers and the younger children. I felt our income was adequate to provide a good present and future for all of us. And I, like many others, (perhaps a little late!) was beginning to

be concerned about the environment and world population. I wanted an abortion. But the political atmosphere of the fifties was different from the thirties. There were crackdowns on suspected "abortion rings". Doctors and hospitals were being surveilled. Physicians were loathe to refer even if they were your friends and knew someone who performed a "clean" abortion. Eventually, through an extended "grapevine"...a friend who had a friend who knew a friend who had a friend...I was given a telephone number. Already I felt uneasy, frightened, about to break the law; worried for my children, my husband, myself.

I phoned the number I had been given. It was a doctor's office. I said a friend had referred me, and I would like an appointment. I was given an address on the south side of ... the Negro (we didn't say "black" in those days) ghetto where I had once been a teacher. I was told to come in the evening, and alone. It was an ordinary doctor's office, full of patients, men and women, black and white. The receptionist asked me to fill out a history. I was shown to an examination room. A nurse took my blood pressure and temperature, and Dr. ... came in. He was friendly and jolly, and told me he was chief of staff at a southside hospital. His fee was $75, and I could "pay as you go", for his procedure would not be over in one visit. He gave me an injection (which he named, but I've forgotten) of something that made me feel very warm from head to toe ... a sort of "flush", and then inserted a catheter into the uterus, telling me that in time I would abort. He gave me a prescription to be filled at the neighborhood pharmacy near

his office. I was to return at the same time in a week. I went home to be comforted by my concerned family.

It was very uncomfortable wearing the catheter day and night, but not painful. I returned the next week and the next and the next, alone and at night. No abortion. But on each visit Dr. ... examined me, changed the catheter, talked, sang songs from operettas, laughed, and assured me that I would eventually abort. Nothing to worry about. It had to work. By this time I was spending most of my time in bed, with the catheter draining and me rather weak. From time to time I would pass clots of blood. One morning I thought I had finally expelled the fetus, but I wasn't sure, because some of the clots had been pretty large. That night I had a temperature of 104 degrees. My worried husband tried to reach Dr. ... without success, and decided it was time to take me to the emergency room at [the hospital] where we were members.

I was placed on a gurney to await a doctor. I knew that for a physician to diagnose and treat effectively, I must give him all pertinent information. I told him I had had an abortion, and as he could see, it hadn't worked too well. That admission was my mistake. I simply should have said I had miscarried. Now, suddenly, nurses and doctor left the room. They could not admit me, yet. I was very weak and hot and scared. About 45 minutes later two men in street clothes came in. They were deputies from the District Attorney's office, and proceeded to question me: who did it, where, when. I refused to answer, and they told me I had committed a criminal offense and could be "the second woman to go to

Tehachapi in California history" for this offense unless I cooperated. My husband became furious and went off to call our lawyer. The deputies continued to alternately threaten and cajol. It wasn't hard for me to be silent; I was very sick. When our attorney arrived he told me I need not say anything, and told THEM to leave. I was admitted to the hospital.

Very little was left in my uterus, but I was treated and put on IV anti-biotics for four days (during which time I had four different roommates who had come in for D&C's). My lawyer came every day to confer, for the D.A. was pursuing my case and I was to be charged with a statutory offense. I said I would never give the doctor's name because, while his method of abortion had been dangerous for me, he had helped many other women, rich and poor. And, I would be glad to test the law which I had broken. I was feeling very brave!

For the next two months, men from the D.A.'s office came to the door, phoned, tapped our phone, and pressured both me and my attorney to "give in". I had made one phone call to Dr. ... when I came home from the hospital to tell him what had happened. He was unperturbed. I was not to worry. Finally, my attorney felt he could not properly advise me, as he was primarily a civil liberties lawyer, and I was now a criminal case. He retained one of the best criminal attorney's in [the city] (a man I could never have afforded) in a "friendship" arrangement, who persuaded me that I must accept the D.A.'s proposition to be a State's witness. When I took the stand I could plead "the Fifth". I felt miserable about protecting myself with the Fifth Amendment. But my attorney said,

"they're out to break what they think is a big abortion ring, and they think it's your man, and they aren't going to let go". So, I went to make a deposition.

The questions I was asked and the innuendos that were made were offensive, racist and sexual: "was the fee low in return for sex?"; "did he fondle you?"; remarks suggesting that my husband was not responsible for the pregnancy; and, of course, who, what, when and where. I simply "could not remember" any names or addresses. I knew by then that they had them anyhow. Eventually I was subpoenaed as a witness in [the case against Dr. ...]. My attorney said the trial was before a woman judge and in closed chambers. This relieved me, and I'm sure Dr. .... There would be no reporters. My husband would be protected from publicity which could possibly harm him professionally as a clinical psychologist and professor. My children would not be embarrassed or stigmatized. I was still uneasy about the whole court procedure and "taking the Fifth", but my attorney said it was very simple; just state my name and address and then refuse to answer further questions on the grounds it would tend to incriminate me. My attorney would not be in the courtroom. I did not need representation. I was not on trial. I was only a witness. But I was nervous, and shaken when I had to face the "defendant" and the catheter, and refused to identify either. I was dismissed. The doctor from [the hospital] (also called as a witness) met me in the hall before the trial. he said he was "terribly sorry" that I had to go through all this. He had been a brand new staff member when I was brought into

Admissions, and he simply was not sure of hospital policy. If only he had not asked... Policy apparently, was not to ask!

Well, I did not become the "...second woman in California history to go to Tehachapi" as threatened. Dr. ... was not convicted (his defense was that he performed no "surgery", and only treated me for on ongoing uterine problem, as his records would clearly show!). Only ..., a black newspaper, reported the case and my name. Our home felt secure again. My husband kept his job and "good name". Some years later my daughter chose to have an abortion which was done well and without trauma, but it still was clandestine, illegal, and expensive. And then came Roe v. Wade. How we cheered, knowing that her daughter and all the daughters ever after would never have to suffer danger nor indignity when choosing to terminate a pregnancy.

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LETTER-296

This true story is written to those who have the power to deny women the right to a safe, legal abortion.

In December of 1969 I became pregnant and chose to terminate the pregnancy. At that point in time there existed an underground referral service at the University I attended. I was referred to Detroit, Mich. to a doctor who performed abortions. I was told he did them all of the time and I had nothing to worry about. The abortion was performed in a hotel room with no anesthetic. The doctor entered my room and demanded $400 before he started.

The abortion was performed on the bed with my legs resting on two chairs. I

experienced an extreme amount of pain and was told that if I didn't shut-up he would leave and not complete the abortion. After he was finished I layed in bed for 18 hours unable to get up or eat. When I finally found the strength to get out of bed, I staggered into the bathroom, sat down on the toilet and passed out, only to wake up hours later and find out I had been laying against a steam hot water pipe and received second degree burns on my shoulder; scares I have to this day. Somehow I made the trip back home. Twenty four hours later I was in such extreme pain that I called a doctor. I was admitted to the hospital immediately and diagnosed with peritonitis, punctured uterus, colon. My doctor told the person who brought me in that he did not expect me to live. I spent 16 days in the hospital and had to have major surgery to have the damage done to me repaired.

I identified the doctor; through police pictures, that performed the abortion. He was apprehended in Detroit with $18,000 but was let go two days later.

There is no doubt in my mind that if Roe v. Wade is overturned that what happened to me twenty years ago will be a common experience. Women will continue to seek abortions. Leave the current law in tact so that women are not put through what I had to go through. I deserved more then and all women deserve more now.

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LETTER-318

I want to add my personal story to the attached letter. I am one who is strongly affected by peoples' life stories, and I'm hoping my story affects you.

I was raised in a nice, upper-middle-class home by God-, family- and country-loving parents who didn't drink, smoke, swear or beat their children. At the age of 19, through an accident and naivete, I got pregnant. Since this was 1967 and I had no access to a safe low-cost abortion, I was faced with a choice. Having neither the money nor the nerve to face a back-alley abortion, I chose to have the baby. Also, to protect my parents, I married the father, also 19, whom I had known only a few weeks.

Since my young husband had no skills and was afraid to get a job because he was violating probation (had stopped reporting when I met him), I took a job as a waitress to support us. After a few months I was laid off for being "too pregnant". Welfare paid for the birth of my son.

The day I arrived home from the hospital with the baby, the police arrived and arrested my husband for probation violation, and he went to jail. I don't remember how we made it through those times, but I do recall long hours spent in public health clinics and welfare offices with a crying baby.

Eventually we found work, and grandparents babysat. I wanted to have another child so my son wouldn't grow up lonely. My husband and I were both working, and renting a two-bedroom house near the grandparents, so it seemed possible.

With some financial help from my parents, we had just bought a little one-room house in another town when we found I was pregnant again. The birth of twins, welfare supplementing my husband's meager

income, a one-room house and shaky beginnings exploded a bad marriage.

When we separated, my husband took my son and left me the year-old twin girls, a lot of debts and bills, and the discovery that I was pregnant again. The pregnancy was identical to the one I'd experienced with the twins, and was unlike my single-birth pregnancy. That evidence, plus the fact that twins are VERY prevalent in my family, led me to face the choice of being a single welfare mother of probably five children, or - because it was 1973 and Roe v. Wade had just been decided - having a safe, legal abortion in my gynecologist's office. For the sake of my children, I chose the latter.

With help from Welfare and my parents, I returned to college, where I earned a Masters of Social Work degree. I got a job in my field, went off AFDC, and have been a contributing member of society ever since.

But this is not the happy ending to some fairy tale, Mr. Thornburgh. I have three children whose beginnings were the result of a slip-up, youthful carelessness and naivete, and a government that claimed control over my body. I was forced to choose between crippling poverty and death or maiming. Choosing the former, I subjected the son I was not prepared for and his subsequent siblings to the almost inevitable broken-home and absent-parent syndrome.

Although their father and I have done our best to raise them while trying to put our own lives together, the kids have not done well. Each of them has had run-ins with the law, one is on probation until her eighteenth birthday, all are substance-

abusers, it appears none will graduate from high school, and there's a good chance they'll all be chronically unemployed for years to come.

My twin daughters have had four abortions between them. For each, the first was at the age of fourteen. (They did not know at the time that I'd had an abortion, so don't jump to the conclusion that I'd somehow encouraged this by "modelling" it.) I am not proud that they got pregnant, nor are they - far from it! But what a relief that they were not forced to repeat, perhaps for generations, the cycle of poverty that marred their beginnings. If my daughters and my son can avoid having children until they are financially and emotionally prepared to do so, doesn't ALL of society benefit?

I got out of poverty with the help of social assistance, my parents and a ton of initiative. But I can tell you unequivocally, I never could have done so if I had been forced by law to bear another set of twins - or even one more child. I couldn't have gone to college or gotten a job without college that could have supported more children. My family's fate would have been years of Welfare, and our society would have been burdened with more unwanted children. I love my children dearly, but I think they got a bad break, starting their lives in such difficult circumstances.

Do I want you to support equal rights for ALL people, as we're guaranteed in the Constitution? You bet your life - and everyone else's! ENCOURAGE THE SUPREME COURT TO UPHOLD ROE V. WADE!

Thank you for listening. I hope you are feeling, too.

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LETTER-351

I have a very specific personal reason for wanting abortion to remain legal--without access to safe and legal abortion, my husband and I cannot have a family.

My husband and I are both carriers for a rare and deadly genetic disease called Tay-Sachs. Eighty-five percent of Tay-Sachs carriers are of Eastern European Jewish origin, but 15% are of other backgrounds. Both parents have to be carriers for a child to be born with the condition. There is absolutely no cure for Tay-Sachs; it is 100% fatal. The age range for a child born with Tay-Sachs is 2-1/2 to 5 years.

Unfortunately, we have found out all this through bitter first-hand personal experience. I gave birth to a child who was diagnosed with Tay-Sachs at 11 months. My obstetrician had advised my husband to be tested to find out if he was a carrier when I was six weeks pregnant (prior to that, neither of us knew anything about Tay-Sachs). The doctor told me that the carrier test would be unreliable on a pregnant woman (not true, as we later found out), and that, anyway, if my husband was not a carrier, we had nothing to worry about. This was absolutely true, assuming the test had been done correctly. Unfortunately, the laboratory that handled my husband's carrier test made a simple mathematical error when analyzing the test results. Because of this mathematical error, we were told that Dave was not a carrier, when indeed he really was. And although I am a carrier, too, we did not know this because I had not been tested.

Tay-Sachs is a progressive neurological disease. The child with Tay-Sachs stops normal physical development at about six months, and then very gradually begins losing all skills gained up until that point. In the case of our daughter (Abigail), she was never able to sit up, although she did everything normally up until that point. By the age of 18 months (7 months after she had been diagnosed), Abigail was blind, had devastating seizures (which have to be controlled with medication), lost the ability to swallow (she now has to be fed through a tube), and lost all motor skills (smiling and laughing, holding her head up, rolling over--all things she had previously been able to do). She is now 2-1/2 years old (she will be 3 in June). We had to hospitalize her permanently last March (a year ago); prior to that we had nurses at home to care for her while we worked, but even this level of care became insufficient at a certain point. Although Abigail receives superb care at the facility where she lives now (she is in a hospice unit in a larger hospital--the hospice is for terminally ill children only), she is in a vegetative state. She is completely paralyzed, does not respond to or recognize anyone, and is in almost constant discomfort because of the chronic congestion that is caused by her inability to swallow or cough. Suctioning and various positioning techniques relieve her discomfort somewhat, and she is given antibiotics and other medications when she is given antibiotics and other medications when she gets respiratory infections such as pneumonia and bronchitis, but such treatment is only partially successful.

Eventually her ability to fight off these infections will weaken to the point where she will die, probably by the age of 4 or 5, but possibly earlier.

Although my husband and I are both carriers for Tay-Sachs, we can still have a normal family. With Tay-Sachs, one out of four pregnancies are affected when both parents are carriers. In other words, every time I get pregnant, we have a 75% chance of having a normal, healthy child--but I do have to have a prenatal test. Done between 9 and 12 weeks of pregnancy, the test--known as a CVS--is highly accurate, and allows me to have an abortion much earlier than if I were tested by amniocentesis, which cannot be done until about 16 weeks of pregnancy.

It took a while for my husband and I to feel that we were emotionally ready to have another child, but a year and a half ago we made the decision to start trying again. Since that time, I have had several early miscarriages and two "healthy" pregnancies--"healthy" in the sense that I did not miscarry. However, in both cases the prenatal test indicated that I was carrying a Tay-Sachs-affected fetus. In both cases I elected to terminate the pregnancies. This decision was not painless (abortion never is), but it was an easy decision to make. I would never, never, never, in a million years, deliberately and knowingly bring another Tay-Sachs child into the world. The knowledge that I have the ability to spare another child the degradation that my cherished daughter is going through means everything to me. It would be a crime to put another child through the humiliation and pain that this cruel disease inflicts.

At the same time, the hope of someday having a healthy child, and the knowledge that it can happen if we will only have the strength to keep trying, is one of the few things that is helping to keep me sane through the anguish of watching my child slowly die. If abortion were to be made illegal, I would have to give up that hope, as I would never take the risk of conceiving and having to bear another child with Tay-Sachs. Legal abortion for me and my husband is a pro-family issue--without it I could not <u>have</u> a family. It is as simple as that.

***

LETTER-369

Like most women in this country, I am concerned about the possibility that the Supreme Court will substantially limit <u>Roe v. Wade</u>. Also like many women in this country, I had an abortion in my youth--one that was legal and safe. I am committed to making sure that my daughters have the same opportunity if necessary.

When I was 19 I became pregnant. I was not irresponsible; I had an I.U.D. But no method of contraception is perfect and I was one of the three out of a hundred that didn't make it. At the time I was an honors student in college working my way through school at a 32 hour a week job. Had I not had the abortion, had I decided to keep the baby, I would have had to quit school. I would probably still be working as a sales clerk somewhere, eeking out a living just below the poverty line. Instead I had the opportunity to go to law school and become a successful, contributing tax-payer. I am able to ensure that my children will be able to

grow into successful adults rather than part of the seemingly unending cycle of poverty.

I now have two children, the youngest is only four weeks old. There is not a day that goes by that I am not clear about the miracle that life is. I would not have another abortion if I became pregnant again. My life is different. My potential is different. The life I could provide to my child is different. But I do not have a moment of regret about the choice I made in 1970.

Enclosed is $100 to keep up the good work. When I can, I will send more. If there is anything else I can do, please let me know.

***

LETTER-568

I was a nineteen-year-old college student in New York when I got pregnant in 1962. I and my boyfriend pooled our money and borrowed from friends until we had the $460 necessary to pay for an illegal abortion from a doctor to whom a friend had referred us. We went to the doctor's office and I had the abortion, without anesthesia, while my boyfriend waited and worried that I might die.

When the operation was over, we took the elevator to the ground floor and found the street lined with police cars. The officers surrounded us and arrested me, my boyfriend, and the physician for the illegal abortion. They took me, alone to another doctor and subjected me to a physical examination to verify that an abortion had been performed. Then they took me to jail where I spent the night alone in a cell. The police provided a box

of sanitary napkins because I was still bleeding from the surgery.

The next morning the district attorney in the Bronx filed charges against me, my boyfriend, and the doctor. The judge released me and my boyfriend in the recognizance of our parents whom the police informed of the proceedings. The New York Post printed a story about the arrest on page five of the morning paper on May 8, 1962. My brother was a newsboy, and he stole all the papers out of one of the buildings on his route in an effort to protect my privacy. The charges were eventually dismissed.

I have now been married for almost twenty-five years to the man who was my boyfriend at the time. We waited to have children until we could provide them the opportunities they deserved. Our two daughters are now in college themselves. One volunteers in her spare time as a counselor at Planned Parenthood. I have agreed to allow my story to be told because I am committed to preserving my rights and my daughters' rights to privacy and liberty.

II.
Letters of unnamed Amici Curiae: the "Jane Roes"

ROE LETTER-26

In light of recent reports that the U.S. Supreme Court is considering overturning 'Roe v. Wade' which legalized abortion, I feel an absolute necessity to voice my opinion as well as my own personal experience.

In February 1985, I was treated for an exacerbation of Multiple Sclerosis with a

very high dosage of Prednisone for three (3) weeks. Unfortunately, during that period, I unknowingly became pregnant, even though my husband and I were practicing a very reliable method of contraception. Inasmuch as corticosteroids are known to cause severe birth defects, especially during the first 6-8 weeks of pregnancy, I knew I would have to abort the embryo. I would not put myself, nor my husband, through the trauma of raising a child with a severe birth defect.

In addition, the stress associated with giving birth and then raising a deformed child could also have had a detrimental impact on my illness.

Thus, I located a Physician who performed the "VIP" (Voluntary Interruption of Pregnancy) under general anesthesia in a hospital setting on an outpatient basis.

To this day, I am thankful that the procedure was available in a hospital setting. If it had been illegal, (or even restricted to women whose lives were in danger), I would have been forced to go abroad, or worse consider the horrible alternative of possible mutilation or death!

An abortion should not be anyone's decision but the woman's - it's her body; her health; her life, at stake.

It's a RIGHT that should be available to any woman for whatever reason. It's availability does not mandate its use, rather, it's a CHOICE! A choice that should always be available!

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ROE LETTER-27

I am writing as a co-signer to the amicus curiae brief that NARAL will file on the cases pending in the Supreme Court that

will affect the legality and availability of abortions in the United States. Although I am not ashamed of having had an abortion, please do not use my name on your brief.

My first accidental pregnancy occurred in 1981 when I was 25: My husband and I have always been dedicated users of birth control, and the pregnancy was a bitter and painful shock to me. We had been married for two and a half years, and although the marriage was not happy, we decided to have the child. I was terribly depressed for much of the pregnancy, and to this day I wonder if I ever would have had children if the choice had not been pressured. But by the time our first son was born we were both happy to welcome him into our lives. Still, the adjustment to motherhood has been the hardest thing I have ever done (I'm still adjusting); it has also given me great happiness. When our older son was just a year old, I missed a period. Apparently, I managed to expel a size C Lippes Loop without being aware of it. I still can't figure out how that could happen! This time, neither my husband nor I could face another baby. We knew that thousands of people of had babies that close -- or closer -- together, but yet another unplanned child would be too much for us. At that time I felt that, as much as I loved my son, I knew what the physical and psychological cost of another child would be, and I did not think I could do it again so soon. It was so hard for me to be a good mother, and I wanted so much to be a good one, but I had already spent a year struggling not to feel overwhelmed with one baby -- I knew I could not cope with two. My husband concurred and accompanied me to

an abortion which took place, ironically, on the tenth anniversary of Roe v. Wade.

Nice, middle-class comfortably married ladies are not supposed to have abortions, and although I feel apprehensive of social censure (that's why I don't want you to use my name), I do not regret my choice. I am sorry I could not bear that child, because I see how beautifully my two boys are turning out, and I know that child too would have been a lovely child. But the cost of having it would have been too high for me, for my husband, and perhaps for our older son. And nice middle-class ladies definitely do <u>not</u> put babies up for adoption.

I am now 33 years old and, despite unerringly consistent use of birth control, have had three accidental pregnancies. I have used every birth control device known to man or woman. I cannot take the pill because it makes me incapacitatingly depressed; I cannot use a diaphragm because of anatomical peculiarities; I have expelled two different IUD's. I will probably be fertile another fifteen to twenty years. I hope the condoms and the sponges keep working. Every month I count the days. I do not know if I will have another child, if we can afford another child economically or psychically. The cost is high on both counts, but I'm not ready to be sterilized. If I need another abortion in the future, I just hope, for the sake of all my family, it will be a safe, legal one.

***

ROE LETTER-53

I am taking the time to write this letter because I believe that there are a

some generalizations made about women who have had abortions, and their reasons for having chosen abortion. Although I can only speak for myself, there are probably many women just like me.

One misconception held by anti-abortionists is that an unplanned pregnancy is somehow the woman's fault. Granted, had I (and my partner) practiced abstinence, the pregnancy would never have occurred. However, my pregnancy resulted from a failure of my birth control method, which is supposedly more than 95% accurate. I resent the attitude of those who believe that a woman should be punished for a supposed "fault", especially, when the "fault" does not exist.

I believe that taking the time out to have a child would have changed my life for the worse, whether I would have had the child put up for adoption or not. I was a junior in college, with hopes of attending graduate school to obtain my doctorate, in a field that does not allow falling behind, even for a few months. I am now a graduate student, working for my doctorate in biophysics. At the risk of sounding extremely immodest, I know that among my professors I am thought to have a promising career ahead of me as a biomedical researcher. For those who wonder about possible Einsteins that could have been born, what about the female Einsteins that could have developed had their lives not been disrupted by an unplanned pregnancy?

I still believe that my choice was the right one; I have never for a moment regretted it. Even if I had never had an abortion, I would still be pro-choice today. I support a woman's right to reproductive choice, and oppose anyone who

would attempt to force his/her beliefs on others. Thank you for your time.

***

ROE LETTER-78

I had an abortion today. I am a young widow in the military and have a 3 year old son. My son's daddy died suddenly the day before his 3rd birthday. We are still trying to cope with the loss - both emotionally and financially.

I've been stationed in a 3rd world country full of poverty, dirt, ignorance, tyranny, and hostility towards Americans. I had to rely on military doctors who apparently were highly incompetent. They told me I wasn't pregnant when I was really 15 weeks along! The only military personnel who was helpful was the Chaplain. He helped me keep my sanity in the month of December.

I had had no symptoms of pregnancy till December, the month I asked for a pregnancy test and exam. Even though I was assured, "You just have an infection," I recognized the signs of pregnancy that finally emerged full blown by January. I learned that only dirty, life-threatening illegal abortions exist in that country. And so I struggled through the red tape to get out of that country and come back home where I could exercise some control over my life, safely and sanely.

It took me till February before I got home to my parents. By this time I was 22 weeks! I was determined to end that pregnancy because financially and mentally and physically I knew I could not survive if I carried to term. While giving birth to my 3 year old I had multiple complications, and the doctors then told me it would be physically risky for me to try

again. My son already had lost his Daddy. I surely didn't want him to lose me, too. And even if I did survive, I felt I owed what resources I had left to the child already living and needing me so badly.

Fortunately (it was high time I started having some luck), my parents found the only clinic in a 4 state area that performed abortions up to 24 weeks. They went with me.

It is the 2nd day of a two-day procedure. I received the best of care from both the counseling and medical staffs, and all went well. I am feeling fine physically and relieved and grateful emotionally.

Now I can begin again, and rebuild a life for me and my son. I thank God that I was born in the good old U.S. of A. where people have personal rights and freedoms. May we never lose our liberty and fall backward into the mentality and condition of a 3rd world country!

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APPENDIX C
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Letters from Friends of the Amici Curiae
Quoted or Cited in Text

FRIENDS LETTER-5

It was a beautiful day in September 1974, when I made the decision to begin working in an abortion clinic. I was a young woman who had known the fear of pregnancy without the availability of legal abortion. I knew about illegals. My aunt had several illegal abortions and my grandfather's stories as a police officer, had been passed through a generation. He told of attempted suicides, the use of coat hangers, and deaths related to hemorrhage. I knew about "the pill", Planned Parenthood, and abortion clinics in New York. I though I knew "it all" but soon began to realize I knew little.

I knew the fear of pregnancy as a consenting adult. What I didn't know was incest at the age of 11 or rape at the age 16 by an older boyfriend and the resulting pregnancies. I did not know that men tell women they had a vasectomy, so they need not use a condom. I did not know that tubal ligations fail and women become pregnant. I did not know that parents beat their children that become pregnant. I did not know that desperate women would resort to unconventional methods to rid themselves of a pregnancy, when safe, legal abortion was available.

I did not know that a minority of religious zealots would try to push their beliefs on desperate women. I did not know that their ultimate goal is to convert the world to their belief of "reborn again christianity". I did not know that these same people would not only tell me what to

do in my bedroom, but tell me what I can and can not read. I did not know that I would work in an environment of harassment and fear, where windows have been riveted with bullets and phones have carried bomb threats. I did not know that I would be followed in my car or my personal privacy invaded by home picketers.

The past 14 years have been an "eye opening" experience. I know that a registered nurse who works in an abortion clinic is dedicated to the right of women to receive free access to safe, legal abortion no matter what the cost. I know that Roe v. Wade must remain as written or my grandfather's stories will no longer be a part of history. They will reappear on daily basis, and desperate women will die. I know that it could be a cold, dark day in the summer of 1989 when the Supreme Court decides to begin chipping away at Roe v. Wade, but I am hopeful and know that summer is full of sunshine and warmth, and the Justices will safeguard this 16 year old right of women to choose a safe and legal abortion.

***

FRIENDS LETTER-17

The importance of choice and the right to a legal safe termination of pregnancy is an extremely strong issue for me. Perhaps because of three people I have know who have had to deal with this issue.

My sister-in-law as a teenage became pregnant before abortion was legal. She had a "back alley" abortion. As a result of this she was not able to have children when she was a married woman with an education and very much wanted children. We have always felt that if the procedure

had been done in a hospital or clinic under clean + safe conditions, by a doctor this tragedy wouldn't have happened. (1950's)

My second experience was with my cousin + his wife. They had two children + were thrilled when she became pregnant. At the time there was a measles epidemic. The two older boys brought measles home from school to her. He doctor felt the fetus had been damaged and the pregnancy should be terminated. She <u>agonized</u> over this. In the 60's you had to have a 2nd opinion and a psychiatrist had to write a letter on her behalf stating that she was emotionally unable to deal with a deformed child. Why on top of everything should a woman be forced to go through this?

The most traumatic case was a girl I new in school in the 50's. She was very quiet and shy. I understood she came from a very religious background. She became pregnant and went to Tijuana. She never made it home. She had a massive hemorage and died between the border + San Diego. She was seventeen.

Never again!!

***

FRIENDS LETTER-27

My aunt died having a "back room" illegal abortion." Abortion is one of the most fundamental of rights; the right to pursue happiness, the right over one's own body. The folks who want to overturn Roe vs. Wade desire to keep women bare foot and pregnant, and out of the <u>business</u> world. Men are terrified of <u>this</u> and the ignorant women who support this view (because of their own terror of having to justify their lives.

FRIENDS LETTER-30

Though I have not had an abortion, I have taught young women who, because of sexual immaturity and/or date rape, found themselves pregnant and in need of an abortion. Because of the Roe v. Wade decision, they at least had the freedom to choose thier options.

***

FRIENDS LETTER-33

I am writing to share some of my experiences with respect to both legal and illegal abortions over the past 25 years. It is my wish to urge the Supreme Court, in its consideration of the Webster case, and others which may follow, not to limit women's access to competent and legal abortions. Please feel free to excerpt any material which you feel may be useful in that regard.

I write from the perspective of a woman young enough to be still of child-bearing age but old enough to remember vividly the last era of illegal abortions. I also bring to these issues my training as a geneticist and physician, all of which reinforces my strong opinion that, whatever abuses may be associated with readily available abortions, the alternatives harbor much greater evils, both for the individual woman and for society in general.

I was in college in the mid-1960's in western Oregon. Among my friends and close acquaintances there were four women, that I knew of, who had abortions. Let me tell you about them.

Joetta was a large, effusive, good-hearted woman, full of laughter and optimism. She was a virgin until she met

Dan in her junior year. They married shortly after graduation. But before they did, they conceived a child, whether through carelessness or contraceptive failure I do not know. After much agonizing Joetta sought an abortion. She was a bright and ambitious woman, and although she sorely wanted children, she also wanted to finish her education, and to allow Dan to finish his. Whatever arguments can be made for adoption, the fact of the matter is that an ill-timed pregnancy, carried to term, frequently derails a woman's (and, less frequently a man's) chances for education, career and achievement. This was true then - it is still true today. Joetta went to Seattle for her abortion. It was done in a doctor's office, after hours (and after the money was counted), without anaesthesia, quickly and gruffly. She drove back home the same night. She had significant pain and bleeding for many weeks, although no immediate life-threatening complications. She was graduated, married, and went on to graduate school. Some years later, in a college bulletin, I saw a notice of her death, at age 26. Inquiries of mutual friends revealed that she and Dan had tried for some years, without success to conceive. Ultimately they did, and she died of a ruptured ectopic pregnancy. A late result of her previous abortion? Scarring of the fallopian tubes due to poor surgical technique? Who knows. Does it matter? Not to Joetta. Not to Dan. But to women grappling today with hard reproductive and personal choices - yes, it matters very much.

Nancy Jo was a very different kind of woman.. She was a tiny, fragile-looking,

spectacularly beautiful girl with an affect of innocence and gullibility which was only partly an act. Men and women alike felt a protectiveness towards her - she seemed so in need of cuddling and looking after. One was always somehow surprised when a chance remark revealed her sharp mind and almost causally obtained academic grounding.

She was also what many would call a slut. By late adolescence her lovers were too numerous to count. And everyone knew it. What most people didn't know was that her first sexual experiences were acquired at the hands of her alcoholic and brutal father while her equally drunken mother slept off her booze. She was a victim of childhood sexual abuse before it became fashionable to acknowledge this social tragedy, before there were hotlines. A rural Wyoming girl, raised on a poverty stricken chicken farm, a single daughter among four brothers, she learned early that compliance with men's wishes won her certain freedoms - and a warped, impoverished kind of affection, valuable only to one who has never known real caring. In spite of this familial cesspool in which she was raised, she achieved academically and won a scholarship to college, working part time to pay living expenses. But her good mind was sabotaged by her emotional neediness. Nancy Jo was astounded when she became pregnant, although no one else was. I am ashamed to recall it, but I laughed when she told me. She saw herself as a little girl - how could she be pregnant? She was, however, grown-up enough to know that she was not a fit mother and cognizant enough of social reality to see abortion as her only salvation. For women faced with unwanted

pregnancies, in situations of real or perceived isolation, there really are no choices.

She took an overnight train, alone, to a small town in Montana where she had made contact with a supposedly sympathetic elderly doctor. She wore a white dress - a defiant badge of girlish innocence in the August heat. Two days later she staggered, ashen, back to our apartment. (I was the one "taking care" of Nancy Jo that summer- someone always was.) Her white dress was smudged with grime from the dirty train and a large red stain covered the back of the skirt, directing one's eye to the rivulets of blood running down her legs. Why the cabdriver who picked her up at the train station hadn't taken her directly to a hospital I will never know.

In Montana, following instructions, she had checked into a fleabag hotel near the train depot. A "nurse", summoned by the desk clerk, had escorted her, via a circuitous route, to the doctor. He had scraped her out unceremoniously and had sent her back to the hotel with instructions <u>not</u> to call if she had problems. At our local emergency room she was packed and cauterized and transfused. Two days later, unable to control her bleeding, her doctor performed a hysterectomy. She was 20 years old. It seemed at the time, and in retrospect as well, that the physical and emotional scars of that dreadful, seedy and painful episode represent an additional nightmare that that already sorely burdened young woman didn't need.

I tell Lynne's story with a knot in my stomach and sweaty palms. It's been 24 years; I remember it like it was yesterday.

She was my best friend and I was with her for her "procedure". Lynne got pregnant using a diaphragm. Not irresponsible adolescent passion. Perhaps improper use. But probably just bad luck. It happens. The "doctor" came to my second floor walk-up apartment on a Sunday morning. (We were serious students; we didn't want to miss any classes.) He was probably in his mid 60's, unkempt, a sneer under his straggly mustache. "Money, ladies", he said, "then we work". Lynne handed over $200. He turned to lock the front door behind him. He eyed us critically, with a definite leer. He put out his hand and fondled my breasts, quickly, jabbingly. I was too dumbfounded to withdraw. He looked at Lynne, long and lean, considerably less well endowed that my "zaftig" figure, and said "You should grow some tits, sweetheart, like your friend here." Then he reached around and squeezed her behind. "But you're just fine back here - good and firm." Nodding at me, "She's too broad for my taste". Any vestige of sophistication, any veneer of independent womanhood, any sense of intellectual accomplishment we might have ever had vanished in front of that sleazy, leering old man. Why didn't we kick his butt out on the spot? Sheer terror, I suppose. Both of him and of this terrible, threatening unwanted pregnancy and all it implied.

He suddenly changed his focus, became all business. He surveyed the apartment, and came finally to the kitchen with its large window facing an open field. He withdrew a linen-wrapped package from a brown paper bag. It was sealed with autoclave tape - the kind, I had learned in biology class, that developed black lines

when exposed to certain temperatures and pressures. I remember thinking, naively, that at least the instruments were sterile.

Lynne had her abortion on my kitchen table, with her legs strapped to the high backs of two wooden chairs, and a dishrag stuffed in her mouth to muffle the screams. I sat in the living room and sobbed while it was going on. Afterward he chucked me on the chin and left. Lynne lay on the living room couch and said only "Thank God the body doesn't remember pain". But the mind does. I'm a physician now, and I've witnessed my share of pain and suffering, but seldom have I felt so helpless, so at the mercy of a hostile biology, as on that day.

Diane's story is very different. She found the courage to tell her parents when she became pregnant. And her parents found the emotional and financial resources to help her. She flew to Japan, with her mother, and obtained a safe, legal abortion in a modern clinic. She was observed for 24 hours for complications, received counseling on birth control, and returned to the U.S. chastened and subdued but <u>not</u> brutalized and afraid for her life and for future fertility.

Somewhat closer to home is my stepdaughter's saga. Her natural father had abandoned her and her mother at an early age. At the age of 15 she lost her mother to breast cancer. Her stepfather (now my husband) tried hard after his wife's death to provide her with a secure and loving home. But some combination of adolescent rebeliousness and, undoubtedly, an enormous sense of abandonment and vulnerability, led her to a variety of

self-destructive behaviors. A former honors student, she was failing in school and pregnant before her 16th birthday. She had a safe, legal abortion, got some psychiatric counseling and was graduated from high school two years later - not with honors, but with a diploma in hand. She is nineteen now, and we have had some rough times. But she is growing up, letting go of the hostility towards the world, showing signs of a growing maturity and functional independence. I think she will be OK. Should this child, already scarred by harsh circumstance beyond her control, have been forced to complete that pregnancy, perhaps drop out of high school, or at best continue school in an atmosphere of snickers and ridicule from her peers? How much psychological burden can be assumed with any hope of a functional recovery? Do we sacrifice our adolescents (foolish and irresponsible as they may often be) in the name of a morality focused on the unborn? Sometimes the living must take precedence, in needs and rights, over the yet-to-become.

Which of these scenarios would we prefer to see replayed? Unwanted pregnancies will continue to occur, and women, attempting to compete in academic, business and social settings which are <u>still</u> governed by rules adapted to the male's freedom from reproductive responsibilities, will continue to refuse to have their lives controlled by their biology and will opt for abortions in many circumstances. The fact of the matter is that over the last ten years contraceptive options have been reduced, rather that expanded. With the virtual abandonment of IUD's because of many complications and the new suggestion

in the medical literature that birth control pills may in fact place women (especially younger women) at an increased risk for breast cancer, even those women who are methodical and rigorous in their use of birth control may find themselves forced to choose a less reliable method, and thus place themselves at risk for an unwanted pregnancy, rather than compromise their health. And even those who conceive through blatant unconscionable carelessness should not be butchered by back-room abortionists nor should they be forced to face a premature parenthood which would likely be handled in an equally irresponsible manner. Society has shown no great willingness to address (with pockektbook in hand) the need for childcare and meaningful levels of supplemental income for children being raised in impoverished environments. The number of such children will increase dramatically if abortion becomes unavailable to all those unwilling to risk their lives with an illegal procedure and unable to afford travel to a country where legal abortion exists. My personal feeling is that regardless of the level of societal responsibility a woman should have the right to control her reproductive life, if necessary through abortion. But until such time as our society is willing to accept <u>complete</u> financial responsibility for children born to unwilling parents, as well as to ensure (if such a thing is ever possible) that a pregnant woman suffer no discrimination in the employment marketplace, it is sheer foolishness as well as blatant sex discrimination to force a woman to carry to term an unwanted pregnancy.

While the accidental conception probably accounts for the greatest number of abortions, there is another category of pregnancy which demands your serious consideration in any discussion of limiting a woman's access to legal abortion. That is the pregnancy involving a fetus which has been determined by prenatal examination to be severely abnormal. I speak now as a physician and geneticist, involved for a number of years in counseling and consoling would-be parents whose potential conceptions are at risk for a variety of genetic and developmental defects. I speak also as a 43 year old mother, anxious to have another child, yet painfully aware of my significant age-related risk for conceiving a child with a chromosomal abnormality. In many cases these are parents (myself included) who would not dare to risk a pregnancy were prenatal diagnosis and the option of aborting a seriously compromised fetus available. Many accuse such families of demanding "perfect" children and abhor the notion of selectively aborting abnormal conceptions. I think this attitude represents a tremendous naivity concerning the gravity of many of these defects and the emotional and financial havoc that the birth of such a child can bring to a family. Should a family at risk, for instance, for Tay-Sachs disease, be forced to watch the agonizing, lingering and inevitable degeneration and death of a toddler rather that terminating the doomed pregnancy? Should a woman be forced to carry to term a fetus, such as an anencephalic or a trisomy-18, which faces sure and early death? And while some families may feel capable of dealing with

the many problems of a severely retarded child, such as one with Down Syndrome, others will see such a birth as a tragedy which would destroy the fabric of their lives. Is society ready to accept the burden of caring for these children. (And I do not mean in institutional settings, the thought of which brings shudders to those for whom quality of life is an issue on equal par with life itself.) Of course not - not in any meaningful fashion. You cannot convince me that adoption of such children is a feasible alternative. The number of disabled children currently in institutional or foster care awaiting, interminably, adoption by loving families, speaks forcefully against this as a realistic possibility.

These are highly personal issues, requiring in each case careful and agonizing decision-making. But the decisions must remain private ones, not legally mandated, because the consequences of these decisions are, ultimately, borne by the woman in question and, if she is lucky, her family. The issue of when life begins, and the rights of an unthinking embryo, become academic exercises when measured against the right of the individual woman to define her reproductive role and the enormous pain which is incurred when that right is denied.

FRIENDS LETTER-41

I am writing this letter in reference to the following cases: Webster v. Reproductive Health Services, Turnock v. Ragsdale, Ohio v. Akron Center for Reproductive Health or Hodgson v. Minnesota.

The freedom of choice is something that the American women have worked long and hard for. If legal abortion is canceled than we will have progressed back twenty years or more when a women had to seek illegal means of abortion, thus causing deaths when it was not necessary.

I can speak on a personal basis about the above as I lost my mother at the age of 7 years because at that time it was illegal to obtain an abortion even for medical reasons. Our family doctor had to send her to someone else because he was legally unable to perform the required abortion.

By making it legal to have an abortion has eliminated many number of unnecessary deaths.

I and my family stand with the majority of U.S. citizens that support legal abortion.

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FRIENDS LETTER-50

As a fourth year medical student in the sixties, I took a 1 month elective in Obstetrics at Cornell in NYC. In those four weeks, I took care of 2 patients, 2 victims of illegal and unclean abortions, who subsequently died of sepsis. One was a beautiful, intelligent and mature auburned hair teenager whom I shall never forget.

It was with relief that one of my best friends could, years later, have an aseptic (and legal) abortion so that she could later get married and have a stable home for a wanted (and affordable) child of her own. Because of the legalization of abortions she and her wanted child are alive and thriving.

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FRIENDS LETTER-53

I am writing to support the amicus briefs being filed in support of women's untrammeled right to abortion.

During 1983, I was president of a chapter of the National Organization for Women in ..., Illinois. The three hospitals in ... do not permit abortions under any circumstances, one for religious reasons and two for fear of what anti-choice terrorists can do. The least of the consequences include disruption of ambulance traffic and stress on patients who can hear the bullhorns.

What it boils down to, then and now, is that you cannot get an abortion in .... The closest clinic is in Granite City, Illinois, about 100 miles away. Because my number was listed as the chapter contact in the phone book, I frequently got urgent calls from desperate women, women who were so frantic to terminate their pregnancies that they would threaten self-mutilation through self-abortion if a way could not be found to get them south to Granite City.

In the Ragsdale case in Rockford, Illinois, the same phenomenon occurred. The clinic there is the only one for 100 miles in any direction. When it was threatened, the local NOW chapter started getting phone calls from women in despair.

When I was in high school, abortion was not legal in Illinois. I remember hearing a pregnant 15-year-old offer to sleep with an entire carful of young men in hopes that this vigorous activity would cause her to lose the baby. I remember one young man of my acquaintance repeatedly punching his 16-year old girlfriend in the stomach in

hopes of initiating a miscarriage. I know of another case in the late fifties in which a woman tried to self-abort by douching with an industrial solvent. Her son, born alive, is in his 30's now with the reasoning ability of a six-year-old. No one knows who will take care of him when his mother dies.

In my own circle of close friends, one woman was raped by an uncle at 9; another by a friend of her brother's at 11; another by a complete stranger at 14. None of these rapes was reported. The women did not speak of them at all until years, even decades, later. How will similarly situated women be treated under state abortion laws that will require prompt reporting of assaults before permitting abortions? One good friend was raped by her father; do you think he would have let her go to the police?

It may be time for the privacy argument to fall, and it is definitely time to release the court from making medical decisions. However, the Constitution gives strong grounds for the right of the woman alone to determine her reproductive status in its guarantees of equal protection and its prohibition of slavery.

The strongest argument to support a woman's untrammeled right to abort hinges on the personhood of the mother, and bypasses both the sentimental and the medical debates over the personhood or citizenship of the fetus. No law in the country can compel one citizen to risk his life for another. Even military law cannot compel fatal altruism on the part of one individual for the direct and immediate benefit of another, even a comrade in arms. No state can compel a bystander to

intervene in a crime in progress, no matter how heinous the provocation nor how slight the physical risk to the intervenor. Likewise, no state can compel a father to donate so much as a single pint of blood to his baby.

However, anti-choice advocates do not hesitate to put such a compulsion on mothers. Although childbirth is demonstrably riskier than abortion at any range of maternal age, most anti-choice statutes require a clear and immediate threat to maternal life before permitting abortion. A mother cannot withhold her blood nor any other bodily necessity the fetus may require. If the offspring in questions were a six-year-old child rather than a six week old or even six-month fetus, she could legally, (if not morally), deny access to her organs for transplant and her blood of transfusion. It is only during pregnancy that anti-abortion legislation, in the absence of Supreme Court protection, can strip a woman of her bodily integrity and her legal independence. Under no circumstances can a man be so disenfranchised.

Finally, there are constitutional prohibitions of slave labor; yet to compel a woman to bear an unwanted pregnancy to term is forced labor in both senses of the phrase, leaving a woman a slave of the state, the father, or the fetus (depending on whom the party of interest is determined to be).

Please protect the right of American women to self-determination and safe, legal, and anti-septic abortions.

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FRIENDS LETTER-61

First of all I'd like to express my thanks to the Supreme Court Judges for making abortions safe and legal. On a personal level I'm currently involved to keep it that way.

I am an only child and was raised by the women in my family. Every woman in my family has been abused by the men in their lives. It was hand-me-down effect from alcohol abuse that led my step father to sexually abuse myself, he forced himself on me for 9 years.

My two aunts have each had one abortion, during the time of legal and safe abortions. I escorted one aunt to the clinic, I was reminded that while my step-father took his pleasures with me, just how fortunate I was to not become pregnant!

There is no doubt in my mind I would have wanted the Freedom of Choice!

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FRIENDS LETTER-67

When I was married in the early 1950's, I wanted to have four children and, fortunately, in time each of four babies were welcomed into our family. My family doctor advised me not to have anymore children for health reasons and I had already decided I would not consider a fifth. I asked him, however, what I would do if I should become pregnant again. He replied, "You'll have the baby." His statement made a profound impression on me, penetrating to the very core of my innermost self. His attitude of mandatory motherhood no-matter-what contradicted everything I knew to be respectful, compassionate and fair to a fellow human being. His pronouncement motivated me to

become an abortion rights activist and for the past twenty years I have done whatever I could to help keep abortion safe, legal and within the reach of any woman who feels she must make that choice.

I respect the view of those people who would not choose abortion for themselves. It's the political antiabortionists I quarrel with. By the way, I have known so-called Right-to-Lifers to change their minds when abortion got down to them personally and to insist that their daughters have abortions for no other reason than that they didn't like their daughter's sex partner. It is as unconscionable to force a woman into an abortion as it is to deny her the right that is hers--to choose if and when to have a baby. I cannot respect, therefore, the view of those people who oppose abortion for all women. Over the course of some ten years I offered help to about thirty women ranging in age from fifteen to thirty. Each woman had her own special reason for having an abortion. I never gave advice--I'm not a counselor. I gave them what they asked for--information that ought to be free to anyone and financial help. The fifteen year-old feared to go to her parents--religious fanatics. An eighteen year-old, an exchange student raped in Spain, could not face her parents. Most were college students facing an unwanted pregnancy alone. Whatever their individual reasons for choosing abortion, all were exceedingly grateful for the opportunity to make a choice that made the difference in their lives. There is no doubt in my mind that the right to live belongs first to the already born (female and male) who know what is best for them and who strive to

make the best of their existence in a world that cries out for sane judgments.

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FRIENDS LETTER-122

I am writing to briefly describe my experiences with young women seeking an abortion. As a result of these experiences, I feel strongly that it is critical for all women to have the right to choose an abortion, regardless of their individual circumstances.

In 1983-84, I was a graduate student in public health at ... University. In order to earn money, I worked as a counselor at a large abortion clinic. I was responsible for counseling women over the phone and scheduling their appointments. In addition, I frequently worked as the admitting counselor, preparing patients for the abortion and answering any final questions they may have had.

Many of the patients at the clinic were very young women, some who had never ventured beyond their neighborhoods. When they arrived at the clinic, most were anxious and some fearful. Yet despite their anxieties, all were sure of their decision to abort. For many, it was an agonizing choice, not one made lightly or without serious consideration. As I talked to these patients, some told stories of rape, incest, birth control failure or ignorance about reproductive health. For all of them the availability of abortion allowed them to maintain their physical, emotional and social health. It was an option that allowed young women to continue their educations and pursue their dreams. It allowed rape victims to begin the healing process. It allowed mothers to

sustain their families. It allowed women to maintain control over their bodies, their lives and their futures. For many of the patients I saw, if abortion was not available, their lives would be irrevocably different and decidedly damaged.

Because of this experience, I firmly support a woman's right to choose abortion and I pledge to do all I can sustain that right.

FRIENDS LETTER-127

I have been a nurse for almost thirty years. In those thirty years I have taken care of women who have had both legal and illegal abortions.

When I first began my nursing career abortions were illegal. This did not stop desparate women from attempting to abort themselves. I have vivid memories of caring for a woman who had used a caustic substance on herself. She developed a severe infection and was admitted to the hospital. She went into renal failure and had to be dialized. She did not survive!

I shudder at the thought that our Supreme Court would force us back to those horrors.

I have also spent time counselling women with problem pregnancies. These women did not want to be pregnant. They did not make the decision lightly to terminate their pregnancy. For many of them a pregnancy would have forced them to drop out of college and seek jobs. Many would end up on welfare to raise their babies.

People who suggest that these women should deliver their babies and give them up for adoption have learned nothing from history. The majority of women I have worked with who continued their pregnancies

did not give up their babies. They kept their babies and raised them as single, poor moms who abuse their children.

It is also an insult to women to force them to be "brood mares" for childless couples. The courts should not have the right to tell women how their bodies will be used.

Please show that you understand the lessons from history and do not allow abortions to become illegal again. Women will continue to have abortion so please lets keep them safe and legal.

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FRIENDS LETTER-166

I am a 55 year old mother of two children who were both wanted and planned. I was fortunate enough, having married at 18 to have had proper counseling on family planning.

I know that personally, I would have a very hard time deciding to have an abortion, because of my strong belief in life.

However, the quality of life of unwanted and battered children is questionable.

Also, I have known a young woman years ago who died at age 26 of complications from self abortion. I have been aware that thousands of women each year, for as long as I can remember, have gone to extreme lengths, endangering their lives to get out of unwanted pregnancies.

I support healthy families, planned parenthood, but about all <u>freedom of choice</u>. This is a fundamental <u>right</u> for every woman.

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FRIENDS LETTER-170

The Complacent Radical

"Didn't we do this 20 years ago?" Anne asked as we searched for the number of the house where the meeting was scheduled. "Didn't we win this battle?"

Indeed we had. In the late 60s we marched and spoke out to legalize abortion, revealed those sad, frightening, sometimes horrible secrets of our and our friends' illegal abortions. We had been arrested and freed on our own recognizance, made speeches and defended ourselves to an IRS that harassed us with tax audits in three of every five years, though we rarely earned more than $7500 in any given year. Once before we had met in small apartments to plan strategy and review the painful personal reasons for our political activism.

But here we were again, with all the <u>deja vu</u> sparked by Salvation Army couches overlain with Indian-print fabrics and proclaiming posters decorating the walls.

When it comes time to reveal why we are at this particular meeting, we embarrassedly say we have been through this before. Embarrassed because our victory has not held; embarrassed because we have spent many of the intervening years building our professional lives; embarrassed because we couldn't keep Lowell Weicker in the Senate or Danforth Quayle out of the White House.

How often will we have to do this? we think. <u>Why</u> must we do it? Haven't our victories permitted us to live secure bourgeois existences, to leave the streets for comfortable offices and labor-saving-deviced homes? I had not expected to be putting on Emma Goldman's mantle again. In

fact, I had been so far from believing I would be organizing and speechifying again that I had even named my feline Emma Goldcat. A memorial to my heroine and to the days when I saw myself as a modern Emma, raising consciousness and organizing. I expected it to be a memory only: I did not expect to be doing it all again in middle age.

We sit next to these 20-year-olds feeling a mixture of pride and sorrow. Proud and sorry to look so appropriate for our professional personas--physician Anne, advertising executive Marcia. Proud that we have opened doors that were closed to our mothers, sorry that, having passed through those doors we have so little time to challenge new barriers. Proud to have been leaders in a progressive struggle; sorry to have been pushed back to a past that gave men rights over our bodies and our lives that should always be ours. Proud to have been instrumental in a historical change; sorry to be confronting forces we though we had vanquished.

We've not come full circle, of course; history is a spiral that doesn't repeat exactly. This time the struggle is to protect a freedom long since won. But it's as though they wanted to rescind our right to vote or remove the freedom to marry whom we choose or divorce when we must.

It was over! I want to shout. My closest childhood and young adult friend, whose abortion on her dining room table by an immigrant woman with no sterilization and the crudest of instruments, whose experience was paramount in activating me on this issue, is already dead. Why do I have to fight for her life again? I have thanked God and our women warriors that my

own daughter, when she had to have an abortion, could go to a physician, be given anesthetics and pain killers, could survive it with minimal trauma, remembering Sue, who had an abortion by a sadist doctor who refused her all analgesia insisting that she feel every thrust of the knife. She deserved the pain, he thought, moralizing even as he took her $500 -- in small bills. But we are being threatened again. My own perimenopausal, sterilized body is not in jeopardy, but they are trying to force our daughters to return to butchers; they want total reproductive control, insisting that we carry unwanted fetuses to term and raise unwanted babies without public money or child care centers. If they have their way, we will have to do without contraception because after all every ovum is a potential baby.

So here we are again, coerced from complacency, aging warriors whose weapons are our emotions and our history. I want to write this as a funny piece, because there is considerable humor in our being old radicals meeting with a new generation of movers and doers. The vision of us--well-coiffed and manicured, wrapped in cashmere and silk, carrying calendars that read "meeting with marketing V-P" and "grand rounds presentation" instead of "grand jury demo" and "strategy meeting," coming here in an Alfa Romeo instead of a battered old Volvo-- has more than a touch of humor.

I'm going to have a 50th birthday in a couple of years. I should be concerned with funding my Keogh and keeping my cholesterol below 190, not with raising money for Planned Parenthood because the "Moral Majority" wants them to stop

educating girls and women about contraception which might guard against unwanted pregnancies and sexually transmitted diseases. I should be protecting my elegant fingernails, not scratching off wallpaper in tenements that we have fought to turn over to homeless AIDS patients and their infected babies. I want to kvetch about my stiffening knees, not sit at malls asking stranger to sign petitions saying they want to keep the right to choose their life directions by themselves, without government intervention.

I am an aging radical and I want to age gracefully, not on the front lines of more battles against fascist control. I want to enjoy my limited affluence, not spend my evenings planning how to protect us from the reactionaries who are moving to abolish freedom of choice in all aspects of our private lives; who want to take over our wombs and bodily fluids (they want access even to our urine, to make sure we smoke only legal toxins and nothing natural); who want to reduce our art to objects of consumption (how else can we view their permitting Ted Turner to tamper with copyrighted films?); who want to own language (how else can we understand the Newspeak of the 1980's?). And they are succeeding. So, here I am in my cashmere sweater, driving my Alfa Romeo to one more demonstration, sitting in one more strategy meeting, planning one more speech in favor of liberty and justice for all.

[The writer] presides over an agency in ... that produces medical education and promotional programs. She used to think "liberals" weren't progressive enough; now

she sees them as another endangered species.

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FRIENDS LETTER-172

I offer the following experiences as my personal reasons why I am in favor of Pro-Choice:

When I was six years old, I was forced to endure a 40 mile trip to what was referred to as "Feather Annie's." I stayed in the car with my father and two brothers while my 41 year old mother went inside the private residence. My father's serious attitude instilled fear and insecurity in my older brother and I. When my mother returned to the car she was crying. She repeated the words "I'm afraid I'll die- I'm afraid someone will find out I came here and I'll get her (referring to the woman who performed the abortion) in trouble with the law. I'm glad it's over, but I'm afraid - if I die, what will happen to the children?" It was an awful experience for a child who was too young to understand. All the way home she cried and repeated over and over her fear of dying. I do not remember of her expressing any regret, she expressed her relief that it was over. Her fears became contagious and needless to say it was traumatic for me and my older brother (one brother was less than 2 years old). Many years later when my brother and I recalled that day, we agreed that the only crime committed was by a society that forced a woman to have to submit herself to fear and agony of that magnitude. Our mother survived and imbued in us forever was our sympathy for her on that day. After all, she had already born six children, she was in poor health, and

my father was unemployed in that year of 1936.

My mother told me that it was a terrible tragedy that the little 2 year old neighbor girl's mother died suddenly. When I became old enough to understand I found out that it was no secret, in the small town we lived in, that the young mother had died from a self induced abortion. As a very young child I was terribly disturbed over the fact that this dear cute little girl had no mother for the reason that her mother had died because she didn't want to have another baby. I felt sad that such a thing could happen, it was hard for me to accept that "Jane's" pretty young mother had to die. I saw sadness in Jane's face and unhappiness was apparent in her father's behavior. I cannot justify a law that allowed such unfortunate circumstances to happen.

In the 1950's my sister lost a good friend who had an illegal abortion. The 28 year old woman who died had five small children. Her unplanned and unwanted pregnancy was more than she was able to handle and her untimely death was the result of not having the choice of a safe and legal abortion. A law with the potential effect of depriving a loving husband and five small children of the presence of a young wife and mother is a disgrace in a compassionate society.

I am happy to share my testimony.

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FRIENDS LETTER-179

I am writing to let you know that my first experience with abortion was a very grave one that left an indelible mark on me and my commitment to the need for legal

abortions performed by medically knowledgeable staff.

— In 1965 I had to care for a 19 year old girl as she lay dying of infection following an illegal abortion. The fact that she denied having had an abortion up to the time of her death and the tearful disclosure by her mother after her death underscored the fear these two people were experiencing because this was an illegal act.

Hospitals such as the one I was doing my nurses training in at the time, saw the results of desperate women who knew there were risks, but who endured them because they felt they had no alternative.

Making abortion illegal again will not make abortion go away it will only make it unsafe again. Do you want to make women suffer the indignity and danger of back-alley abortions or self induced abortions? Who knows how desparate a woman faced with an unplanned, unwanted pregnancy will be-can <u>any</u> <u>one</u> <u>else</u> profess to know what she must do?

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FRIENDS LETTER-227

Every women should have the right to control her own body. As long as there are unwanted pregnancies there are going to be abortions. They should be safe and legal. If abortion is made illegal, women are going to die from botched abortions. Our society can't afford to pay that price. As an adopted child I know what choice is about. I still feel that abortion should be legal.

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FRIENDS LETTER-240

So much of the dialogue, argument, and confrontation regarding this issue, at least in the ten years during which I have been aware of it, have seemed to take place in a vacuum of sorts. I don't use vacuum in a pejorative sense but rather as a contrast to "real life, real people." Discussion about ethics, values of life, murder, survival, hope, love, religion, poverty, adoption, birth control, motherhood, and duty can be instructive and insightful, but those who engage in it from the perspective of "anti-abortion" ignore the greatest issue of all: a woman's physical, mental and spiritual integrity. Across all the variety of contexts in which choices about abortion must be made, from urban poverty to exclusive medical clinics, from rapes to comas, and against the range of factors from age to income which come into play, there is only one constant -- a woman's right to control her destiny. Because of chromosomal variation, a woman can get pregnant. As important and miraculous as this possibility may be, however, it cannot diminish a woman's right to assess the values and needs attendant to her existence. In this, a woman is entitled to no less, no more than a man. Her entitlement must include the right to make and live with choices about her body and what it may or may not do.

Life is not carried out as a controlled experiment, it's variables dictated in a predictable void, and a woman's integrity should not be treated as if it were.

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FRIENDS LETTER-242

Despite being male, I believe that my experiences as a counselor give me a personal perspective from which to speak on the issue of abortion. Based on my conversations with women over many years, I believe that the most devastating effect of rape is not the act itself, but the aftermath of nightmares, anger and self-recrimination which follow. These emotions can last for years, and subjecting a rape victim to the additional mental agony and physical discomfort of an unwanted pregnancy strikes me as cruel and demonstrates an extraordinary insensitivity on the part of those who would outlaw abortion.

Other women have told me countless stories of a child born out of wedlock, the father suddenly disappearing, and a life, fraught with financial difficulties, which become a continuous struggle with mental and emotional exhaustion, leading in some cases to drugs, alcoholism and child abuse. Social services are already so overburdened that the meager benefits available to these women are delivered too slowly to prevent hardship. Do we multiply the sufferings of unwilling parents and unwanted children - at great social costs- to placate noisy zealots?

Finally, anyone with eyes to read and a capable mind should know that there is division of medical and moral opinion on the moment when life begins. When reasonable people differ on the solutions to difficult problems, toleration and compassion for opposing views seem healthier than false certainties derived from simplistic moralists. I do not advocate abortion. I ask only that the

court honor the separation of church and state on which this country was founded and be humane and realistic enough to allow poor citizens the choice which will always be available to the rich.

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FRIENDS LETTER-245

The Supreme Court of the United States will soon be considering cases in which they will be asked to rule on facts not in evidence. I refer specifically to the question of when the products of conception become "human."

Those who oppose a woman's right to reproductive freedom would have you believe there is only one answer to that question. As a physician of almost twenty years experience, I submit that their response lies in <u>faith</u>, not Science. It is abundantly clear that there is <u>NO</u> agreement in Theology or Science about when the products of conception become a human individual. To even suggest there is, is wholly inaccurate. For the court to overturn <u>Roe v. Wade</u> on this issue would be to legally endorse <u>one</u> religious viewpoint with the force of law. As an American, I would find the imposition of someone else's articles of faith intolerable.

***

FRIENDS LETTER-249

My mother, who has since passed away, was born and raised in a small country town in Hungary in 1909.

When she was around 16 years old, her best friend had an abortion. It took 3 months for her to watch her friends slow death, due to an infection which could not be treated because #1 there was no

antibiotics at the time, and #2 abortion was not an acceptable practice.

My mother had an extremely difficult time accepting her friend's death. Even when I was a young woman, she would tell me how beautiful and good her friend was. Even though my mother never joined the ranks of the "Feminist Movement," and in fact, was quite a homebody raising 3 children, she always supported the right of every woman to choose what was best for them to do with "their" bodies, even though, and especially because, of her friend.

Abortion has been around for a long, long time, and will continue. I cannot even imagine the deaths that will occur at the hands of those people who will illegally perform unsafe surgical techniques, nor can I imagine those women who will be unable to bear children, because of botched abortions.

Our young people will not stop having sexual relations. Would anyone want an unsafe surgical procedure to happen to their daughter? Mother? Wife?

***

FRIENDS LETTER-260

I cannot claim a personal experience with a woman who has had an abortion. However, a number or women have told me privately that they have had abortions. Some of these would be acknowledged as therapeutic; others would not.

Partly because of the stories of these women (now that I've begun writing I remember the neighbor woman who had to wait until an ectopic pregnancy ruptured before the doctor could help her. This was in the 1950's. Another woman told me of the brain

function damage she felt that she had received as the result of a similar situation.) I believe that there is the need for safe, legal abortions and that they should be readily available.

Furthermore, I have always been thankful that I have lived during a time when birth control could/can be discussed, when information and birth control products became and are openly available.

In my family there are stories of deaths due to childbirth, ruined health, fear and wrecked family relationships that could have been prevented had birth control devices been generally available in those days.

I think that every woman (and man, too) should revere the work of Margaret Sanger.

FRIENDS LETTER-264

I am writing this letter to demonstrate my strong support of the continuation of reproductive freedom, the right to choose, for all women. Although I have not personally had an abortion, I have had experience with two friends who made this difficult decision and have considered the right to choose this avenue a vital one to myself as a women, to all women, children and to families as a whole.

In the cases of my friends, one was a young girl who in today's terms was 'date raped' but at the time of her pregnancy was of course considered at fault. Thankfully, her family was supportive of her and, although abortion was not a legal option at that time, were able to take her someplace where it was. This was not an act of irresponsibility but rather one of compassion for this girl as an individual and a responsible decision regarding the

future of a child in this kind of situation. Our communities and society as a whole do not assist with child rearing in any financial, practical or emotional way. A decision about having a child is responsible only if considerations of the future are a part of that decision.

In the case of my other friend, a decision was made between husband and wife to postpone having children. Although she used birth control at all times, she did get pregnant. Her husband was not willing to consider a change in their decision. In order to give her marriage every chance it had and to have children in an intact two parent family, she made the very difficult decision to have an abortion. Once again, rather than being an irresponsible frivolous decisions, it was one that took a great deal of courage and concern for her future children.

For myself, reproductive freedom has meant a respect for women and has given a right that should naturally be ours. With any right comes the hope that each individual will use it wisely. However, there is a wide continuum of 'wisely' and there is also no power so supreme that it or they know what wise use of a right is for any individual. Although I have not had to make the decision to have an abortion, I was prepared to if I had gotten pregnant after my husband and I had decided against having more children. It would not have been an easy decision, but most life decisions are not easy. It would, however, have been the best decision for myself and my entire family. I should have the right to that decision since I have the sole responsibility for any child born to me.

Under reproductive freedom, no one is determining the path of another. It is the freedom to choose, to have the varied options available that is the key. No one can guarantee anyone else's actions and choices but neither does anyone take responsibility for the consequences for someone else's choices. We each make our own choices and live with the consequences of them.

I hope this issue is considered with the greatest of seriousness. We are speaking to the heart of the freedoms that this country stands for and the hope that the women and children of this country are given the respect that they, as well as every other individual, deserve.

***

AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN FERTILITY SOCIETY, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION AND AMERICAN SOCIETY OF HUMAN GENETICS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Whether the Court should reaffirm that the "liberty" and privacy rights embodied in the Due Process Clauses of the Constitution fundamentally protect, *inter alia*, individual medical treatment decisions.

2. Whether Sections 188.029 and 188.205 of the Missouri statute unconstitutionally infringe the fundamental right of patients to make medical treatment decisions in consultation with their physicians.

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Cases:	Page
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	27
Canterbury v. *Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972)	32
Carey v. *Population Serv. Int'l*, 431 U.S. 678 (1977)	26, 28, 37
City of Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)	*passim*
Colautti v. *Franklin*, 439 U.S. 379 (1979)	*passim*
Coyle v. *Smith*, 221 U.S. 559 (1911)	27
Doe v. *Bolton*, 410 U.S. 179 (1973)	39
Eisenstadt v. *Baird*, 405 U.S. 438 (1972)	27
Estelle v. *Gamble*, 429 U.S. 97 (1976)	34
Fitzgerald v. *Porter*, 523 F.2d 716 (7th Cir. 1975)	28
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	27
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	27, 27, 28
Harris v. *McRae*, 448 U.S. 297 (1980)	29, 35, 38, 48
Huzjak v. *United States*, 118 F.R.D. 61 (N.D. Ohio 1987)	32
Ingraham v. *Wright*, 430 U.S. 651 (1977)	32
Jacobson v. *Massachusetts*, 197 U.S. 11 (1905)	37
Lee v. *Winston*, 717 F.2d 888 (4th Cir. 1983)	33
Loving v. *Virginia*, 388 U.S. 1 (1967)	27
Maher v. *Roe*, 432 U.S. 464 (1977)	48
Memorial Hosp. v. *Maricopa County*, 415 U.S. 250 (1974)	34
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	23, 27, 30
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	35
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977)	23, 30
Natanson v. *Kline*, 186 Kan. 393, 350 P.2d 1093, *clarified*, 187 Kan. 186, 354 P.2d 670 (1960)	32
Olmstead v. *United States*, 277 U.S. 438 (1928)	27
Perry v. *Sindermann*, 408 U.S. 593 (1972)	49
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	27
Planned Parenthood v. *Ashcroft*, 462 U.S. 476 (1983)	36

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Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 27, 35
Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) 27
Thornburgh v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) 28, 37, 47
Union Pacific Ry. v. *Botsford*, 141 U.S. 250 (1891) .. 24, 30
Whalen v. *Roe*, 429 U.S. 589 (1977) 27
Winston v. *Lee*, 470 U.S. 753 (1985) 24, 33
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 32

Constitutional Provisions and Statutes:

U.S. Const. amend. IV 24, 33
U.S. Const. amend. VIII 24, 33
U.S. Const. amend. XIV ..... *passim*
Mo. Rev. Stat. § 188.029 (1986) ..... *passim*
Mo. Rev. Stat. § 188.205 (1986) ..... *passim*

Other Authorities:

Abortion, Medicine & the Law (J. Butler & D. Walbert 3d ed. 1986) 17, 18, 20
Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446 (1975) 22
Adolescent Abortion: Psychological and Legal Issues (G. Melton ed. 1986) 22
American College of Obstetricians and Gynecologists, *Methods of Midtrimester Abortion* (Technical Bulletin 109, Oct. 1987) 12
American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (6th ed. 1985) 46
American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs*, ¶ 8.07 45

TABLE OF AUTHORITIES—Continued

Page

Amon, Sibai, Anderson & Mabie, *Obstetric Variables Predicting Survival of the Immature Newborn (≤1,000 gm): A Five-Year Experience at a Single Perinatal Center*, 156 Am. J. Obstet. Gynec. 1380 (1987) 6
Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 Br. J. Obstet. Gynec. 1115 (1980) .. 22
Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83 (1986) 9, 11, 12
W. Blackstone, *Commentaries* 1:134 (1765) 31
Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 West. J. Med. 188 (1975) .. 21, 22
Bracken, Freeman & Hellenbrand, *Hospitalization for Medical-Legal and Other Abortions in the United States 1970-1977*, 72 Am. J. Pub. Health 30 (1982) 13
Brewer, *Incidence of Post-abortion Psychosis: A Prospective Study*, [1977] 1 Br. Med. J. 476 21
J. Brocklehurst, *Textbook of Geriatric Medicine and Gerontology* (3d ed. 1985) 7
Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985) 19
G. Burrow & T. Ferris, *Medical Complications During Pregnancy* (3d ed. 1988) 15
Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586 (1982) 10
Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plann. Persp. 86 (1976) 12
Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth—Are the Statistics Biased?*, 248 J.A.M.A. 192 (1982) 10

TABLE OF AUTHORITIES—Continued

Page

Chervenak, Berkowitz, Thornton, Kreiss, Youcha, Ehrenkranz, Hobbins & Berkowitz, *A Comparison of Sonographic Estimation of Fetal Weight and Obstetrically Determined Gestational Age in the Prediction of Neonatal Outcome for the Very Low-Birth Weight Fetus,* 152 Am. J. Obstet. Gynec. 47 (1985) 42

Comprehensive Textbook of Psychiatry/IV (H. Kaplan & B. Sadock 4th ed. 1985) 21, 22

R. Creasy & R. Resnik, *Maternal-Fetal Medicine* (2d ed. 1989) 14, 15, 16, 17

Cruikshank, *Amniocentesis for Determination of Fetal Maturity,* 25 Clin. Obstet. Gynec. 773 (1982) 42

D. Danforth & J. Scott, *Obstetrics & Gynecology* (5th ed. 1986) ..... *passim*

David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions,* 13 Fam. Plann. Persp. 88 (1981) 20, 21

S. Elias & G. Annas, *Reproductive Genetics and the Law* (1987) 42

Ewing & Rouse, *Therapeutic Abortion and Prior Psychiatric History,* 130 Am. Psych. 37 (1973) .. 22

Forrest, *Unintended Pregnancy Among American Women,* 19 Fam. Plann. Persp. 76 (1987) 5

Frank, Kay, Scott, Hannaford & Haran, *Pregnancy Following Induced Abortion: Maternal Morbidity, Congenital Abnormalities and Neonatal Death,* 97 Br. J. Obstet. Gynec. 836 (1987) 20

Gerdes, Abbasi, Bhutani & Bowen, *Improved Survival and Short-Term Outcome of Inborn "Micropremies,"* 25 Clin. Pediat. 391 (1986) 6

Golde & Platt, *The Use of Ultrasound in the Diagnosis of Fetal Lung Maturity,* 27 Clin. Obstet. Gynec. 391 (1984) 42

Greenberger, *Asthma in Pregnancy,* 12 Clin. Perinat. 571 (1985) 18

TABLE OF AUTHORITIES—Continued

Page

Grimes & Schulz, *Morbidity and Mortality from Second-Trimester Abortions,* 30 J. Reprod. Med. 505 (1985) 11

Grimes, Schulz & Cates, *Prevention of Uterine Perforation During Curettage Abortion,* 251 J.A.M.A. 2108 (1984) 19

Hack & Fanaroff, *Changes in the Delivery Room Care of the Extremely Small Infant (<750g),* 314 New Eng. J. Med. 660 (1986) 6

Hack & Fanaroff, *How Small Is Too Small? Considerations in Evaluating the Outcome of the Tiny Infant,* 15 Clin. Perinat. 773 (1988) 8

F. Harper & F. James, *The Law of Torts,* § 17.1 (2d ed. 1986) 32

Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983,* 19 Fam. Plann. Persp. 5 (1987) 5

Henshaw & Silverman, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients,* 20 Fam. Plann. Persp. 158 (1988) 5

Henshaw, Forrest and Van Vort, *Abortion Services in the United States 1984 and 1985,* 19 Fam. Plann. Persp. 63 (1987) 4

W. Hern, *Abortion Practice* (1984) 9

J. Hodgson, *Abortion and Sterilization: Medical and Social Aspects* (1981) 10, 19

Hood, *Anesthesia for Cesarean Section: Minimizing Risk and Complications,* 15 Obstet. Gynec. Clin. N.A. 639 (1988) 16

Hopkins, Marcus & Campbell, *Postpartum Depression: A Critical Review,* 95 Psychol. Bull. 498 (1984) 22

Johnson, Cox & McKim, *Outcome of Infants of Very Low Birth Weight: A Geographically Based Study,* 136 Can. Med. Ass'n J. 1157 (1987) 6

Lazarus & Stern, *Psychiatric Aspects of Pregnancy Termination,* 13 Clin. Obstet. Gynec. 125 (1986) 21, 22

TABLE OF AUTHORITIES—Continued

Page

LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188 (1982) 9, 10

Linn, Schoenbaum, Monson, Rosner, Stubblefield & Ryan, *The Relationship Between Induced Abortion and Outcome of Subsequent Pregnancies*, 146 Am. J. Obstet. Gynec. 136 (1983) 20

Lloyd & Laurence, *Sequelae and Support After Termination of Pregnancy for Fetal Malformation*, 290 Br. Med. J. 907 (1985) 22

Miller, *Maternal and Neonatal Morbidity and Mortality in Cesarean Section*, 15 Obstet. Gynec. Clin. N.A. 629 (1988) 16

Minkoff, *Care of Pregnant Women Infected with Human Immunodeficiency Virus*, 258 J.A.M.A. 2714 (1987) 46

Mulder, *Amniotic Fluid Embolism: An Overview and Case Report*, 152 Am. J. Obstet. Gynec. 430 (1985) 20

National Center for Health Statistics, 37 *Monthly Vital Health Statistics Report* 15 (Supp. No. 3, July 12, 1988) 4

The New York State Task Force on Life and the Law, *Fetal Extrauterine Survivability* (1988) .. 6, 7, 8

Nwaesei, Young, Byrne, *et al.*, *Preterm Birth at 23 to 26 Weeks' Gestation: Is Active Obstetric Management Justified?*, 157 Am. J. Obstet. Gynec. 890 (1987) 6

Noronha, *Neurological Disorders During Pregnancy and the Puerperium*, 12 Clin. Perinat. 695 (1985) 18

C. Pauerstein, *Clinical Obstetrics* (1987) ..... *passim*

Placek & Taffel, *Recent Patterns in Cesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988) 10

Poland & Russell, *The Limits of Viability: Ethical Considerations*, 11 Sem. Perinat. 257 (1987) 5, 6

E. Quilligan & F. Zuspan, *Douglas-Stromme Operative Obstetrics* (4th ed. 1982) 11

TABLE OF AUTHORITIES—Continued

Page

Rayburn & LaFerla, *Mid-Gestational Abortion for Medical or Genetic Indications*, 13 Clin. Perinat. 71 (1986) 19

Richards, Lachman, Putsoe & Moodley, *The Incidence of Major Abdominal Surgery After Septic Abortion—An Indicator of Complications Due to Illegal Abortion*, 68 S. African Med. J. 799 (1985) 13

Robinson & Stewart, *Postpartum Psychiatric Disorders*, 134 Can. Med. Ass'n J. 31 (1986) 21

Rochat, Koonin, Atrash & Jewett, *Maternal Mortality in the United States: Report from the Maternal Mortality Collaborative*, 72 Obstet. Gynec. 91 (1988) 9, 10

Rogers, *Complications at Cesarean Section*, 15 Obstet. Gynec. Clin. N.A. 673 (1988) 16

Rovinsky & Guttmacher's Medical, Surgical, & Gynecologic Complications of Pregnancy (S. Cherry, R. Berkowitz & N. Kase 3d ed. 1985) .. 8, 12, 18

Sabbagha, Tamura & Socol, *The Use of Ultrasound in Obstetrics*, 25 Clin. Obstet. Gynec. 735 (1982) 43

T. Sadler, *Langman's Medical Embryology* (5th ed. 1985) 7

S. Schwartz, G. Shires, F. Spencer & E. Storer, *Principles of Surgery* (4th ed. 1984) 8

Sell, *Outcome of Very Very Low Birth Weight Infants*, 13 Clin. Perinat. 451 (1986) 6

Smith, Frey & Johnson, *Assessing Gestational Age*, 33 Am. Fam. Physician 215 (1986) 43

Stork, *Extracorporeal Membrane Oxygenation in the Newborn and Beyond*, 15 Clin. Perinat. 815 (1988) 8

Stubblefield, *Surgical Techniques of Uterine Evacuation in First- and Second-Trimester Abortions*, 13 Clin. Obstet. Gynec. 53 (1986) 11, 12, 19

Stubblefield, Monson, Schoenbaum, Wolfson, Cookson & Ryan, *Fertility after Induced Abortion: A Prospective Follow-Up Study*, 63 Obstet. Gynec. 186 (1984) 20

TABLE OF AUTHORITIES—Continued

	Page
U.S. Dep't of Health and Human Services, 2A *Vital Statistics of the United States 1981*	9
Verloove-Vanhorick, Verwey, Brand, Gravenhorst, Kierse & Ruys, *Neonatal Mortality Risk in Relation to Gestational Age and Birthweight*, [1986] 1 Lancet 55	42
J. West, *Respiratory Physiology—the Essentials* (3d ed. 1985)	7
Whittle, *Lung Maturation*, 11 Clin. Obstet. Gynec. 353 (1984)	7
8 J. Wigmore, *Evidence* § 2380a (McNaughton ed. 1961)	32
Williams Obstetrics (L. Hellman & J. Pritchard 14th ed. 1971)	7
Williams Obstetrics (J. Pritchard, P. MacDonald & N. Gant 17th ed. 1985)	*passim*
Williams & Bitran, *Cancer & Pregnancy*, 12 Clin. Perinat. 609 (1985)	17, 18
Yu, *The Extremely Low Birthweight Infant: Ethical Issues in Treatment*, 23 Aust. Paediat. J. 97 (1987)	5, 6
Zuckerman & Beardslee, *Maternal Depression: A Concern for Pediatricians*, 79 Pediat. 110 (1987)	21, 22

INTEREST OF *AMICI CURIAE*

Amici curiae are eight major organizations of health care professionals. *Amici* share an abiding dedication to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amici*'s interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion. Indeed, their members hold widely divergent views on the various issues raised in *Roe* v. *Wade*, 410 U.S. 113 (1973). *Amici* recognize that reasonable people differ about how to balance the woman's privacy right against the state's interest in maternal and fetal health, and in particular about whether the state has a compelling interest in fetal health before viability. Given the diversity of views of *amici*'s members, this brief neither endorses nor opposes the Court's holding in *Roe* that the state's compelling interest begins at viability. However, our members all agree that every individual has a fundamental right to make an individual medical treatment decision free of state interference unless the state has a compelling justification for the restrictions it imposes.

Amicus American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students.

Amicus American Academy of Child and Adolescent Psychiatry ("AACAP") is a national professional organization of over 4,200 child and adolescent psychiatrists, who engage in research, prevention, diagnosis and treatment of developmental and psychiatric disorders in children, adolescents and families.

Amicus American Academy of Pediatrics ("AAP") is a nonprofit association of approximately 30,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is

to ensure the attainment by all children of their full potential for physical, emotion and social health.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 28,000 members represent approximately ninety percent of all obstetricians and gynecologists practicing in the United States.

Amicus American Fertility Society ("AFS") is a voluntary, nonprofit organization of 11,000 physicians and scientists—the vast majority of whom are obstetrician-gynecologists—dedicated to advancing knowledge about and treating the disorders of the reproductive system.

Amicus American Medical Women's Association, Inc. ("AMWA") is a nonprofit organization of 12,000 women physicians and medical students, one of whose primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

Amicus American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus American Society of Human Genetics ("ASHG") is a scientific association whose members include more than 3,800 physicians, scientists, genetic counselors and allied health specialists who are involved in research and the delivery of genetic services to families with, or at risk for, a broad array of genetic disorders.

The provisions in the Missouri statute, which require physicians to undertake specific medical examinations and tests concerning the development of the fetus and which

prohibit a physician from counseling a woman concerning abortion as a treatment option, interfere with the woman's right to seek and obtain medical care and prevent her physician and other health care providers from exercising their best medical judgment in providing quality medical care. The outcome of this case will directly affect the professional services *amici*'s members provide and the health of the patients whom they serve. Accordingly, *amici* wish to present their views concerning the important issues raised in this appeal.[1]

MEDICAL BACKGROUND

Amici firmly believe that any attempt by the Court to evaluate the individual's legal rights in the abortion context should be undertaken only after the Court has a relatively full appreciation of the medical facts surrounding pregnancy and the abortion procedure. Accordingly, *amici*, who have unique expertise in this area, offer in this section of the brief an extended discussion of the medical background of pregnancy and abortion to provide a context within which to present our analysis of the fundamental legal issues presented in this case.

This discussion of the medical background, which includes the relative health effects of abortion and childbirth, is not provided to suggest that this Court's ultimate constitutional analysis can or should turn solely on the relative health risks, but instead to demonstrate clearly that both abortion and childbirth are significant medical procedures which carry what are sometimes significant health risks.

I. General Background on Abortion

Although commonly understood to encompass all terminations of pregnancy, abortion is technically defined as the termination of a pregnancy in any way before the fetus has reached the stage of viability. *Williams Ob-*

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

stetrics 467 (J. Pritchard, P. MacDonald & N. Gant 17th ed. 1985); D. Danforth & J. Scott, *Obstetrics & Gynecology* 231 (5th ed. 1986). Viability refers to the point at which the fetus would have a reasonable potential for survival if it were removed from the pregnant woman's uterus. *Williams Obstetrics* at 467. See *infra* at 5-8.[2]

An abortion may be spontaneous (unintentional) or induced (intentional). Since this Court's decision in *Roe* v. *Wade*, the number of lawful, induced abortions has doubled from roughly 750,000 to nearly 1.6 million a year. Henshaw, Forrest & Van Vort, *Abortion Services in the United States 1984 and 1985*, 19 Fam. Plann. Persp. 63, 64 (1987). Almost all of the increase occurred by 1980. *Id.; Obstetrics & Gynecology* at 256. By way of comparison, the annual number of live births has increased from about 3.1 million to 3.8 million since 1973. National Center for Health Statistics, 37 *Monthly Vital Health Statistics Report* 15 (Supp. No. 3, July 12, 1988). Abortion services are concentrated in metropolitan areas; 79% of women in rural America live in counties which have no abortion services, and, in 1985, only two percent of abortions were performed in rural communities. *Henshaw, Forrest & Van Vort* at 64-65.

Induced abortions are primarily performed on young women, unmarried women, white women, and women who

[2] If the termination of a pregnancy occurs after the fetus has become viable but before the 38th week of gestation, then the termination is referred to as the preterm delivery of a premature infant. *Williams Obstetrics* at 467. (Gestational age is measured from the first day of a pregnant woman's last menstrual period, rather than from the more uncertain date of fertilization, which is approximately two weeks later, or of implantation of the fertilized egg in the woman's uterus, which is nearly three weeks later. *Id.* at 139.) If the premature infant of a preterm delivery shows no signs of life at birth, it is classified as stillbirth. *Obstetrics & Gynecology* at 289. Thus, while third-trimester terminations of a pregnancy are commonly characterized as abortions, they technically are not. Nevertheless, for convenience, we will characterize all terminations of pregnancy as abortions.

are having their first abortion. Henshaw & Silverman, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 Fam. Plann. Persp. 158, 159 (1988). Among women age 15-44, more than 21% have had an abortion; if current abortion rates continue, 46% of all American women will have had an abortion by the time they are 45. Forrest, *Unintended Pregnancy Among American Women*, 19 Fam. Plann. Persp. 76, 76-77 (1987).

Ninety percent of abortions are performed during the first trimester of pregnancy. Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plann. Persp. 5, 6 (1987). Only 1% of abortions are performed after 20 weeks of gestation, and approximately 100 abortions a year, or 0.01% of all abortions, occur during the third trimester of pregnancy. *Id.* at 6.

II. Fetal Viability

This Court has observed that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe*, 410 U.S. at 160. Since then, improvements in health care have resulted in greater survival of infants born at a gestational age of 24-28 weeks, which corresponds to a birthweight of approximately 500-1,000 grams, although survival is not common with birthweights between 500 and 600 grams. The earliest point at which a fetus can survive is 23-24 weeks.

The improvements in prognosis for infants weighing between 500 and 1,000 grams have been striking. (These infants are commonly characterized as extremely low birthweight infants or ELBW infants. Yu, *The Extremely Low Birthweight Infant: Ethical Issues in Treatment*, 23 Aust. Paediat. J. 97, 97 (1987).) In the 1950's approximately 2% of ELBW infants survived delivery, and almost all were seriously handicapped. Poland & Russell, *The Limits of Viability: Ethical Considerations*, 11 Sem. Perinat. 257, 257 (1987). By 1960, ELBW infant survival had increased to about 10% and, by 1970, to

about 20%. *Poland* at 257. Recent studies on the ELBW infant indicate that as many as 40-50% will survive. *Yu* at 98; Amon, Sibai, Anderson & Mabie, *Obstetric Variables Predicting Survival of the Immature Newborn (≤1,000 gm): A Five-Year Experience at a Single Perinatal Center*, 156 Am. J. Obstet. Gynec. 1380, 1382 (1987).[3]

As fetal weight rises from 500 to 1,000 grams (or gestational age increases from 24 to 28 weeks), survival gradually improves from about 10% to as much as 80%. At 26 weeks, or 750 grams, approximately half the infants survive. The New York State Task Force on Life and the Law, *Fetal Extrauterine Survivability* 9-10 (1988); Nwaesei, Young, Byrne, *et al.*, *Preterm Birth at 23 to 26 Weeks Gestation: Is Active Obstetric Management Justified?*, 157 Am. J. Obstet. Gynec. 890, 893 (1987); *Yu* at 98. In short, if viability is defined as the point at which 50% of fetuses will survive, then it has moved from 28 weeks to 26 weeks since 1973. If viability is defined as the point at which a fetus has any prospect of extrauterine survival, then it has moved from 24 weeks to 23-24 weeks.

The ELBW infants who survive today are also suffering fewer handicaps than those born 15 years ago. While a majority of these infants were seriously handicapped at one time, *Poland* at 257, approximately 70% of surviving ELBW infants now go on to be free from major handicaps like blindness, deafness, cerebral palsy and mental retardation. *Id.* Approximately two-thirds of the survivors have significant educational problems. Sell, *Outcome of Very Very Low Birth Weight Infants*, 13 Clin. Perinat. 451, 457-58 (1986).

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[3] *See also* Johnson, Cox & McKim, *Outcome of Infants of Very Low Birth Weight: A Geographically Based Study*, 136 Can. Med. Ass'n J. 1157, 1159 (1987); Gerdes, Abbasi, Bhutani & Bowen, *Improved Survival and Short-Term Outcome of Inborn "Micropremies,"* 25 Clin. Pediat. 391, 392 (1986); Hack & Fanaroff, *Changes in the Delivery Room Care of the Extremely Small Infant (<750g)*, 314 New Eng. J. Med. 660, 663 (1986).

While even more of the 500-1,000 gram (24-28 week) infants are expected to survive in the near future, there is an "anatomic threshold" for fetal survival of about 23-24 weeks of gestation (500 grams). This is because the fetal lung does not mature sufficiently to permit normal or even mechanically-assisted respiration (*i.e.*, breathing assisted by a ventilator) before week 23-24 of gestation. *New York State Task Force*, at 7.

In order for enough oxygen to be able to enter the bloodstream, there must be an extensive network of interfaces between the air spaces in the lung and the blood vessels of the lung. Effective oxygenation also requires that there be a very thin barrier of tissue separating the red blood cells from the air spaces. J. West, *Respiratory Physiology—the Essentials* 1-2, 21-22 (3d ed. 1985).

Until weeks 23-24 of gestation, however, the network of air spaces and blood vessels is not extensive enough nor is the tissue barrier thin enough for effective oxygenation of the blood. *New York State Task Force* at 6-7; T. Sadler, *Langman's Medical Embryology* 218-29 (5th ed. 1985); Whittle, *Lung Maturation*, 11 Clin. Obstet. Gynec. 353, 354 (1984).[4] Thus, while substantial strides have occurred in saving infants born between 24 and 28 weeks, the earliest point at which an infant can survive has changed little. Compare *Williams Obstetrics*, at 748-49, with *Williams Obstetrics* 493 (L. Hellman & J. Pritchard 14th ed. 1971).[5]

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[4] The anatomic threshold for development of the network of interfacing blood vessels and air spaces explains why ventilators or injection of pulmonary surfactant have not lowered the threshold of viability below 23-24 weeks. These measures can only help a sufficiently developed lung work to its full potential.

[5] There is an analogous biologic limit at the end of life. While the maximum lifespan has not changed during the course of recorded history and remains at about 100 years, an increasingly higher percentage of people survive to the maximum lifespan. J. Brocklehurst, *Textbook of Geriatric Medicine and Gerontology* 4 (3d ed. 1985).

The anatomic threshold in lung development could be overcome in theory by "extracorporeal membrane oxygenation" (ECMO), which involves diversion of the bloodstream into a machine that takes the place of the lung. The machine removes the blood, oxygeneates it and then returns it to the body for circulation. ECMO is commonly used in heart surgery to bypass the heart and lung while the surgeons are operating on the heart. S. Schwartz, G. Shires, F. Spencer & E. Storer, *Principles of Surgery* 811-14 (4th ed. 1984).

There are significant limits, however, to the use of ECMO. Its use results in bleeding tendencies, damage to the blood cells and deterioration of lung and kidney function. *Id.* at 813-14. Because of the risk with premature infants of bleeding into the brain, it is contraindicated in infants whose gestational age is less than 35 weeks or whose birthweight is less than 2,000 grams. Stork, *Extracorporeal Membrane Oxygenation in the Newborn and Beyond*, 15 Clin. Perinat. 815, 821 (1988). Improvements in ECMO may someday permit its use in premature infants. However, such improvements are not expected in the foreseeable future. *New York State Task Force* at 8; see generally, Hack & Fanaroff, *How Small is Too Small? Considerations in Evaluating the Outcome of the Tiny Infant*, 15 Clin. Perinat. 773, 782 (1988).[6]

III. The Health Effects of Childbirth and Abortion

Many women experience medical complications during childbirth (*i.e.*, a term pregnancy, labor and delivery), and, in rare instances, death results.[7] Abortion also can

[6] It has taken over 50 years from the time laboratory investigation of extracorporeal circulation began to reach the current limits. *Principles of Surgery* at 811.

[7] There are certain health benefits to childbearing. For example, women who do not bear children are at greater risk of breast cancer, uterine cancer, colon cancer and ovarian cancer. *Rovinsky & Guttmacher's Medical, Surgical, and Gynecologic Complications of Pregnancy* 502-04 (S. Cherry, R. Berkowitz & N. Kase 3d ed. 1985).

have adverse health effects, including death, but the severity and frequency of harm is significantly less than in childbirth.

In 1973, this Court observed that maternal mortality from abortion was lower than maternal mortality from childbirth until the second trimester of pregnancy. *Roe* v. *Wade*, 410 U.S. at 149, 163. Since that time, advances in medical knowledge and surgical technque have made both childbirth and abortion safer. In addition, abortion has remained safer than childbirth.[8] LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 190 (1982). By 1981, for example, the risk of a woman dying from an abortion had dropped to 0.5 per 100,000 procedures from 4.1 per 100,000 in 1972. *Id.* at 191; Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 85 (1986).[9] The risk of death from childbirth declined less sharply, to 8.5 per 100,000 live births in 1981 from 18.8 per 100,000 in 1972. U.S. Dep't of Health and Human Services, 2A *Vital Statistics of the United States 1981* 64.[10]

The reported mortality figures may understate the relative safety of abortion compared to childbirth. According to a number of studies, mortality statistics published by the federal government underestimate the num-

[8] Induced abortion is one of the most commonly performed and safest surgical procedures in the United States, with half the risk of death involved in a tonsillectomy and one one-hundredth the risk of death involved with an appendectomy. W. Hern, *Abortion Practice* 23-24 (1984).

[9] The most common causes of death from abortion are uncontrolled bleeding (hemorrhage), complications of anesthesia, infection and pulmonary embolism. *Binkin* at 90.

[10] The most common causes of maternal death from childbirth are pulmonary embolism, pregnancy-induced hypertension, ectopic pregnancy, uncontrolled bleeding (hemorrhage) and cerebrovascular accidents (stroke). Rochat, Koonin, Atrash & Jewett, *Maternal Mortality in the United States: Report from the Maternal Mortality Collaborative*, 72 Obstet. Gynec. 91, 93 (1988).

ber of maternal deaths from childbirth by as much as 37%-50%. Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192, 194 (1982); Rochat, Koonin, Atrash & Jewett, *Maternal Mortality in the United States: Report from the Maternal Mortality Collaborative*, 72 Obstet. Gynec. 91, 92 (1988).[11] The data on abortion mortality, on the other hand, are highly accurate. This is because efforts to detect maternal mortality from abortion have been very thorough. *Cates, Smith Rochat & Grimes* at 193-94.

The risk of other medical complications is also higher in childbirth than in abortion. While 63% of women suffer some adverse health effect during pregnancy, Placek & Taffel, *Recent Patterns in Cesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607, 612, 615 (1988), approximately 12% of abortions result in some medical complication. J. Hodgson, *Abortion and Sterilization: Medical and Social Aspects* 159 (1981). Moreover, the risk of major surgery is higher in childbirth. While nearly 25% of women deliver by cesarean section, *Placek & Taffel* at 607, fewer than one percent of abortions result in the need for intra-abdominal operations. Cates, *Legal Abortion: The Public Health Record*, 215 Sci. 1586, 1587 (1982).

The difference in maternal mortality and morbidity between abortion and childbirth is significantly affected by the gestational age of the fetus. When the fetus is eight or fewer weeks old, abortion is more than 20 times safer than childbirth. *LeBolt* at 191. The difference in maternal complications narrows thereafter with abortion remaining safer until at least 16 weeks of gestation.[12] *LeBolt* at 191.

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[11] The underreporting stems chiefly from the fact that official statistics are based solely on information from death certificates, which frequently provide inadequate information regarding the cause of death. *Cates, Smith, Rochat & Grimes* at 193.

[12] By 1981, the maternal mortality rate for abortions between 16 and 20 weeks dropped to 7.8 deaths per 100,000 abortions. *Binkin* at 87. Also in 1981, the official maternal mortality rate in childbirth was 8.5 per 100,000 live births. *Obstetrics & Gynecology* at 288.

Abortions have become increasingly safer for three reasons. First, like any other surgical procedure, abortions have fewer complications as physicians gain experience performing them. *Binkin* at 90 (1986); Grimes & Schulz, *Morbidity and Mortality from Second-Trimester Abortions*, 30 J. Reprod. Med. 505, 506 (1985). Second, a higher percentage of abortions are performed on women whose characteristics place them at a relatively low risk of complications. For example, the risks are lowest when abortions are performed before week eight of gestation, and the fraction of abortions occurring in that time period has increased from about one-third to one-half. *Binkin* at 88. Finally, the risks to maternal health from abortion have decreased because of a shift to safer techniques for performing abortions. *Id.*

There have been two important advances in technique. First, during the first trimester, suction curettage (vacuum aspiration), the safest method of abortion, has replaced mechanical curettage as the dilation and evacuation method of choice;[13] almost all first trimester abortions are performed by suction. Stubblefield, *Surgical Techniques of Uterine Evacuation in First- and Second-Trimester Abortions*, 13 Clin. Obstet. Gynec. 53, 53 (1986); E. Quilligan & F. Zuspan, *Douglas-Stromme Operative Obstetrics* 182 (4th ed. 1982). Use of vacuum aspiration results in an abortion that requires less time, results in less damage to the uterus and causes minimal blood loss. *Id.*

The second important improvement in technique has been the greater use of dilation and evacuation to perform second trimester abortions. Previously, physicians believed that dilation and evacuation could be performed

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[13] Dilation and evacuation methods involve two steps: (a) widening of the cervix until it is large enough to permit insertion of instruments into the uterus for removal of the fetal tissue (dilation) and (b) removal of the fetal tissue (evacuation).

only through the 12th week of gestation. *Stubblefield* at 63; *Rovinsky & Guttmacher* at 688-89. In addition, alternative techniques were not considered safe enough for widespread use before the 16th week of gestation. As a consequence, a woman who decided to have an abortion during weeks 13-15 had to wait until week 16, when an abortion was more dangerous. *Binkin* at 88.

It is now clear that dilation and evacuation can be used safely through week 20 of gestation, and, since 1980, has been the most commonly used method for mid-trimester abortions, accounting for two-thirds of such abortions. American College of Obstetricians and Gynecologists, *Methods of Midtrimester Abortion* 1 (Technical Bulletin 109, Oct. 1987). Dilation and evacuation is safer than other mid-trimester abortion techniques until week 16 when it becomes as risky as some of the alternatives, but is still preferred for weeks 16-20 because it is simpler, cheaper and less traumatic for patients. *Stubblefield* at 66; *Rovinsky & Guttmacher* at 690.

Improvements in the safety of abortion have also occurred because lawful abortions are much safer than unlawful ones. Between 1940 and 1972, more than 75% of abortion deaths were the consequence of unlawful abortions and, in 1972, women having unlawful abortions were eight times more likely to die than women having lawful abortions. Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plann. Persp. 86, 91-92 (1976). After *Roe*, abortion deaths dropped sharply. Between 1972 and 1974, for example, the total number of abortion deaths declined from 88 to 48, and deaths from unlawful abortions declined from 39 to 5. *Cates & Rochat* at 87. In other words, 85% of the decrease in abortion deaths between 1972 and 1974 reflected reductions in mortality from unlawful abortions. *Id.*[14]

[14] In nearly 70% of the deaths from unlawful abortions in 1972-74, the woman belonged to a minority racial group. *Cates & Rochat* at 91.

Non-fatal complications of abortion also have declined following legalization. For example, hospital admissions for septic abortion in California dropped by 68-75% following liberalization of the state's abortion laws in 1967. Bracken, Freeman & Hellenbrand, *Hospitalization for Medical-Legal and Other Abortions in the United States 1970-1977*, 72 Am. J. Pub. Health 30, 30 (1982). Moreover, in countries in which abortion is still illegal, the likelihood of major complications is much higher than in the United States. In South Africa, for example, the incidence of complications requiring hysterectomy is 50-100 times greater. Richards, Lachman, Pitsoe & Moodley, *The Incidence of Major Abdominal Surgery After Septic Abortion—An Indicator of Complications Due to Illegal Abortion*, 68 S. African Med. J. 799, 800 (1985).

In sum, what the Court found in 1973 is even more true today: the medical risks to a woman of childbirth are greater than the risks of abortion. In the next section, we discuss some of the individual risks of childbirth and abortion.

IV. Individual Physical and Psychiatric Effects of Pregnancy and Abortion

A. *Individual Physical Effects from Pregnancy*

Pregnant women may experience a wide range of adverse health effects. As many as 90% of pregnant women develop gastrointestinal symptoms, including nausea and vomiting. *Obstetrics & Gynecology* at 334-35. Other common problems include fatigue, varicose veins, hemorrhoids, headache and backache. *Williams Obstetrics* at 260-63.

Many pregnant women confront potentially more serious health problems. Hypertension,[15] for example, complicates about 8%-10% of pregnancies. C. Pauerstein, *Clinical Obstetrics* 645 (1987). In the majority of cases,

[15] Pregnancy may induce hypertension as well as aggravate pre-existing hypertension.

the hypertension can be controlled, and no permanent consequences result. *Clinical Obstetrics* at 645, 655-56; R. Creasy & R. Resnik, *Maternal-Fetal Medicine* 801 (2d ed. 1989). However, hypertensive pregnant women are at higher risk for cerebrovascular accidents (strokes), abruptio placentae (premature separation of the placenta from the uterus), and disseminated intravascular coagulation (a severe bleeding disorder). *Clinical Obstetrics* at 656.

About 0.1% of deliveries are complicated by eclampsia, a severe form of pregnancy-induced hypertension. *Williams Obstetrics* at 539. Eclampsia is characterized by headaches, visual disturbances, abdominal pain and seizures, *id.* at 544, and it has a maternal mortality rate that ranges from less than 1% to 17%, *Clinical Obstetrics* at 647, depending upon the adequacy of prenatal care and the access to health care facilities. Because of the seriousness of eclampsia, the standard approach for pregnant women with any degree of hypertension is to induce labor as soon as the fetus is mature and the woman's cervix is favorable for induction. *Obstetrics & Gynecology* at 458; *Williams Obstetrics* at 542.

The pregnant woman also bears a risk of hemorrhage during pregnancy, labor and delivery, and the puerperium (the immediate post-delivery period).[16] During the third-trimester, for example, bleeding occurs in 2%-3% of pregnancies, most commonly from the placenta. *Obstetrics & Gynecology* at 433. Third-trimester bleeding is of particular concern because of its potentially fatal outcome for both the mother and fetus. *Id.* Indeed, the standard response to any third-trimester bleeding is im-

[16] The most common period during which serious blood loss in obstetrics occurs is after delivery, and the main causes are uterine atony (failure of the uterus to contract and close off the woman's blood vessels that previously entered the placenta), lacerations of the birth canal from delivery or retention of placental tissue in the uterus. *Obstetrics & Gynecology* at 764-65; *Williams Obstetrics* at 707-15.

mediate hospitalization to determine the cause of the bleeding so that appropriate treatment can be instituted.[17]

If third-trimester bleeding is caused by placenta previa (obstruction of the birth canal by the placenta) or by abruptio placentae, cesarean section may be required to prevent uncontrolled hemorrhage. *Id.* at 437-42. Potential complications of uncontrolled hemorrhage include kidney failure, stroke, loss of pituitary gland function and death. *Id.* at 438, 441-42. There are also potentially serious complications of the treatments for third-trimester hemorrhage. These include hepatitis or other diseases from blood transfusions, severe infections, and, if a hysterectomy is required, infertility. *Id.* at 438.

Pregnancy-induced diabetes occurs in approximately 1-3% of pregnancies. G. Burrow & T. Ferris, *Medical Complications During Pregnancy* 41 (3d ed. 1988). In addition, there are approximately 1.5 million women of childbearing age who are already known to have diabetes. *Maternal-Fetal Medicine* at 925. Diabetes has a number of adverse effects on the pregnant woman: there is a fourfold increase in the likelihood of hypertensive disease; infection occurs more often and with greater severity; injury to the birth canal during vaginal delivery is more common; cesarean sections are required more frequently; and hemorrhage after delivery (postpartum hemorrhage) is more likely. *Williams Obstetrics* at 600.

Three rare but life-threatening complications of childbirth are amniotic fluid embolism, pulmonary embolism and disseminated intravascular coagulation. Amniotic fluid embolism occurs in less than 0.1% of deliveries, but, because it is fatal in over 80% of cases, is responsible for up to 10% of maternal deaths in childbirth. *Clinical Obstetrics* at 779. In amniotic fluid embolism, amniotic fluid or other fetal tissue enters the woman's circulation where it obstructs the blood vessels in the mother's lung and/or precipitates disseminated in-

[17] Since attempts to determine the source of the bleeding may precipitate massive hemorrhage, investigation must take place where full medical and surgical treatments are available.

travascular coagulation. *Clinical Obstetrics* at 779. Pulmonary embolus is a leading cause of maternal deaths after childbirth, although it occurs in less than 0.1% of deliveries. *Clinical Obstetrics* at 781. It is caused by obstruction of the lung's blood vessels from blood clots that originate in the veins of the legs. Disseminated intravascular coagulation, a severe bleeding disorder that results from a breakdown in the blood's system of coagulation, is seen in women with hypertensive disease of pregnancy, severe infections or abruptio placentae, as well as amniotic fluid embolism. *Obstetrics & Gynecology* at 540-41.

The nearly 25% of women who deliver by cesarean section are exposed to significantly higher risks of death and other, less severe side effects when compared with women who deliver vaginally. *Maternal-Fetal Medicine* at 530. Complications are very common. In 25%-50% of cesarean sections, the woman suffers some compromise of her health, including infection, hemorrhage, laceration of her reproductive, urinary or intestinal tract, and pulmonary embolism.[18] Miller, *Maternal and Neonatal Morbidity and Mortality in Cesarean Section*, 15 Obstet. Gynec. Clin. N.A. 629, 630 (1988); Rogers, *Complications at Cesarean Section*, 15 Obstet. Gynec. Clin. N.A. 673, 676, 679-80 (1988); *Obstetrics & Gynecology* at 738. The risk of maternal death is two to four times greater with cesarean section than with vaginal delivery. *Clinical Obstetrics* at 877.

In addition to causing new disease and complications, pregnancy may aggravate preexisting illnesses. A number

[18] Other rare, but potentially fatal complications, may result from anesthesia. *Rogers* at 682-83. During general anesthesia, the woman's stomach contents may be aspirated into her lung where their acidity makes them extremely toxic, with death occurring in more than 50% of the cases. *Clinical Obstetrics* at 777; Hood, *Anesthesia for Cesarean Section: Minimizing Risk and Complications*, 15 Obset. Gynec. Clin. N.A. 639, 640-41 (1988). Spinal anesthesia can cause excessive paralysis of the nerves, leading to a profound decrease in blood pressure, loss of respiratory function and even cardiac arrest. *Hood* at 644.

of the conditions that increase the risk of pregnancy to the mother's health will make abortion strongly advisable. For example, for a woman who suffers from a congenital heart disease that causes severe malformations of the heart, the additional stress on her heart from pregnancy could pose as much as a 50 percent possibility of causing her death. *Obstetrics & Gynecology* at 494-97; *Abortion, Medicine & the Law* 251 (J. Butler & D. Walbert 3d ed. 1986). Pregnancy also jeopardizes the life of a woman with advanced coronary artery disease or severe impairment of a heart valve, *Clinical Obstetrics* at 630, and all pregnant women with heart disease have a higher risk of congestive heart failure, cardiac infections and arrhythmias (abnormal heart rhythms). *Obstetrics & Gynecology* at 492-97; *Maternal-Fetal Medicine* at 749-58.

Pregnancy also threatens the woman's life or is likely seriously to impair her health when she suffers from chronic renal failure, myasthenia gravis[19] or pulmonary embolism in a previous pregnancy.[20] *Abortion, Medicine & the Law* at 252-54. Cancer is the second leading cause of death among women in their reproductive years, and can threaten the fetus as well as the woman. Williams & Bitran, *Cancer and Pregnancy*, 12 Clin. Perinat. 609 (1985). If treatment of the disease requires radiation or chemotherapy, a choice must be made between the life of the patient and the fetus, since these forms of therapy are likely to result in fetal malformation or death.[21]

[19] 40% of women with myasthenia gravis (a degenerative nerve disease similar to polio) suffer an exacerbation during pregnancy and 3.4% die. *Abortion, Medicine & the Law* at 253.

[20] There is a high risk of a recurrence in subsequent pregnancies. *Id.*

[21] Abortions are sometimes performed because diagnostic testing has revealed severe fetal abnormalities, *e.g.*, the fetus may suffer from a devastating genetic or other congenital defect such as anencephaly or Tay-Sachs disease. Or, the woman may have ingested substances that are harmful to the fetus. *Abortion, Medicine & the Law* at 254-55. A third fetal indication for abortion arises when the woman has developed certain viral infections, such as AIDS, during pregnancy. Finally, if the woman is exposed during

Rovinsky & Guttmacher at 512-15. Furthermore, diagnosis and treatment of cancer in pregnant women is often delayed because the symptoms of pregnancy can mask the symptoms of cancer. *Id.* at 507, 508 and 512. Diagnosis of breast cancer, for example, is typically delayed by two to seven months in pregnant women. *Williams & Bitran* at 612. Other conditions exacerbated by pregnancy include asthma,[22] arthritis,[23] inflammatory bowel disease[24] and epilepsy.[25]

B. *Individual Physical Effects from Abortion*

As indicated previously, abortion can also involve adverse health effects. They are less frequent and generally less severe than those of childbirth. This difference reflects the fact that the stress from abortion is smaller in magnitude and has a shorter duration than the stress from childbirth. Nevertheless, a wide range of adverse health effects can result from abortion.

Many women suffer discomfort from the procedure, including pain, headache and nausea. Approximately 12% of women suffer more serious complications, and

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early pregnancy to radiation in doses as high as those used to treat cancer, the fetus usually will be malformed, if not spontaneously aborted. *Id.* at 256.

[22] Asthmatics have increased risks of complications during pregnancy such as toxemia or hemorrhage. Greenberger, *Asthma in Pregnancy*, 12 Clin. Perinat. 571, 579 (1985). Moreover, asthma is more difficult to treat during pregnancy because certain medications may be harmful to the fetus. *Greenberger* at 580.

[23] The pregnant woman may experience excessive pain because, with the exception of aspirin, all of the anti-inflammatory drugs generally prescribed for arthritis present a substantial risk of harm to the fetus. *Rovinsky & Guttmacher* at 73.

[24] Women with Crohn's disease or ulcerative colitis have a 50% risk of aggravation of their disease. *Abortion, Medicine and the Law* at 252.

[25] The frequency of seizures increases in 24-45% of pregnant women with epilepsy. Noronha, *Neurological Disorders During Pregnancy and the Puerperium*, 12 Clin. Perinat. 695, 695-96 (1985).

about 0.4% will suffer a major complication such as perforation of the uterus or hemorrhage severe enough to require a blood transfusion. Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 16 (1985); J. Hodgson, *Abortion and Sterilization: Medical and Social Aspects* 155, 159-60 (1981).

The risk of an adverse health effect depends upon a number of factors, including the gestational age of the fetus, the procedure used to perform the abortion and the woman's age and general health. *Buehler* at 19. Problems that may arise during or after an abortion include perforation of the uterus or laceration of the cervix by the instruments used in dilation and evacuation. *Obstetrics & Gynecology* at 257; *Stubblefield* at 58. Small perforations or lacerations will heal without any treatment, *Williams Obstetrics* at 481, while larger tears must be repaired with sutures (stitches). In rare cases, an uterine perforation has severe consequences. It may require a hysterectomy, and it increases the risk of a fatal infection or hemorrhage by more than 100-fold. Grimes, Schulz & Cates, *Prevention of Uterine Perforation During Curettage Abortion*, 251 J.A.M.A. 2108, 2108 (1984).

Infections and hemorrhage are potential complications of all abortion techniques. As in a delivery, see *supra* at 14, hemorrhage may result from uterine atony or retention of placental tissue in the uterus. Rayburn & LaFerla, *Mid-Gestational Abortion for Medical or Genetic Indications*, 13 Clin. Perinat. 71, 78 (1986). Post-abortion infections, in contrast to other pelvic infections, generally respond rapidly to antibiotics and curettage of the uterine cavity. *Obstetrics & Gynecology* at 218. Spread of an infection beyond the uterus is a major risk factor for the development of a severe infection. *Id.* at 219.

Amniotic fluid embolism, pulmonary embolism and disseminated intravascular coagulation are three rare but

particularly fatal complications in abortion, as they are in childbirth, *supra* at 15-16. Amniotic fluid embolism, for example, accounts for more than 10% of abortion deaths. Mulder, *Amniotic Fluid Embolism: An Overview and Case Report*, 152 Am. J. Obstet. Gynec. 430, 430 (1985).

It is unclear whether abortion compromises the outcomes of subsequent pregnancies. *Williams Obstetrics* at 483. Some studies have found that later pregnancies had a greater, though still slight, risk of spontaneous abortions, preterm deliveries and low birthweight infants. *Id.; Abortion, Medicine & the Law* at 259. More recent studies have not found a statistically significant increase in risk for any of these three complications. Linn, Schoenbaum, Monson, Rosner, Stubblefield & Ryan, *The Relationship Between Induced Abortion and Outcome of Subsequent Pregnancies*, 146 Am. J. Obstet. Gynec. 136, 140 (1983); Frank, Key, Scott, Hannaford & Haran, *Pregnancy Following Induced Abortion: Maternal Morbidity, Congenital Abnormalities and Neonatal Death*, 94 Br. J. Obstet. Gynec. 836 (1987). Nor does there appear to be an increase in infertility following abortion. Stubblefield, Monson, Schoenbaum, Wolfson, Cookson & Ryan, *Fertility After Induced Abortion: A Prospective Follow-Up Study*, 63 Obstet. Gynec. 186 (1984).

C. *Individual Psychiatric Effects from Pregnancy and Abortion*

As others have observed, including the U.S. Surgeon General, the research on the psychiatric effects of abortion is not sufficiently rigorous to yield a complete understanding of the extent to which abortion results in psychiatric problems. Nevertheless, certain observations can be made.

First, serious psychiatric disease after either abortion or childbirth is unusual.[26] Most women respond to abor-

[26] Serious psychiatric disease is generally defined as mental illness severe enough to require hospitalization in a psychiatric facility. It is usually referred to as post-abortion or postpartum psychosis. David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 Fam. Plann. Persp. 88, 88 (1981); Brewer, *Incidence of Post-abortion Psychosis: A Prospective Study*, [1977] 1 Br. Med. J. 476, 476.

tion with relief, see *infra* at 22. Fewer than 0.3% of pregnant women will go on to develop serious mental illness after either abortion or childbirth. *Comprehensive Textbook of Psychiatry/IV* 1054 (H. Kaplan & B. Sadock 4th ed. 1985); Robinson & Stewart, *Postpartum Psychiatric Disorders*, 134 Can. Med. Ass'n J. 31, 42 (1986); David, Rasmussen & Holst, 13 Fam. Plann. Presp. 88, 88-89 (1981); Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, [1977] 1 Br. Med. J. 476, 476-77. Similarly, the vast majority of women derive very significant emotional and psychological benefits from bearing and raising children.

Second, transient negative feelings that are not serious enough to constitute psychiatric disease are commonly seen following either abortion or childbirth. Somewhere between 50% and 70% of mothers experience the "postpartum blues," which begin during the first week after delivery and last anywhere from a few hours to two weeks, usually 24-48 hours. *Robinson & Stewart* at 32; Zuckerman & Beardslee, *Maternal Depression: A Concern for Pediatricians*, 79 Pediat. 110, 111 (1987). Typical symptoms include sadness, weepiness, poor concentration, anxiety and confusion. *Robinson & Stewart* at 32. After abortion, 15%-40% of women experience feelings of regret, guilt and sadness that are mild and which generally disappear within two weeks. Lazarus & Stern, *Psychiatric Aspects of Pregnancy Termination*, 13 Clin. Obstet. Gynec. 125, 125-27 (1986); Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 West J. Med. 188, 190-92 (1975).

Third, while a significant percentage of women suffer from mild to moderate psychiatric illness after childbirth, it is not clear to what extent abortion is followed by mild to moderate psychiatric illness. In any event, it appears that postpartum illness is more common than post-

abortion illness. Approximately 20% of mothers develop "postpartum depression," a depression whose symptoms are typical of depressions generally and which usually lasts for 6-8 weeks. *Zuckerman* at 111; Hopkins, Marcus & Campbell, *Postpartum Depression: A Critical Review*, 95 Psychol. Bull. 498, 503 (1984). Experts disagree on the frequency of mild to moderate post-abortion psychiatric illness, with estimates ranging from a fraction of a percent to as much as 15%. The majority of experts estimate frequency at the low end of that spectrum. *Lazarus* at 125-27; Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 Br. J. Obstet. Gynec. 1115, 1121 (1980); Ewing & Rouse, *Therapeutic Abortion and Prior Psychiatric History*, 130 Am. Psych. 37 (1973).

To the extent that there is psychiatric illness after abortion, it appears generally to be temporary and limited to those women who have a history of psychiatric problems or who choose to abort because of risks to their health or their fetuses rather than because the fetus is unwanted. *Lazarus* at 125-27; Lloyd & Laurence, *Sequelae and Support After Termination of Pregnancy for Fetal Malformation*, 290 Br. Med. J. 907 (1985); *Blumberg* at 193. Moreover, the predominant response to abortion is relief, and the positive feelings increase over time as the negative feelings diminish. *Adolescent Abortion: Psychological and Legal Issues* 84 (G. Melton, ed. 1986); Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446, 447 (1975).

Women who have abortions also are less likely to suffer psychiatric disability than women who are denied abortions. When compared to women who have abortions, women denied abortions have a greater likelihood of both significant psychiatric disease and serious psychiatric disease. *Comprehensive Textbook* at 1055.

In sum, what this discussion of the medical background of abortions, fetal viability and the physical and psychiatric implications of childbirth and abortion reveals is

that the Court in *Roe* was correct that "the abortion decision in all its aspects is inherently, and primarily, a medical decision. . . ." 410 U.S. at 166.

SUMMARY OF ARGUMENT

I.

Amici do not argue here that the specific balance struck in *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), between a woman's fundamental right to make a personal medical decision and the state's interest in protecting potential life should be reaffirmed or rejected. But *amici* do argue that the "right of privacy" embodied in the concept of personal liberty protected by the Fourteenth Amendment is, as held in *Roe*, "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court should reaffirm that specific holding for three reasons.

A. In part, the Court reached its conclusion about the privacy right because it found that the nature of the woman's interest in the choice confronting her during pregnancy was essentially the same as other inherently private, individual decisions which the Constitution protects. Compare *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Specifically, the Court recognized that, by denying the woman a choice, "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved." *Roe*, 410 U.S. at 153. The Court's reasoning on that point is just as valid today as it was in 1973.

B. The Court's privacy holding is also supported by the fact that individual medical decisionmaking is a process "deeply rooted in this Nation's history and tradition," *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.). The Court has held that the liberty guaranteed by the Fourteenth Amendment includes "the right of the individual . . . to enjoy those privileges long recognized at common law. . . ." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). And no right "is more carefully guarded by the common law, than the right of every in-

dividual to the possession and control of his own person." *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891). Thus, the quintessentially private choice of medical treatment options is entitled to constitutional protection.

C. The holding that a patient has a fundamental right drawn from the liberty component of the Due Process Clause to make a medical treatment decision is "rooted in accepted principles." U.S. Brief at 12. This Court has recognized in applying the broad mandates of both the Fourth and the Eighth Amendments that medical treatment is entitled to substantial protection from governmental interference or neglect. See, *e.g.*, *Winston* v. *Lee*, 470 U.S. 753, 767 (1985). The logic of those cases supports the holding that a privacy right derived from the Liberty Clause of the Fourteenth Amendment shields individual medical treatment choices from interference absent a compelling state interest.

D. The compelling interest analysis triggered by an infringement by the state of the fundamental right to terminate a pregnancy contains two components which must be independently satisfied: 1) the specific means chosen must be reasonably related to a compelling interest and thus consistent with sound medical practice and 2) the specific requirements of the state must be carefully tailored to the state's purposes. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

II.

A. Section 188.029 of the Missouri statute, which the court of appeals construed to require a physician in making a viability determination to perform certain tests in order to support findings concerning the gestational age, weight and lung maturity of a fetus, is medically inappropriate and not reasonably related to any legitimate goal of the state. Instead, Missouri attempts to interfere with the physician's judgment and in so doing imposes needless risk to the mother's health without any corresponding gain to the state's interest in protecting the fetus.

Accordingly, the statute is unconstitutional. See *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

B. Section 188.205 of the Missouri statute, which the court of appeals held literally precludes a physician from "consulting," i.e., making any comment, about having an abortion unless necessary to save the mother's life, is unconstitutional. The statute clearly interferes with a physician's ethical obligations to discuss fully and accurately all information necessary to permit the patient to make an informed treatment choice. By mandating "a state-imposed blackout on the information necessary to make a decision" (851 F.2d at 1080), Section 188.205 forces a constitutionally impermissible "straightjacket" upon the physician's efforts fully to inform his or her patient. *City of Akron*, 462 U.S. at 445; *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

ARGUMENT

I. INDIVIDUALS HAVE A FUNDAMENTAL RIGHT TO MAKE DECISIONS ABOUT THEIR MEDICAL CARE, AND STATE LAWS WHICH INTERFERE WITH THAT RIGHT CAN BE JUSTIFIED ONLY IF THEY ARE NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.

Appellants and their *amici curiae*—particularly the United States—ask this Court to overrule a decision interpreting the Constitution: *Roe* v. *Wade*, 410 U.S. 113 (1973). In so doing, they ask the Court to take two major steps. First, they propose altering the balance struck previously by the Court between the interests of the pregnant woman and those of the state. Second, they ask the Court to declare that no fundamental privacy right exists in this case at all. They make this second, extraordinary request because they believe that the privacy right recognized in *Roe* cannot properly be derived from the Constitution. See U.S. Brief at 9-24.

Given the diversity of views of *amici*'s members, this brief does not take a position on whether the balance of

interests struck in *Roe* should be modified. However, *amici* firmly believe that the Court should reject the invitation of the federal government to deny constitutional protection to the well-established right of privacy that this Court applied in *Roe* v. *Wade*.

In the first place, the holding of this Court on the privacy issue was a common sense application of settled constitutional principles to a situation where a woman must make an individual choice about a matter which the Court found would have profound implications for her health and life. Since the same profound individual implications the Court identified in 1973 still exist (see *supra* at 3-23), the decision should be reaffirmed. Second, the holding on the privacy issue simply reflected the historic tradition, embodied in our common law, of recognizing that all medical treatment decisions ordinarily should be made by the patient, after consultation with a physician concerning the risks and benefits of treatment. Third, the holding on the privacy issue is fully consistent with the holdings of this Court in applying other abstract constitutional principles to medical treatment situations, where the Court has always respected the dignity of the individual and his or her right to obtain desired medical care. Each of these reasons independently supports the Court's holding that the decision to terminate a pregnancy implicates a fundamental right.

A. The Individual's Fundamental Privacy And Liberty Right To Be Free Of Governmental Interference Extends To Medical Treatment Decisions.

This Court has long recognized that, as part of the "liberty" protected by the Constitution's Due Process Clauses, the Constitution guarantees to each individual certain areas or zones of privacy which remain free from unjustified government interference or intrusion. See *Carey* v. *Population Serv. Int'l*, 431 U.S. 678, 684 (1977). The Court's privacy rulings rest on the theory that the constitutional text does not, on its face, specify all rights

that warrant constitutional protection from executive or legislative intervention.[27]

The essence of the liberty interest denominated as the right to privacy is the concept that an individual in certain circumstances has a right to be let alone, *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and that the individual must thus have "independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). As this Court has recognized, that right encompasses matters concerning marriage and procreation. The specter of governmental agents unnecessarily interfering with such inherently private, individual decisions is antithetical to basic concepts of individual liberty in a free society. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). See also *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).[28]

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[27] The concept of "liberty" in the Due Process Clause of the Fourteenth Amendment is a "broad" one. *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). For this reason, it has long been recognized as protecting certain personal choices. *See, e.g., Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923).

Moreover, privacy is hardly the only value that has received constitutional recognition without being expressly specified in the constitutional text. For example, this Court found a right to travel in the Constitution without requiring any explicit textual basis. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). In addition, although "federalism" is nowhere mentioned in the Constitution, the doctrine is part of the constitutional scheme. *See Coyle* v. *Smith*, 221 U.S. 559, 565 (1911); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

[28] The United States seems to accept *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), as a legitimate decision on the ground that enforcement of a statute prohibiting the use of contraceptives would require wholly impermissible governmental prying into the private lives of individuals. (U.S. Brief at 12 n.9.) Having accepted *Griswold*, however, the government's textual theory (U.S. Brief at 23-28) for rejecting *Roe* v. *Wade* collapses, because this Court did not locate the right recognized in *Griswold* in a specific constitutional provision and could not, as the United States suggests, have

Moreover, and of particular significance to *amici* and their members, the right to privacy which is derived from the concept of liberty also encompasses the right of an individual to make decisions about his or her medical care and treatment. As our discussion of the health implications of pregnancy and abortion makes clear, the Court's assumptions about the importance of this particular medical treatment decision are as true today as they were in 1973. Women face physiological and psychological risks and burdens when they become pregnant. Under this Court's decisions, individual choices become fundamental rights because they have a powerful and perhaps irreversible impact on who we are and who we will become. See *Fitzgerald* v. *Porter*, 523 F.2d 716, 719-20 (7th Cir. 1975): "These cases do not deal with the individuals' interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny." Accordingly, it seems plain that the health effects of pregnancy and abortion, by themselves, should be sufficient to support the holding in *Roe* that the woman's choice should be constitutionally protected.

In holding that the abortion decision involved a fundamental right, the Court correctly noted that considerations of protecting the woman's health were vital. Specifically, the Court observed that:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.

Roe, 410 U.S. at 153. Similarly, in explaining the basis for the protections afforded first trimester abortions, the

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located it in the Fourth Amendment alone. *See Carey* v. *Population Serv. Int'l*, 431 U.S. 678, 687 (1977). The United States' brief therefore bears "witness that the right of privacy which passes for recognition here is a legitimate one." *Griswold*, 381 U.S. at 485.

Court identified the important health concerns implicated by the woman's choice. "[U]ntil the end of the first trimester mortality in abortion may be less than mortality in normal childbirth . . . . This means . . . that . . . the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 163. See also *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429 n.11 (1983).

The full extent of the importance attached to the pregnant woman's interest in being able to preserve her life and health is perhaps most apparent, however, in the context of third trimester abortions. At this stage, the State's interest in protecting fetal life is considered compelling. *Roe*, 410 U.S. at 163-165. Nonetheless, this Court has recognized that protection of the pregnant woman's health interests is still considered "paramount." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 769 (1986). Consequently, while *Roe* otherwise permitted proscription of third trimester abortions, it did not do so in instances where abortion "is necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 163-164.

The importance of the health considerations underlying *Roe*'s holdings has led this Court to observe:

> In concluding that the freedom of a woman to decide whether to terminate her pregnancy falls within the personal liberty protected by the Due Process Clause, the Court in *Wade* emphasized the fact that the woman's decision carries with it significant personal health implications—both physical and psychological . . . . [I]t could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*.

Harris v. *McRae*, 448 U.S. 297, 316 (1980).

To the extent that the right in this case depends upon the importance to the woman of the consequences of her

choice (see *supra* at 3-23), the decision whether or not to have an abortion should be considered a fundamental right.

B. This Court's Recognition That Every Individual Has A Fundamental Right To Make Decisions About His Or Her Medical Treatment Is Supported By The History And Traditions Of This Nation.

The Court's treatment of the woman's choice as a protected interest under the Constitution is supported by more than a common sense application of this Court's liberty and privacy rulings to the medical facts surrounding abortions. The Court's handling of the constitutional status of a medical treatment decision by the individual is also supported independently by the traditional respect this nation has always granted to the individual's interest in making personal medical treatment decisions in consultation with a physician.

The substantive guarantees afforded by the Due Process Clause encompass the protection of interests that are "deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.). In deciding whether a particular interest is so embedded, the Court's judgment has historically been informed by whether the interest was protected at common law. The Court has stated that the liberty guaranteed by the Fourteenth Amendment encompasses "the right of the individual . . . to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

In this regard, it is significant that: "No right is held more sacred, [n]or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891). An individual's interest in being permitted to make personal decisions

affecting bodily security, free from government coercion, is thus a traditionally protected interest.[29]

The interest in protecting the physical security and health of one's body is an ancient one. Blackstone classified this interest as one of the three principal articles—later embodied in our Constitution as "life, liberty and property"—constituting the "rights of the people of England." "[T]he preservation of a man's health from such practices as may prejudice or annoy it . . . are rights to which every man is entitled . . . ." W. Blackstone, *Commentaries* 1:134 (1765).

Indeed, both the common and statutory law of this country have consistently recognized the importance of the individual's interest in being able freely to make decisions designed to limit risks to his or her own health. In the law of torts, this interest is reflected, for example, in the requirement of informed consent to medical treatment. The principle which supports this doctrine is that the patient has a right to weigh whatever risks attend the particular treatment and to decide if they are intolerable.

> The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .'

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[29] Our general tradition of protecting the individual against coerced medical decisions posing a threat to health is more relevant than the narrow history of abortion regulation for determining the fundamental rights issue before this Court. That history of abortion is misleading because restrictions on the practice arose during an era when the procedure was dangerous. As noted in *Roe*, 410 U.S. at 148-49, "when most criminal abortion laws were first enacted, the procedure was a hazardous one for women . . . [;] [a]bortion mortality was high." Even then, abortion was frequently permitted when superceding health risks were present, *e.g.*, when necessary to preserve the life of the woman. *Id.* at 138-39. However, "[m]odern medical techniques have altered this situation," as this Court recognized in *Roe*, *id.* at 149, so that abortion restrictions that once served to protect the woman's health could now jeopardize her health. *See supra* at 8-13.

Canterbury v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (quoting *Schloendorff* v. *Society of New Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) (Cardozo, J.)). Accord *Natanson* v. *Kline*, 186 Kan. 393, 410, 350 P.2d 1093, 1106, *clarified*, 187 Kan. 186, 354 P.2d 670 (1960); F. Harper & F. James, *The Law of Torts* § 17.1 (2d ed. 1986).

Similarly, in order to guard the patient's ability to take steps essential to protecting his or her health, virtually every state in this country has recognized a physician-patient privilege. "The rationale of this privilege is to promote health by encouraging a patient to fully and freely disclose all relevant information which may assist the physician in treating the patient." *Huzjak* v. *United States*, 118 F.R.D. 61, 63 (N.D. Ohio 1987). See 8 J. Wigmore, *Evidence* § 2380a (McNaughton ed. 1961).

These examples illustrate this country's long-standing tradition of treating potential infringements upon an individual's ability to protect his or her health and autonomy with the utmost seriousness. That tradition is, in turn, constitutionally reflected in the Due Process Clause's substantive protection of life and liberty. "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982). Accord *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977) ("Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security"). For that reason, the right to protect one's bodily security, and to make medical decisions to that end, has always been deemed to require more than a mere minimal justification for government infringements. Under those principles, a woman's choice whether or not to terminate her pregnancy should be deemed a fundamental liberty interest protected by the Due Process Clause.

C. This Court's Recognition That Every Individual Has A Fundamental Right To Make Decisions About His Or Her Medical Treatment Is Supported By This Court's Approach To The Protection Of Health Under Specific Constitutional Provisions.

The United States criticizes (U.S. Brief at 12) the holding that a woman has a fundamental right embodied in the liberty component of the Due Process Clause to choose the medical treatment that she wishes her physician to provide as not "rooted in accepted principles." But the legal reasoning that supports the right in this context is essentially the same as the approach taken by this Court in applying other constitutional provisions, with language that is equally inexact, to issues concerning the provision of medical treatment generally. Thus, in the Fourth Amendment context, this Court has held that "our society recognizes a significantly heightened privacy interest" when government interference in medical decisions creates any increased risk to individual health. *Winston* v. *Lee*, 470 U.S. 753, 767 (1985).

In *Winston*, the government sought to perform a surgical procedure to remove a bullet from a criminal defendant's body. Presented with conflicting evaluations of the risk of the surgery, the court of appeals concluded that "the statistical risk of actual physical harm . . . is . . . very low [and could] be considered minimal." *Lee* v. *Winston*, 717 F.2d 888, 900 (4th Cir. 1983). Nonetheless, this Court reasoned:

> The operation sought will intrude substantially on respondent's protected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; *the very uncertainty militates against finding the operation to be "reasonable."*

Winston, 470 U.S. at 766 (emphasis supplied). The Court held that, in the absence of compelling countervailing interests, the very possibility of even marginal medical risk precluded the endangering government action. *Id.* As a matter of constitutional interpretation,

the *Winston* Court's derivation of a privacy interest from the Fourth Amendment's general protection against "unreasonable searches and seizures" to protect a patient's medical treatment choice cannot be distinguished from the *Roe* Court's derivation of a privacy interest from the liberty clause to protect a conceptually identical right to make a medical treatment choice.

Similarly, the constitutional value attached to protection of personal health is also evident in this Court's decisions under the Eighth Amendment. This Court has held that the Eighth Amendment's proscription of cruel and unusual punishments is violated by 'deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). Thus, even an individual whose liberty interest has been constitutionally abridged retains a privacy right to receive medical care as part of the abstract protection against cruel and unusual punishment. Again, there is no basis for arguing that the process of recognizing this fundamental right of a prisoner to receive medical care is derived from anything more concrete or more settled than the right to make an individual treatment decision which can be drawn from the Due Process Clause.

Not only is the process of analysis under these other provisions similar to what *amici* propose here for the Due Process Clause, but also the entire fabric of the Court's holdings regarding medical treatment decisions reflects a basic pattern in the Constitution which supports the right asserted in this case. See *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 259 (1974) (medical care constitutes "a basic necessity of life"). Repeated protection for a right under disparate sections of the Constitution indicates that the right is fundamental to and underlies the design of the Constitution itself. That is the case here.

The consistent close scrutiny by this Court of government attempts to interfere with personal interests in health and bodily security is not inadvertent. Rather, it demonstrates that these interests warrant the "fundamental" constitutional status that they have been granted throughout this Court's decisions. In sum, the Court should reaffirm both that there is a right of privacy generally incorporated into the "liberty" component of the Due Process Clauses and that the right extends to individual medical treatment decisions, including whether or not to terminate a pregnancy.

D. State Interference With A Fundamental Right Triggers Searching Judicial Examination Pursuant To The Compelling State Interest Test.

State "interference" with or "infringement" of a fundamental right triggers a searching judicial examination pursuant to the compelling state interest test. See *Roe* v. *Wade*, 410 U.S. at 155; *City of Akron*, 462 U.S. at 427. See also, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). A state law which infringes a fundamental right is "presumptively unconstitutional," *Harris* v. *McRae*, 448 U.S. 297, 312 (1980) (quoting *Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980)). It cannot withstand judicial scrutiny unless the state has a "compelling interest" and, in the abortion context, two elements of the compelling state interest test are met: the specific means chosen must be "reasonably related" to the state's compelling goals and thus consistent with sound medical practice; and those specific requirements must be carefully tailored to the state's purposes. Failure to satisfy either of these elements is fatal to the state's effort to infringe the woman's fundamental right. *City of Akron*, 462 U.S. at 426-31.

In much fundamental rights adjudication, a holding of infringement will doom a law because the state has no constitutionally recognized "compelling interest" in such an infringing enactment. In the abortion context, however, this Court has clearly recognized two "compelling" goals which can justify regulation of the decision whether or not to terminate a pregnancy. Thus, the state has a compelling interest in protecting the mother's health. *Roe*

v. *Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428. Similarly, the state has a compelling interest in preserving the potential life of the fetus. *Roe* v. *Wade*, 410 U.S. at 162-163; *City of Akron*, 462 U.S. at 428.

However, the presence of a compelling purpose does not, *ipso facto*, ensure the constitutionality of the state's particular infringement of the fundamental right. As the Court explained in *City of Akron*, 462 U.S. at 434, "the existence of a compelling state interest in health, however, is only the beginning of the inquiry." Thus, a state's requirements must be "reasonably relate[d]" to the compelling goals. *Roe* v. *Wade*, 410 U.S. at 163; *City of Akron*, 462 U.S. at 434 n.19 (quoting *Doe* v. *Bolton*, 410 U.S. 179, 194 (1973). Typically, this "reasonably related" element of the test involves an inquiry into whether the state's requirements have a reasonable medical basis. "The State's discretion to regulate . . . does not, however, permit it to adopt abortion regulations that depart from accepted medical practice." *City of Akron*, 462 U.S. at 431. See *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476, 487 (1983) (Powell, J.); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 78-79 (1976).

Second, state laws that interfere with or burden the right must be carefully tailored to the state's objective. See *Roe* v. *Wade*, 410 U.S. at 165; *Planned Parenthood* v. *Ashcroft*, 462 U.S. at 485 n.8; *City of Akron*, 462 U.S. at 438. The law must, in other words, not be overbroad and must, therefore, advance the compelling state interest without any additional and unnecessary interference with the fundamental right. *City of Akron*, 462 U.S. at 438-439.

Application of the compelling state interest test and its elements, and the striking of any balance between fundamental rights and compelling state interests, ultimately turns, of course, on the nature of the fundamental rights that are involved. The United States, however, proposes that in determining the permissible scope of state interference with the abortion decision, under either a "compelling interest" or "undue burden" analysis, this

Court should only take account of the effects of such interference on the woman's "interest in procreational choice." U.S. Brief at 22 n.16. This proposed approach is deeply flawed. It suggests that the Court should ignore the woman's fundamental interest in medical treatment decisions. Instead, abortions would be permitted only if the woman was "coerced" into becoming pregnant.

The United States' proposed analysis leaves no room for the woman to terminate a pregnancy to protect her own health or even to save her life. Obviously, denying her an abortion at that point is wholly irrelevant to the prior decision "whether or not to beget or bear a child," U.S. Brief at 22 (quoting *Carey* v. *Population Serv. Int'l*, 431 U.S. 678, 685 (1977)), which the government asserts should be the only "liberty interest" at stake. But, this Court already has held that the state cannot insist that there be a "trade-off" between the life of the mother and the survival of the fetus. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768 (1986), *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979).[30]

It is difficult to accept that the government believes that serious threats to a woman's health or even her life are not relevant in assessing the balance between the woman's right and the state's interests. The manifest shortsightedness of the government's reasoning undermines completely its proposed approach. In our view, it would be inconsistent with any reasonable notion of a "narrowly tailored" statute to hold that, in order to protect its interest in potential life, a state may, regardless

[30] The direct one-to-one trade-off is what distinguishes this case from *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). It is one thing to hold that the state can compel an individual to face a limited health risk in order to protect a significant number of other individuals and where even the specific individual's health is placed at significant risk if he or she is allowed to "opt out." It is fundamentally different to say that society can impose a direct and immediate burden and risk on one individual in order to benefit another.

of circumstances and irrespective of the severity of the threat to the woman's life or health, flatly prohibit all women from choosing, in consultation with their physicians, to have an abortion performed.

II. SECTIONS 188.029 AND 188.205 OF THE MISSOURI STATUTE UNCONSTITUTIONALLY INFRINGE THE FUNDAMENTAL RIGHT OF PATIENTS TO MAKE MEDICAL DECISIONS IN CONSULTATION WITH THEIR PHYSICIANS.

Given the fundamental nature of the woman's right in being able to decide whether to terminate a pregnancy, there are two types of state action which trigger heightened judicial scrutiny. First, heightened scrutiny is required when state laws interfere with the *woman's* decisions whether to enter into a physician-patient relationship with respect to abortion and whether or not to terminate her pregnancy. This Court has recognized specific situations when the compelling interest test should be applied: when a state abortion law imposes certain additional health risks on the woman; when a state law attempts to influence the woman's informed choice between abortion or childbirth through the physician-patient relationship; or when a state law imposes costs on a woman unique to the abortion procedure and out of proportion to any health benefits.[31]

Second, heightened scrutiny is appropriate when state laws interfere with a *physician's* ability to enter into a physician-patient relationship, to counsel the patient and to provide medically indicated care and treatment pertaining to the patient's pregnancy termination decision. Thus, there is infringement when a state law interferes with a physician's best medical judgment or is otherwise inconsistent with the state of medical knowledge and sound

[31] *See, e.g., Harris* v. *McRae*, 448 U.S. at 328 (White, J., concurring) (additional health risks); *City of Akron*, 462 U.S. at 444 (influence woman's choice); *Planned Parenthood* v. *Danforth*, 428 U.S. at 69 (share decision-making authority); and *City of Akron*, 462 U.S. at 435, 438, 447 (costs unique to abortion).

medical practice, when a state law threatens the physician with sanctions which arise solely from abortion counseling and treatment, or when a state law imposes other burdens on a physician in the abortion context which could deter establishment of a physician-patient relationship or the discharge of professional obligations within that relationship.[32]

As explained below, two sections of the Missouri statute constitute infringements of this sort. These statutory sections deprive the physician of "the room he needs to make his best medical judgment" and to exercise that medical judgment "in the light of all factors . . . relevant to the well-being of the patient." *Doe* v. *Bolton*, 410 U.S. 179, 192 (1973). Moreover, these statutory sections also impermissibly burden the woman's decisionmaking ability by exposing her to unnecessary health risks and expense and by restricting her ability to obtain needed counseling. The net effect of these provisions is a regime of medically unsound practices that are contrary to the first principles of the patient-physician relationship. No legitimate state interest, much less a compelling one, justifies these departures from sound medical practice.

A. Section 188.029 Of The Missouri Statute Is An Unconstitutional Interference With The Right Of Patients To Make Important Medical Decisions In Consultation With Their Physicians.

Mo. Rev. Stat. § 188.029 provides that a physician must determine fetal viability before performing an abor-

[32] See, *e.g., Doe* v. *Bolton*, 410 U.S. at 195-200; *Planned Parenthood* v. *Danforth*, 428 U.S. at 453-54, *City of Akron*, 462 U.S. at 445, 450 (interference with best medical judgment); *Danforth*, 428 U.S. at 64, *City of Akron*, 462 at 448 (inconsistent with state medical practice); *Colautti* v. *Franklin*, 439 U.S. at 390, 394, 397 (sanctions solely from abortion role); *Danforth*, 428 U.S. at 79-80 (other burdens—record keeping requirement needs justification).

tion on any woman whom the physician has reason to believe is carrying a fetus of 20 or more weeks gestational age. *Amici* do not object to this requirement. Indeed, they recognize that it is reasonably related and narrowly tailored to the state's compelling interest in protecting viable fetal life.

The statute, however, goes on to require:

> In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

Significantly, this provision, as construed by the court of appeals,[33] is far more than a requirement that certain findings be made and that tests be performed if they are necessary to determine viability. Rather, the statute requires these specific findings and tests regarding gestational age, weight and lung maturity of the fetus in *all* cases--even those in which they are unnecessary to determine fetal viability. This inflexible requirement is medically inappropriate and not reasonably related to any legitimate goal of the state. To the contrary, it interferes with the physician's ability to follow sound medical

[33] Missouri asserts that its statute only requires a physician to perform tests that are "necessary to make appropriate findings in the case before him." Brief for Appellant at 34. However, as recognized by the court of appeals:

> The state's argument appears premised on an entirely different statute . . .; the *Missouri* statute does not require doctors to make those tests necessary to determine viability. Rather, the statute plainly declares that in determining viability, doctors *must* perform tests to find gestational age, fetal weight and lung maturity.

851 F.2d 1071, 1075 n.5 (emphasis in original).

practices and impermissibly burdens the pregnant woman's fundamental right to make medical decisions in consultation with her physician.

A determination of viability represents a medical assessment of the fetus' chance of survival, *i.e.*, the physician's judgment that "there is a reasonable likelihood of the [particular] fetus' sustained survival outside the womb, with or without artificial support." *Colautti* v. *Franklin*, 439 U.S. at 388. The viability determination is dependent upon a large number of factors, each of which may require complex medical assessment. The importance of each of these factors and the medically appropriate method of measuring them will vary with the circumstances of the individual pregnancy. Indeed, this Court has consistently stressed that viability must be determined by the pregnant woman's physician in the exercise of his or her professional judgment considering the circumstances of the individual pregnancy. *Planned Parenthood* v. *Danforth*, 428 U.S. at 61, 64.

The challenged statute singles out three factors that can affect viability. First, the Missouri statute requires that physicians perform tests to determine fetal lung maturity. As the district court found below, 662 F. Supp. at 422 "the only method to evaluate [fetal] lung maturity is by amniocentesis." Requiring amniocentesis in all abortions after 20 weeks is contrary to sound medical practice. The medical literature clearly establishes that amniocentesis is a procedure that would be useless and contrary to accepted medical practice for the purpose of determining fetal lung maturity until about 34 weeks of gestation.[34] More important, "aminocentesis

[34] *Williams Obstetrics* at 273. Methods to assess fetal lung maturity were developed to allow physicians to select the appropriate time *in the third trimester* to intervene in a problem pregnancy, so that the infant delivered would be free of the respiratory distress syndrome, a common clinical problem encountered by preterm infants. *See* Cruikshank, *Amniocentesis for Determination of Fetal Maturity*, 25 Clin. Obstet. Gynec. 773 (1982).

imposes additional significant health risks for . . . the pregnant woman . . . ."[35] 662 F. Supp. at 422.

Second, the Missouri statute requires that physicians perform tests to determine gestational weight. However, *in utero* estimates of fetal weight are often not necessary or even useful in determining viability.[36] For example, a recent study observed that "obstetrical gestational age was found to be the best predictor of neonatal death, while sonographic estimated fetal weight [measured just 3 days before delivery] did not add significantly to this prediction." Chervenak, Berkowitz, Thornton, Kreiss, Youcha, Ehrenkranz, Hobbins & Berkowitz, *A Comparison of Sonographic Estimation of Fetal Weight and Obstetrically Determined Gestational Age in the Prediction of Neonatal Outcome for the Very Low-Birth Weight Fetus*, 152 Am. J. Obstet. Gynec. 47, 47 (1985).

Third, the Missouri statute requires that physicians perform tests to determine gestational age. Although gestational age is probably the best single determinant of fetal viability, it is often not necessary to perform any

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[35] Amniocentesis increases the risks of hemorrhage, infection and hematoma formation. Golde & Platt, *The Use of Ultrasound in the Diagnosis of Fetal Lung Maturity*, 27 Clin. Obstet. Gynec. 391, 396 (1984). At least one maternal death due to complications of amniocentesis has been reported. S. Elias & G. Annas, *Reproductive Genetics and The Law* 129 (1987). It can be difficult to tap the amniotic sac safely, because of the location of the placenta or fetus, or the absence of a significant amniotic fluid pocket. *Golde & Platt* at 397. Further, the delay necessary to schedule a non-emergency amniocentesis (about two weeks) increases the risk of an abortion. *See* 662 F. Supp. at 422 n.41.

[36] "[T]he best obstetric estimate of gestational age [based on LMP, pregnancy testing, and ultrasound if necessary is] a better predictor of neonatal mortality than birthweight." Verloove-Vanhorick, Verwey, Brand, Gravenhorst, Kierse & Ruys, *Neonatal Mortality Risk in Relation to Gestational Age and Birthweight*, [1986] 1 Lancet 55, 55 .

"test" or "examination" to make this determination. "An accurate report of the last menstrual period ["LMP"] is the single most reliable piece of clinical information" in predicting gestational age. Smith, Frey & Johnson, *Assessing Gestational Age*, 33 Am. Fam. Physician 215, 219 (1986).[37] Thus, for example, if the physician has been seeing the woman regularly and is satisfied that her LMP date is accurate, there would be no need to perform *any* tests to determine gestational age. A physician who is uncertain as to the woman's LMP may utilize other means of determining gestational age. In order to obtain a more objective assessment, physicians rely on ultrasound, which still provides only a range of ages and may incorrectly date a pregnancy by as much as three weeks. Sabbagha, Tamura & Socol, *The Use of Ultrasound in Obstetrics*, 25 Clin. Obstet. Gynec. 735, 737-38 (1982). Thus, it must be left to the woman's physician to decide whether, and to what extent, to rely on such tests.

In sum, viability is a complicated medical determination to be made by an individual physician in light of all the circumstances of an individual pregnancy. There is no set of tests that is always necessary or even indicated. By requiring specific tests for *all* pregnancies of 20 weeks or more gestational age, regardless of the physician's professional judgment as to whether they are necessary or even useful to determine viability, Missouri attempts to interfere with the physician's medical judgment of whether an individual fetus is viable and which

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[37] Although some authors advocate routine use of ultrasound to determine gestational age, lack of accessibility and the high cost of this examination are often prohibitive. Moreover, recent research indicates that clinical markers [including LMP, the first appearance of auscultated fetal heart tones, the fetal height, and quickening], when consistently . . . applied, can be as accurate as ultrasound in assessing gestational age.

Smith, Frey & Johnson at 215.

variables are to be considered in the viability determination in a particular pregnancy. Compelling all physicians to perform such unnecessary tests in all cases imposes needless risk and expense on the pregnant woman and unconstitutionally interferes with the "central role of the physician" in "consulting with the woman about whether or not to have an abortion." *Colautti* v. *Franklin*, 439 U.S. at 387. For these reasons, the Missouri statute is unconstitutional.[38]

B. Section 188.205 Of The Missouri Statute Impermissibly Burdens The Constitutional Right Of Patients To Make Informed Medical Decisions In Consultation With Their Physicians.

Mo. Rev. Stat. § 188.205 (1986) provides:

> It shall be unlawful for any public funds to be expended for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life.

This prohibition applies to all publicly funded Missouri physicians. By its terms, it precludes these physicians from "encouraging" *or* "counseling" a woman to have an abortion, except when the woman's life itself is at stake.[39]

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[38] Even accepting that the state's interest in the preservation of potential life becomes compelling prior to viability, this provision of the statute would nevertheless be unconstitutional because it fails the second prong of the compelling state interest test. Specifically, as detailed above, the requirement of performing tests to establish specific fetal variables that may bear on viability "depart[s] from accepted medical practice," *City of Akron*, 462 U.S. at 431, and in at least one respect, significantly increases the risks to the mother's health. Therefore the law is not "rationally related" to the state's compelling interest.

[39] Appellants take the position that § 188.205 merely prohibits the use of public funds "for the purpose of directly urging a woman to have an abortion not necessary to save her life," Brief for Appellant at 38. A plain reading of the "encouraging or counseling" ban does not support this interpretation. Thus, the court of appeals found that "the scope of the encouraging or counseling ban appears literally to be much broader than the interpretation offered by the state." 851 F.2d at 1078. The breadth of the statutory language makes it virtually inevitable that at least some patients of publicly funded physicians will be denied " 'any . . . comment relative to abortion' ". *Id.* at 1078 n.11.

The result is to deprive the woman of a full understanding of her medical condition and options. This is contrary to the most fundamental principles of medical practice. It is justified by no state interest, compelling or otherwise.

1. It is a fundamental principle of medical practice in this country that the patient has a right to make his or her own decisions about medical treatment. See *supra* at 28-35. It follows that a physician must fully and accurately disclose all of the information necessary to permit the patient to make an informed choice. As stated in ¶ 8.07 of the American Medical Association's *Current Opinions of the Council on Ethical and Judicial Affairs*:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice . . . . The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for his care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.

In order to discharge the obligation to help the patient make an informed choice, a physician must be free to counsel a patient about all relevant facts within the physician's knowledge or expertise that bear upon the patient's decision. Comprehensive and appropriate counseling includes apprising the patient of his or her current medical condition and prognosis, explaining the need for further testing or treatment, disclosing the full spectrum

of available medical options [40] and referral, if necessary, to an appropriate specialist or other provider.

2. Missouri's prohibition on the use of public funds for counseling a woman to have an abortion not necessary to save her life severely restricts the ability of physicians who receive public funds to provide their patients with necessary and appropriate medical information. By forbidding comprehensive medical counseling, § 188.205 unduly constricts and distorts the physician-patient dialogue in a manner which is inconsistent with professional ethics and the provision of sound medical care.

Specifically, § 188.205 would limit the ability of certain physicians to provide needed medical information about abortion to pregnant women where abortion is not "necessary" to save the woman's life—even if the pregnancy poses a serious threat to her life or health. See *supra* at 13-18. It would apply, moreover, even if pregnancy termination is an option which the physician, in his or her medical judgment, normally would discuss with the patient. In addition to threatening the life or health of the pregnant woman, certain maternal disorders greatly increase perinatal mortality and morbidity. For example, 20-50% of pregnant women with AIDS pass on their infection to the fetus. Minkoff, *Care of Pregnant Women Infected With Human Immunodeficiency Virus*, 258 J.A.M.A. 2714, 2715 (1987). A physician must be free to disclose to a pregnant woman the serious threat that her medical condition poses to her fetus, and

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[40] For example, the American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 57 (6th ed. 1985), provides:

> In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and keeping the infant, continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy.

to counsel the woman, if appropriate in the circumstances of the patient's medical situation, that pregnancy termination is an option. The prohibitions of § 188.205 prevent such necessary medical counseling and thereby impair the ability of physicians to act in accordance with medical ethics and their best medical judgment.

In short, the prohibitions of § 188.205 severely limit the free flow of vital medical information between physician and patient. They require physicians to withhold needed medical counseling and thereby compel them to give their patients medically incomplete and potentially misleading information. By prohibiting counseling for abortion without regard to the patient's individual medical needs, the statute effectively precludes an informed dialogue between patient and physician about her particular circumstances. Section 188.205 seriously intrudes upon the integrity of the physician-patient relationship and compels physicians who receive public funding to turn their backs on principles of medical ethics, sound medical practice, their own best clinical judgment and the medical needs of their patients.

3. This Court repeatedly has warned against governmental intrusions into the informed consent dialogue between physicians and their patients. In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the statute at issue compelled physicians to provide, *inter alia*, five kinds of information to a woman prior to receiving her consent for pregnancy termination. The Court declared that this type of governmental intrusion into the decisionmaking process "is the antithesis of informed consent," *id.* at 764, and that it "intrudes upon the discretion of the pregnant woman's physician." *Id.* at 762. See also *City of Akron*, 462 U.S. 416.

Section 188.205 provides an even more constricting "straitjacket" than did the statutes at issue in *Thornburgh* and *City of Akron*. There, although required to

provide certain information, physicians were free to supply their patients with any additional, medically appropriate information they wished to provide. Here, by contrast, physicians are *forbidden* from providing necessary and appropriate medical information that is responsive to the needs and requests of their individual patients.[41]

4. Missouri attempts to save its statute by analogizing § 188.205 to the statutes considered in *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Maher* v. *Roe*, 432 U.S. 464 (1977). Brief for Appellant at 36-38. *McRae* and *Maher* are inapposite. In those cases, this Court held only that it was permissible for the government to exclude the *performance of abortions* from the medical procedures it was willing to fund. Neither case involved government distortion of the personal medical decisionmaking process that takes place between a physician and a patient. Indeed, in both cases the Court was careful to stress that a mere failure to pay created no obstacle to a woman's effectuation of her rights. *McRae*, 448 U.S. at 317.

By contrast, if the patient accepts the physician's state-limited information as trustworthy "medical advice," she will rely on the distorted consultation, often to her detriment. She will be given medically incomplete and

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[41] The court of appeals held that § 188.205 is unconstitutionally vague, "because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." 851 F.2d at 1078 (citing *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1967) (footnote omitted)). The court of appeals recognized:

> The prohibition on 'encouraging or counseling' implicates both first and fourteenth amendment rights of both physicians and their patients . . . .
>
> * * * *
>
> [P]ossible targets of the statute are chilled into avoiding even speech that is normally afforded the utmost protection under the Constitution.

851 F.2d at 1078. *See supra* note 39. *Amici* agree with this analysis.

often misleading information. The court of appeals correctly identified the burden the statute imposes and why it is unconstitutional:

> Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, *it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth.*

851 F.2d at 1080 (emphasis added).[42]

Like the court below, "[w]e can perceive of few obstacles more burdensome to the right to decide than a state-imposed blackout on the information necessary to make a decision." *Id.*[43]

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[42] A state is not free to interfere with a patient's fundamental right to make an informed personal medical decision in consultation with her physician simply because that interference is accomplished as a condition for receipt of government funds. *See e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Once the government undertakes to fund medical services, it may not interfere with the provision of sound medical advice by physicians who perform those services. To do so offends established standards of medical practice and ethics.

[43] The argument that the state's interest in protecting potential life is compelling prior to viability would not preserve the constitutionality of this provision of the statute. First, it is not rational for the state to effectuate even a compelling interest in fetal life by providing the woman with medically incomplete and misleading information in the context of the physician-patient dialogue. Second, the scope of the statute's restrictions is not narrowly tailored to any possible interest in protecting fetal life. For example, the statute would prohibit a physician from advising a pregnant patient about abortion as an option even in circumstances where there is no possibility that the fetus could survive, such as where an ultrasound examination has confirmed that the fetus is anencephalic.

CONCLUSION

The judgment of the court of appeals declaring Sections 188.029 and 186.205 of the Missouri statute unconstitutional should be affirmed.

Respectfully submitted,

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BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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OCTOBER TERM, 1988

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Appellants,

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REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

The National Association of Women Lawyers ("NAWL") and the National Conference of Women's Bar Associations ("NCWBA") submit this brief as *amici curiae*, with the consent of the parties, in support of Appellees' position that *Roe v. Wade*, 410 U.S. 113 (1973) not be overruled. This brief addresses only one of the seven questions presented to this Court: whether *Roe v. Wade* should be reconsidered. As organizations with strong interests in women's rights and securing justice for all, NAWL and NCWBA are concerned that the abandonment of the important and well-established precedent of *Roe v. Wade* would be harmful to the legal system and would endan-

ger public confidence in the objectivity and independence of the Court.

The NCWBA is a non-profit professional organization of approximately 50,000 male and female attorneys. Membership is open to all individual state, regional, and local women's bar associations. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests of women, and to pursue these goals through appropriate legal, social and political action.

Founded in 1899, the NAWL is a voluntary national membership organization of the legal profession, having official representation in various organizations, commissions and governmental agencies, both national and international. It is comprised of approximately 1200 individual members and numerous women's bar association affiliate members (encompassing several thousand additional members) across the country. Its individual members, from each state and the District of Columbia, include prosecutors, public defenders, private attorneys, trial and appellate judges from the state and federal courts, legislators, law professors and law students. Although the members of the NAWL hold a broad spectrum of personal views, they share a common concern that the law be administered justly, fairly and predictably. As an organization made up primarily of women it has and continues to be a supporter of women's rights. As an organization of attorneys it supports the integrity of the justice system.

The NAWL favors the decriminalization of abortion in the early stages of pregnancy and the adoption of a uniform approach to abortion. As an affiliate of the American Bar Association, with a voting delegate in the House of Delegates, it has participated in efforts in this area of the law which included a resolution in 1972 approving the Uniform Abortion Act. That Act was promulgated by the National Conference of Commissioners on Uniform State Laws, and adopted by the NAWL, because the proliferation of conflicting state policies on abortion was thought to be unwise and unworkable as a matter of legal administration and unjust as a matter of social policy. The

Uniform Abortion Act declared lawful abortions performed by doctors during the first twenty (20) weeks of a pregnancy; abortions after the twentieth week were permitted, if at all, only under certain narrowly defined circumstances. Uniform Abortion Act, § 1(b).

The central concern underlying the original Uniform Abortion Act, and its support from the NAWL, was the need to assure uniformity in state laws in an area in which differences in state laws had produced undesirable social consequences. In the years immediately preceding *Roe*, abortions were unlawful in most states, although the procedure was lawful in a few states, most notably New York and California. As a consequence, literally hundreds of thousands of pregnant women residing in states with restrictive laws went to New York and California to have abortions. In 1972, the year preceding *Roe*, forty percent (40%) of all legal abortions in the United States, some two hundred thousand (200,000), were performed on women who had left their state of residency to have the procedure performed elsewhere. (*See* Chart, attached as Appendix A.)

For a significant part of the population, however, the costs of travel prohibited the option of an abortion. Indigent women, who could not afford such travel were thus denied a safe and lawful abortion simply because they could not afford an opportunity available to more affluent women. There was, thus, a divisive and unfair social consequence arising from the lack of uniformity in state laws concerning abortion. And that unfortunate consequence was compounded by the well-known fact that a disproportionate number of poor women are minorities.

The NAWL's and NCWBA's positions concerning abortion also reflected a recognition of the problems inherent in criminalizing an action which is fundamentally a personal, moral decision. Many individuals' choices regarding abortion are deeply personal and determined by particular religious and philosophic beliefs. To criminalize an act over which there are such strongly held conflicting views is perceived by the NAWL and NCWBA to be unwise.

Finally, because a significant portion of the population desired the option of an abortion, a prohibition on abortion was recognized to be unrealistic. Illegal abortions were a fact—and a significant social problem. The adverse medical and social consequences from illegal abortions were obvious.

Following the January 1973 decision in *Roe*, the National Conference of Commissioners on Uniform State Law approved a Revised Uniform Abortion Act. The Revised Act conformed to the principles set forth in *Roe*, and thus provides different rules governing abortions in each trimester of a pregnancy. The NAWL, again through its position with the American Bar Association, approved the Revised Act in February 1974, in recognition of the wisdom of a uniform approach to the complex issues raised by abortion and of the problems associated with inconsistent state by state legislation.

The NAWL has recently reaffirmed its position on legalized abortions. In February, 1989, it unanimously passed a resolution affirmatively endorsing the right to privacy recognized by the United States Supreme Court in *Roe v. Wade*, supporting every woman's right to reproductive self-determination and supporting efforts to secure equal protection of the laws for poor women by allowing the use of public funds for abortions for welfare recipients. The NAWL and NCWBA further believe that the right to reproductive choice is an indispensable step in the attainment of full equality for women, including their members, thousands of women lawyers.

In sum, the NAWL's and NCWBA's positions regarding abortion have consistently reflected three concerns: (1) that abortions be legally available to a uniform degree throughout the country; (2) that a procedure which involves highly charged and conflicting moral and social issues not be criminalized; and (3) that the realities of illegal abortion were detrimental to our society.

Both the NAWL and NCWBA are in short, national organizations of attorneys, with well-established positions favoring a uniform approach to the abortion issue that recognizes the core

holding of *Roe v. Wade*: Women have a constitutional right to an abortion, although that right may be limited by the states during some later periods of pregnancy. Moreover, the NAWL and NCWBA have equally, if not greater, established positions favoring certainty, equality and justice in the law, policies that are, in this case, entirely consistent with the principles of *stare decisis*.

ARGUMENT

I. OVERRULING *ROE V. WADE* WOULD ENDANGER PUBLIC CONFIDENCE IN THE INTEGRITY AND OBJECTIVITY OF THE COURT

The doctrine of *stare decisis* is always an important consideration for this Court to weigh whether interpreting the Constitution or a statute. The fact that this Court has on a number of occasions overruled past decisions does not mean that it has done so lightly or without good and articulated reasons. A decision to follow or to overrule prior precedent lies at the heart of the judicial process. The interest and concern of the NAWL and NCWBA in this case is the preservation not simply of an orderly, consistent and predictable process of adjudication, but, even more importantly, the preservation of public confidence in the integrity, objectivity and independence of the judiciary.

In an age where legal realism has dominated philosophy and rapid change has characterized the social environment, it is too easy to overlook the important values embodied in adherence to precedent. The most important of these is the constraining or limiting function that precedent has on judicial action. It is, at bottom, what legitimates our unique constitutional system and which permits this Court its important voice in that system. As Justice Harlan wrote for a unanimous Court:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of

maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

In reconsidering the holding of *Roe v. Wade*, this Court should give great weight to *stare decisis* and particularly to "the necessity of maintaining public faith" in the system of judicial review. We submit that overruling *Roe* would damage that faith so essential to preserving the rule of law.

A. ***No "Special Justification" Exists For Overruling* Roe *And None Of The Grounds Customarily Invoked Are Present Here.***

The doctrine of *stare decisis* has special importance in that it provides certainty to our legal system. While this Court has, for a variety of reasons, overruled prior precedent, the Court has never overruled established precedent simply because the Court as presently composed would have reached a different result. Rather, "[a]ny departure from the doctrine of *stare decisis* demands special justification". *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)[1].

[1] As this Court recently explained, the doctrine of *stare decisis*

> permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, 76 L.Ed. 815, 52 S.Ct. 443 (1932) (Brandeis, J., dissenting).
>
> Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). *See generally*, Monagham, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988).

Admittedly, reversal of a constitutional holding as opposed to a legislative interpretation is said to be more frequent on the Brandeisian rationale that, in constitutional matters, "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Company*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).[2] Hence, reversal of a constitutional holding is arguably appropriately done more often. Where surrounding factual circumstances have so changed as to make a long-standing and originally sensible reading of the Constitution outmoded it makes practical sense for the Court to overrule precedent rather than insist on the difficult process of amendment; *Erie Railroad v. Tompkins*, 304 U.S. 64, 74-80 (1938) is a classic example and fits well into the Brandeis theory.

The argument regarding the difficulty of overruling constitutional precedent may, however, be overstated. On highly controversial matters a realistic Court undoubtedly can appreciate the legislative realities and the political persuasiveness of the Court's own pronouncement which often influences public attitudes and thereby the Congress. Just as the Court's most serious function is interpretation of our fundamental charter in the first instance, however, so too does it exercise particular restraint in overruling its prior view, precisely because it *is* so much more difficult for the political branches to change the result. Consensus once achieved is not lightly put aside. In interpreting the Constitution it is the Court's conviction about fundamental principles rather than the possibility of political reversal through amendment which motivates its holding in the first place. Attorneys, as well as the public, rightfully rely on the assumption that this Court's constitutional holdings are well-reasoned and binding. If that is true, then the process of judicial reversal should require at least the same somber consideration as did the original holding, uninfluenced by

[2] The reference, of course, is to the difficulty of constitutional amendment. But it should be noted that in the case of *Roe* the Congress could not muster even a majority of votes to start the process of a constitutional amendment.

the politics of reversal. It is only where experience dictates the overruling of a precedent, as new and better reasoning is demanded by new facts presented to the Court that this Court has overruled prior constitutional holdings. Only then does the Court "bow to the lessons of experience and the force of better reasoning. . . ." *United States v. Scott*, 437 U.S. 82 (1978).

1. "*The Force of Better Reasoning*".

As the Court in *Scott* noted, "better reasoning" is coupled with, indeed arises from, the demand of new facts. But even assuming (which we do not concede) that better reasoning alone, without supervening facts, can justify overturning a decision based on the Constitution, we know of no arguments available today on the constitutional issues involved in *Roe* which were not available and in fact made when it was decided, and which have not been, explicitly or implicitly, invoked in its many progeny. Those arguments have not become "better reasoning" simply through repetition. Indeed, many objective observers might agree that the reasoning of the dissenters was "better" in 1973 (and now) than that of the then majority, but it is not "better" now because it has improved with age or by reason of its "lessons of experience". In short, the mere repetition of arguments made to and rejected by the *Roe* majority in 1973 should not justify reversal.

Reinforcing this point is the further fact of *Roe's* many progeny which accept that decision and its reasoning as settled. Indeed, this Court has repeatedly reaffirmed *Roe* and expressly recognized the importance of *stare decisis* in doing so:

> Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nevertheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine

> that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 419-20 (1983) (footnote omitted); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) ("Again today, we reaffirm the general principles laid down in Roe and Akron."); *See also Harris v. McRae*, 448 U.S. 297, 312-14 (1980); *Colautti v. Franklin*, 439 U.S. 379, 386 (1979); *Maher v. Roe*, 432 U.S. 464, 471-72 (1977) ; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 55, 60-61 (1976); *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975); *Doe v. Bolton*, 410 U.S. 179, 182-83 (1973) . *Cf. H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Beal v. Doe*, 432 U.S. 438 (1977) ; *Bellotti v. Baird*, 428 U.S. 132 (1976).

Of particular importance is avoidance of the equation of "better reasoning" with changes in the composition of the Court itself. The ever changing composition of the Court is frequently and properly a factor in changing general directions of judicial interpretation. But it is virtually always accompanied by other changes as well.

Here the point is the institutional character of the Court. Decisions by a majority of the Justices, however composed, are decisions of the Court itself entitled to institutional deference. Respect for past decisions of such a majority helps to build a mutual respect which, in turn, is important to the enormous public esteem in which the Court is held and which is essential to that respect for its decisions which leads to voluntary compliance. Absent such respect, politicians — and the public — will conclude that "court packing" can change this Court's constitutional holdings. History teaches us that that is a conclusion to be avoided if the Court is to retain its institutional respect.

2. *"The Lessons Of Experience"*

Clearly there are "lessons of experience" arising from the many cases finding their way to Courts of Appeals and especially to this Court. At first blush, one might wonder why the States have had such difficulty in interpreting *Roe* and why this Court has been called upon so many times to pass on its interpretation. Do these facts and these cases suggest any major flaw in the *Roe* decision? Do they come about because *Roe* was wrongly decided?

We respectfully suggest that the reasons for the continued controversy concerning *Roe* stem not from the lesson of experience or supervening social change, but from the political vigor of the debate about abortion. There would be continued dispute had *Roe* been decided differently simply because of the fact that the public forms opinions on this issue from deeply held religious, moral and philosophic convictions that go to the very core of the role of government and personal decision-making. Admittedly, if the Court had not invoked its prior privacy decisions to decide in *Roe* that a woman had a fourteenth amendment right to abortion which in certain circumstances the States can not constitutionally deny or frustrate, these cases, all of which test the circumstances and methods through which states may regulate the process of abortion, would not have arisen in a constitutional context. But it is always the case that when this Court extends a recognized constitutional right to new factual situations, the extent and nature of the "new" right is likely to be tested. The more controversial that right is, the more vigorously it will be both attacked and defended. That experience — the controversy over the limits of a constitutional holding — is not, however, a sufficient basis for overruling the holding.

As this Court itself has recently recognized:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law

> even when its content gives rise to bitter disputes. We recognized at the very beginning of our opinion in *Roe*, 410 U.S. at 116, that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 771-72 (1986) (citation omitted).

The decision of the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) to effectively overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896) presents an excellent contrast to the question now before the Court. *Plessy* withheld a constitutional right and the "lessons of experience" in the more than a half a century between *Plessy* and *Brown* demonstrated that the right must exist under our constitutional system. *Roe* in contrast bestowed a right. In the fifteen (15) years since *Roe* was decided there are no similar lessons of experience that would justify the elimination of the right *Roe* recognized.

The analogy to *Brown*, however, is appropriate in another regard. In the initial years following *Brown*, as in the fifteen (15) years following *Roe*, state legislatures and the public who opposed the *Brown* ruling attempted in numerous ways to undermine this Court's core holding and sought repeated review of the *Brown* decision. It was this Court's steadfast adherence to *Brown* that thirty-five (35) years later has lead to its wide acceptance.

B. *Once Determined By This Court, Constitutional Rights Of Individuals Should Be Denied Only In The Most Exceptional Circumstances*

In the cases decided by this Court overruling precedent for one reason or another, it is virtually impossible to find any case which takes away individual rights previously held by this Court to have been guaranteed by the Constitution. If one eliminates those cases based on *Lochner v. New York*, 198 U.S. 45 (1905), which were based on then current notions of economics and which so frustrated national policy as to threaten this Court's

independence during the New Deal, one is left essentially empty handed. No case which purported to guarantee constitutional rights thought to be fundamental in any sense has been overturned.[3]

It is not an exaggeration to say that much of the respect which this Court has deservedly achieved over almost two centuries stems from the fact that it is the strong guarantor of rights against both the Federal and State Governments in our political system. As we have noted, decisions recognizing such constitutional rights are not always popular. Nevertheless, while the Court has sometimes refused to expand existing rights against governmental entities, it has never taken back the fundamental right once recognized.[4]

This history is significant in the *Roe* context. Restoring the pre-*Roe* status quo is a significantly different decision than the one the Court faced when it decided *Roe*. Prior to *Roe* there were no expectations to be frustrated, no deeply entrenched practices to be reversed through judicial pronouncement. After *Roe*, that is no longer true. Overruling precedent in such a unique circumstance can seriously threaten stability and continuity and, for that reason alone, should be avoided. *See* Rawls, *The Idea Of An Overlapping Consensus*, Oxford J. Legal Studies, 1, 12-15 (1987). Here, the reliance at issue differs from the normal argument for *stare decisis* in that it is not action taken in reliance on a rule, but an expectation—in the light of history a justifiable one—born of reliance on the integrity of our constitutional system. That the Court could strike down *Roe* without new facts, circumstance or reasoning, would be bound to raise anxiety by potential beneficiaries of other rights.

[3] It is true that this Court had considerable difficulty dealing with the problem of picketing and other exercises of free speech on the privately owned premises of shopping centers. Arguably, *Hudgens v. NLRB*, 424 U.S. 507 (1976) limits free speech in this respect, but the limitation is scarcely fundamental, and certainly it does not extinguish the basic underlying right of freedom of speech.

[4] The case of *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) has been cited as authority for overruling even recent prior precedent and therefore relevant to overruling *Roe*. See Amicus Brief for the United States at 10. In fact *Barnette* cuts the other way. It recognized the rights of individuals on grounds of conscience, extending freedom rather than curtailing it, in a context which was hardly politically popular. In many ways it more nearly resembles *Brown* for it was protecting the right of a minority—in *Barnett* a small minority refused to yield to the demands of an often violent majority on first amendment grounds. The increasing mob violence, fueled by wartime sentiments, was a new circumstance of which the Court properly took account. The analogy to *Roe* would be apt if *Barnette* had preceded *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and the Court, yielding to popular pressure and a spate of violence, had taken back the right it had recognized in *Barnette*.

The issue is not whether a woman could simply rely, or in fact does rely, on her right to an abortion. The question is to what extent is one justified in counting on this Court to maintain, as it has always done in the past, its position of protecting what the Court itself has characterized as fundamental human rights. Such reliance in the area of fundamental constitutional rights is, and must be, justifiable. Without overwhelming reasons, and none exist here, this Court should not disappoint that reliance.

C. *Reversal Of* Roe *Would Be Publicly Perceived As Incompatible With Judicial Independence And Objectivity*

The fundamental basis for adhering to *stare decisis* in most cases is simply preserving the legitimacy and independence of the judicial system in our constitutional government.[5] It is

[5] Justice Stevens recognized the significance of the institutional stability of the Court when he stated:

> Of even greater importance, however, is my concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel. Granting that a zigzag is sometimes the best course, I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity. That presumption is supported by much more than the desire to foster an appearance of certainty and impartiality in the administration of justice, or the interest in facilitating the labors of judges. The presumption is an essential thread in the mantle of protection that the law affords the individual. Citizens must have confidence that the rules on which they rely in ordering their affairs—particularly when they are prepared to take issue with those in

difficult to imagine a case which raises that issue more directly and more starkly than does the possibility of overruling *Roe*.

For deeply religious and moral reasons with which this Court is thoroughly familiar, the public is seriously divided on the fundamental question of permitting abortion at all, and, to a somewhat lesser extent, on the many subsidiary problems raised by permitting abortions. Because of the strength of these convictions and the large number of people involved on both sides of the threshold question, the abortion issue has become heavily politicized. Not only are people divided on the question in every state, but the states are divided on the question themselves. Arguments on both sides are passionate, often strident, demonstrations occur frequently and differences have occasionally lead to violence born of conviction in the rightness of one's position. Since *Roe* the Court itself and individual Justices and Judges in the Federal system have frequently been the targets of hostile comments, demonstrations and other abuses.

Roe, of course, did not create these strongly felt divisions. *Roe* has, however, brought about the only uniformity that exists today on abortion. By declaring a woman's right to abortion under the Constitution, *Roe* shifted the focus of attention in state legislatures and more forcefully brought the Federal Courts into the abortion controversy. Were *Roe* to be overruled it would remove for a period of time this Court from the eye of the storm. Debate, demonstrations and the host of political and human problems which unavoidably accompany State abortion regulations would continue unabated. And there would also continue to be political pressure on the President and Congress to use federal power to influence the states' rules and regulations in one direction or another. Divisions among pro-abortion states and anti-abortion states would create further demands for federal

power in doing so—are rules of law and not merely the opinions of a small group of men who temporarily occupy high office. It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.

Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147, 153-54 (1981) (Stevens, J., concurring) (footnotes omitted).

intervention and there is the probability, whatever this Court does, that abortion problems will come before it in the future.

Understandably, but unfortunately from the Court's perspective, the abortion issue has entered national politics. The Solicitor General has urged and continues to urge this Court to reverse *Roe*, not because it runs counter to or frustrates some broad national policy[6] but simply because he, like the President, believes *Roe* was wrongly decided.

This politically-charged environment requires a heightened sensitivity to the traditional *stare decisis* doctrine. For this Court to reverse *Roe* in the absence of new persuasive and articulated facts and reasons would damage this Court in the public mind and adversely reflect upon its political independence and judicial impartiality. The press has already indicated that it will see any overruling of *Roe* in this light, and it is from the press that the public obtains its information.

An independent judiciary is one of the essential characteristics of a free society. Anything which damages the public's perception of judicial independence of the political branches damages the Court, the legal profession, and constitutional government so essential to our freedoms.

CONCLUSION

No new facts, circumstances or experience warrant the withdrawal of the constitutional right recognized in *Roe v. Wade*. It

[6] In this respect the current abortion controversy contrasts with the constitutional revolution of 1937 and President Roosevelt's Court Packing Plan. While the Hughes Court clearly overruled long lines of precedent, essentially at the behest of the President and Congress, it did so to remove constitutional blocks to regulatory laws overwhelmingly voted by the chosen representatives of the people, and it did so without sacrifice of human liberty, but, arguably, to its enhancement.

is respectfully submitted, therefore, that the Court should adhere to the considered decision announced in *Roe v. Wade*.

Respectfully submitted,

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Appendix A

WOMEN OBTAINING OUT OF STATE ABORTIONS: 1972 BY STATE OF RESIDENCE

State	Proportion of state residents obtaining their abortions out of state	Number of state residents obtaining out of state abortions
New Jersey	100.0%	22,832
Ohio	100.0%	16,666
Texas	100.0%	16,022
Michigan	100.0%	14,626
Illinois	100.0%	14,091
Missouri	100.0%	6,953
Indiana	100.0%	5,481
Kentucky	100.0%	3,132
Oklahoma	100.0%	2,843
Iowa	100.0%	2,356
Minnesota	100.0%	2,227
Rhode Island	100.0%	1,869
Maine	100.0%	1,690
Nevada	100.0%	1,630
West Virginia	100.0%	1,491
New Hampshire	100.0%	1,483
Louisiana	100.0%	1,210
Utah	100.0%	730
Wyoming	100.0%	269
Montana	100.0%	172
North Dakota	100.0%	148
South Dakota	100.0%	116
Idaho	100.0%	20
Tennessee	99.8%	4,279
Mississippi	93.0%	809
Arizona	90.4%	2,590
Vermont	81.7%	859
Massachusetts	80.7%	14,187
Wisconsin	76.0%	2,347
South Carolina	72.3%	2,208
Florida	70.9%	8,246
Connecticut	69.1%	5,757

Appendix A

State	Proportion of state residents obtaining their abortions out of state	Number of state residents obtaining out of state abortions
Georgia	64.5%	4,561
Pennsylvania	62.5%	14,232
Virginia	60.0%	6,707
Nebraska	56.1%	1,008
Arkansas	49.0%	762
Alabama	45.1%	948
Delaware	41.7%	914
Maryland	40.3%	6,002
North Carolina	30.0%	3,539
Colorado	10.6%	573
Kansas	6.8%	311
New Mexico	5.1%	100
District of Columbia	2.0%	145
Alaska	0.8%	9
Oregon	0.7%	49
Hawaii	0.3%	12
Washington	0.2%	42
California	0.1%	152
New York	0.0%	44
Total		199,489

Source: Hearings on Constitutional Amendments Relating to Abortion before the Subcommittee on the Constitution of the Senate Judiciary Committee, 97th Cong., 1st sess. (1981).

AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CERTAIN MEMBERS OF THE CONGRESS OF THE UNITED STATES: SENATOR HOWARD METZENBAUM (D. OH.), SENATOR BOB PACKWOOD (R. OR.), SENATOR BARBARA MIKULSKI (D. MD.), REPRESENTATIVE DON EDWARDS (D. CA.), REPRESENTATIVE BILL GREEN (R. NY), REPRESENTATIVE PATRICIA SCHROEDER (D. CO.), REPRESENTATIVE OLYMPIA SNOWE (R. ME.) AND CERTAIN OTHER MEMBERS OF CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) 7, 12, 23n, 25n

Allen v. *Newberry*, 21 How. (62 U.S.) 244 (1858) 19n

Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) 15n, 22-23

Arizona v. *Rumsey*, 467 U.S. 203 (1984) 10, 19

Baker v. *Carr*, 369 U.S. 186 (1962) 9, 20-21

Bellotti v. *Baird*, 443 U.S. 622 (1979) 23n, 25n

Betts v. *Brady*, 316 U.S. 455 (1942) 7, 22

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 24

Brown v. *Board of Education*, 347 U.S. 483 (1954) 10, 14, 17

Brown v. *Board of Education*, 349 U.S. 294 (1955) 10

Bunting v. *Oregon*, 243 U.S. 426 (1917) 16n

Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) 9, 19, 20, 21

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 17

Civil Rights Cases, 109 U.S. 3 (1883) 15

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Colautti v. *Franklin*, 439 U.S. 379 (1979).....23n, 25n

Colegrove v. *Green*, 328 U.S. 549 (1946) 21

Complete Auto Transit v. *Brady*, 430 U.S. 274 (1977).. 23

Crandall v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868)..... 24

Dep't of Revenue v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) 23

Dred Scott v. *Sandford*, 60 U.S. 393 (1857).....13, 15

Drollinger v. *Millingan*, 552 F.2d 1220 (7th Cir. 1977) . 26n

Eisenstadt v. *Baird*, 405 U.S. 438 (1972)..... 23

Feldman v. *United States*, 322 U.S. 487 (1944) 23

Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 23

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).....24, 27

Gibson v. *Berryhill*, 411 U.S. 564 (1973)..... 24

Gideon v. *Wainwright*, 372 U.S. 335 (1963)..... 5, 22

Goesaert v. *Cleary*, 335 U.S. 464 (1948) 15

Green v. *United States*, 355 U.S. 184 (1957) 8

Griswold v. *Connecticut*, 381 U.S. 479 (1965).....11, 14, 23

Hammer v. *Dagenhart*, 247 U.S. 251 (1918)..... 22

Harris v. *McRae*, 448 U.S. 297 (1980)..... 26n

Helvering v. *Hallock*, 309 U.S. 106 (1940) 18n

Hepburn v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870) 19n

Hudgens v. *NLRB*, 424 U.S. 507 (1976) 15n, 22

PAGE

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) 23

Kentucky v. *Dennison*, 24 How. (65 U.S.) 66 (1861) ... 23

Kewin v. *Board of Education*, 65 Mich. App. 472, 237 N.W.2d 514 (1975)..... 26n

Knapp v. *Schweitzer*, 357 U.S. 371 (1958) 23

Korematsu v. *United States*, 323 U.S. 214 (1944) 15

Legal Tender Cases, Knox v. *Lee*, 12 Wall. (79 U.S.) 457 (1871) 19n

Lochner v. *New York*, 198 U.S. 45 (1905) 16, 17

Loving v. *Virginia*, 388 U.S. 1 (1967) 23

Lutz v. *United States*, 434 A.2d 442 (Dist. Col. App. 1981)..... 26n

Maher v. *Roe*, 432 U.S. 464 (1977) 26n

Mapp v. *Ohio*, 367 U.S. 643 (1961)..... 21

Memoirs v. *Massachusetts*, 383 U.S. 413 (1977) 15n

Meyer v. *Nebraska*, 262 U.S. 390 (1923)..... 24

Miller v. *California*, 413 U.S. 15 (1973) 15

Minersville School Dist. v. *Gobitis*, 310 U.S. 586 (1940) 14

Miranda v. *Arizona*, 384 U.S. 436 (1966)..... 5, 9

Moragne v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970) 18n

Muller v. *Oregon*, 208 U.S. 412 (1908) 16n

Murphy v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)..... 23

NAACP v. *Alabama*, 357 U.S. 449 (1958)..... 24

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)..... 20

PAGE

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 7, 23, 24n, 26, 27

Newberry v. *United States*, 256 U.S. 232 (1921) 19n

Orozco v. *Texas*, 394 U.S. 324 (1969) 10

Owens v. *Jennings Municipal Fire & Police Civil Service Bd.*, 454 So.2d 426 (La. App. 1984) 26n

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 23

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 23n, 25n

Planned Parenthood Assoc. v. *Ashcroft*, 462 U.S. 476 (1983) 23n, 25n

Plessy v. *Ferguson*, 163 U.S. 537 (1896) 15

Puerto Rico v. *Branstad*, 107 S. Ct. 2802 (1987) 23

Puget Sound Stevedoring Co. v. *Tax Com.*, 302 U.S. 90 (1937) 23

Ravin v. *State*, 537 P.2d 494 (Alaska 1975) 26n

Reynolds v. *Sims*, 377 U.S. 533 (1964) 9

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 24

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) .. 24

Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*

Screws v. *United States*, 325 U.S. 91 (1945) 22

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 24

Simopoulos v. *Virginia*, 462 U.S. 506 (1983) 25n

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 14, 23

Spector Motor Service v. *O'Connor*, 340 U.S. 602 (1951) 23

PAGE

State v. *Baker*, 56 Hawaii 271, 535 P.2d 1394 (1975) ... 26n

State v. *Henderson*, 269 N.W.2d 404 (Iowa 1978) 26n

State v. *Mueller*, 66 Hawaii 616, 671 P.2d 1351 (1983) . 26n

State v. *Murphy*, 117 Ariz. 57, 570 P.2d 1070 (1977) ... 26n

Swann v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) 13

The Belfast, 7 Wall. (74 U.S.) 624 (1869) 19n

The Shreveport Rate Case, Houston, E. & W. T.R. Co. v. *United States*, 234 U.S. 342 (1914) 16n

Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 23n, 25n

United States v. *Classic*, 313 U.S. 299 (1941) 19n

United States v. *Darby*, 312 U.S. 100 (1941) 22

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 9, 19, 27

West Virginia State Bd. of Education v. *Barnette*, 319 U.S. 624 (1943) 14

Williams v. *Florida*, 399 U.S. 78 (1970) 18n

Wolf v. *Colorado*, 338 U.S. 25 (1949) 7, 21

OTHER AUTHORITIES:

Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445 (1984) 24

Cates & Rochat, *Illegal Abortion in the United States*, 8 Family Planning Perspectives 2 (1976) 11

PAGE

Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and Law (January 1988) ... 22n

Goldstein, *Mother—Love and Abortion* (1988) 22n

Gunther, *Constitutional Law* (11th ed. 1985) 16n

Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col. L. Rev. 1 (1988) 24n

Report of the Surgeon General to the President (Jan. 9, 1989) 11

Wasserstrom, *The Judicial Decision* (1961) 18n

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

No. 88-605

WILLIAM L. WEBSTER, et al.,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CERTAIN MEMBERS OF THE CONGRESS OF THE UNITED STATES:

SENATOR HOWARD METZENBAUM (D. OH.), SENATOR BOB PACKWOOD (R. OR.), SENATOR BARBARA MIKULSKI (D. MD.), REPRESENTATIVE DON EDWARDS (D. CA.), REPRESENTATIVE BILL GREEN (R. NY), REPRESENTATIVE PATRICIA SCHROEDER (D. CO.), REPRESENTATIVE OLYMPIA SNOWE (R. ME.) AND CERTAIN OTHER MEMBERS OF CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Consent of Parties

Appellants and appellees have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

Interest of *Amici*

Amici are members of the Congress of the United States as follows:

Members of the United States Senate:

Brock Adams (D. WA.)
Max Baucus (D. MT.)
Jeff Bingaman (D. NM.)
Bill Bradley (D. NJ)
Quentin Burdick (D. N.DK.)
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William Cohen (R. ME.)
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Daniel Inouye (D. HI.)
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Tim Wirth (D. CO.)

Members of the United States House of Representatives:

Gary Ackerman (D. NY)
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Howard Wolpe (D. MI.)
Ron Wyden (D. OR.)
Sidney Yates (D. IL.)

Members of Congress are sworn to uphold the Constitution of the United States and have an interest in the outcome of this case as members of a coordinate branch of government committed to the preservation of the rule of law. This brief is submitted in the conviction that the interpretation of individual liberties espoused by the Executive Branch is fundamentally at odds with the Constitution, and with the judiciary's role as a principled and independent guardian of constitutional liberties. Moreover, *Amici* have an institutional interest in the stability of constitutional precedent. Overruling *Roe* v. *Wade*, 410 U.S. 113 (1973), would threaten the repose of the nation. When public sentiment is most sharply divided, the independence of the judiciary is vital. It is precisely the task of this Court to insulate individual rights from the changing winds of politics. As members of a coordinate branch of government, *Amici* would find themselves in an untenable position with respect to their own responsibilities, both to uphold the Constitution and to urge their constituents and fellow citizens to accept the decisions of the Supreme Court, were a widespread perception to arise that the constitutional protection of rights depends merely on changing political events and the accident of new appointments to the Court. Fundamental rights cannot be subject to the cycles of changing political opinion if the Constitution is to represent the rule of law.

As members of Congress we are concerned that the overruling of *Roe* v. *Wade* would criminalize conduct that is now constitutionally protected, resulting in a sudden and unprecedented problem of non-compliance with individual state criminal laws. Congress is ill-equipped to design a national response to this problem. Nor can Congress remedy the patch work of state regulations that will result in burdensome and inequitable treatment of women based on income and, in all likelihood, race. Our respect for the rule of law, along with our recognition of the problems of law enforcement and equality in the administration of justice, lead us to urge this Court to place great weight on *stare decisis* with regard to *Roe* v. *Wade*.

SUMMARY OF ARGUMENT

The doctrine of *stare decisis* plays a central role in constitutional jurisprudence, as it does in the development of the common law or the interpretation of statutes. While recognizing that this Court has, in certain circumstances, determined that earlier cases should no longer be followed, we have concluded that the overruling of *Roe* v. *Wade* would be a sharp departure from the articulated principles that have guided this Court's application of the *stare decisis* doctrine.

For this Court to overturn a prior decision that recognized a fundamental right would be an unprecedented departure from two hundred years of American constitutional history. This tradition enables the judicial system to fulfill its role as a stabilizing force in American society, for there is a significant difference between overturning a decision that denied a right and doing so in order to take one away. Denying a right creates no broader horizon of personal freedom, no promise of a better way of life, and no expectation that the denial of the right will be permanent. Our tradition instead evokes a striving for the realization of rights and an expectation that a fundamental right, once established, will be retained.

In line with this tradition, individuals and institutions adjust to decisions recognizing rights, even if those rights may be modified in the course of normal constitutional litigation. Thus, the police have adjusted their practices to *Miranda*, the political process to the rule of one-person-one-vote, and the court system to the requirements of *Gideon* v. *Wainright*. These are but a few of the many decisions, once thought to be controversial, that have been accepted by individuals, governments, businesses, and other entities, and have become part of the fabric of the nation's daily existence. This Court should not take lightly the historic role of *stare decisis* in fulfilling the expectations of our people for the continued enjoyment of rights that the judicial process has recognized.

Moreover, the right of privacy, reaffirmed in *Roe* v. *Wade*, has a strong tradition in this Court's jurisprudence of funda-

mental rights. The inclusion within that right of a woman's freedom to terminate a pregnancy was based on decisions of this Court recognizing the right to be free from governmental control over decisions that determine an individual's pattern of life and the importance of free choice in matters of family life, including child rearing and procreation. As a part of this body of judicial precedent, *Roe* v. *Wade* warrants strong support under the *stare decisis* doctrine.

The practical consequences of overruling *Roe* v. *Wade* would be far-reaching. Criminalizing abortions will not eliminate them. Since illegal abortions would become commonplace, as was the case before state abortion prohibitions were deemed unconstitutional in 1973, overruling *Roe* v. *Wade* would criminalize the conduct of otherwise law-abiding citizens, as well as their physicians and others who assist them. Massive non-compliance can only foster a disrespect for the rule of law. Women with access to money will be able to travel to those states where abortion is legal, replicating the interstate traffic before the liberalizing of divorce laws. Driving abortions underground, or forcing women to travel to have one, will have a particularly cruel and disparate impact on poor women, who consist disproportionately of racial minorities.

Nor would overruling *Roe* v. *Wade* diminish the controversy that surrounds the issue of abortion; on the contrary, by shifting the controversy to the political arena, abortion can be expected to be a dominant issue in every legislative election, and in every contest where judges are elected. This Court has effectively adjusted the contours of the right recognized in *Roe* v. *Wade*; while the Court's decisions have been criticized and praised by both sides of the controversy, the process has taken the usual course that follows from the unambiguous enunciation of a right not hitherto established. That process should not be abandoned to the harsh arena of divisive single-issue politics.

When this Court has chosen to depart from the doctrine of *stare decisis*, it is generally because legal and factual changes have eroded the precedential legitimacy of earlier cases. *Roe* v. *Wade*, however, is encrusted with none of the frailties that have

led to the abandonment of other constitutional decisions of this Court. Here we do not have the changed economic conditions that led to the abandonment of the narrow view of Congress' legislative powers that threatened to shackle the federal government's efforts to combat the Great Depression in the 1930s. Nor does *Roe* v. *Wade* resemble cases like *Wolf* v. *Colorado* or *Betts* v. *Brady*, where the actual functioning of the criminal justice system had demonstrated that new rules were necessary to protect Fourth and Sixth Amendment rights. And, unlike *National League of Cities* v. *Usery*, which set forth a rule that the lower courts, and ultimately this Court, found unworkable, *Roe* v. *Wade* has been applied in hundreds of cases throughout the country to adjudicate the validity of state laws regulating abortion.

The continuing legal vitality of *Roe* v. *Wade* was the basis for this Court's strong belief, expressed in Justice Powell's majority opinion in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983), that *Roe* v. *Wade* was entitled to special deference under the rule of *stare decisis*:

> There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

Nor have there been any factual developments since 1973 to undermine the conclusion of *Roe* v. *Wade* that, prior to the point when a fetus possesses physical qualities to enable it to survive if separated from the womb, no compelling state interest exists for depriving a woman of her right to procreative choice. The recognition of that right has facilitated the movement of women toward full and equal participation in Ameri-

can life. Denying that right would re-impose on this discrete segment of our population a burden that had been lifted by this Court sixteen years ago.

The only ground advanced by those urging this Court to overrule *Roe* v. *Wade* is the argument that it was incorrectly decided. In the absence of changes in factual assumptions or of legal developments that undermine the reasoning of the earlier case, this Court has rarely, if ever, overturned a constitutional precedent simply because some members of the Court believe the earlier case to have been incorrectly decided. To do so where a fundamental right is abandoned would be unprecedented. Indeed, the only conclusion members of the public could draw from a decision to overrule *Roe* is that constitutional rights last only as long as the Court majorities that recognize them.

The doctrine of *stare decisis* insures that the decisions of this Court, absent compelling circumstances, will remain in effect over long periods of time. The stability of Supreme Court decisions is important to Members of Congress who must persuade their constituents to respect those decisions in spite of shifting political majorities. The abandonment of *stare decisis* principles in the context of *Roe* v. *Wade* would undermine not only the right of privacy but also the rule of law.

ARGUMENT

I

THE DOCTRINE OF *STARE DECISIS* HAS PLAYED A CENTRAL ROLE IN CONSTITUTIONAL ADJUDICATION

Notwithstanding the attention that the overruling of prior decisions often commands, such occurrences are comparatively rare and should not obscure the powerful influence of precedent in constitutional adjudication. In the words of Justice Frankfurter (*Green* v. *United States*, 355 U.S. 184, 215 (1957) (dissenting)):

> We should not be so unmindful, even when constitutional questions are involved, of the principle of *stare decisis*, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us.

To be sure, as Justice Brandeis pointed out over fifty years ago, *stare decisis* cannot be an "inexorable command" in constitutional law, where in most cases the Court alone has the power to modify a past decision. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 407 (1932) (Brandeis, J., dissenting). Nonetheless, in certain circumstances the doctrine of *stare decisis* is clearly of *greater* importance in constitutional adjudication than it is in non-constitutional adjudication. As the Court has said:

> *stare decisis* . . . permits society to presume that *bedrock principles are founded in the law rather than in the proclivities of individuals*, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. *Hillery*, 474 U.S. 254, 265-66 (1986) (emphasis added). Quite plainly, the Court cannot permit the expectation to develop that its pronouncements on "bedrock principles" are final for one Term or one Administration only.

Constitutional decisions often dramatically affect the rights of individuals and the practices of governments. When a constitutional decision, even of the most controversial nature, requires or permits readjustment of people's lives and important social institutions, a strong presumption should and does arise that the decision will be of continuing validity. The police, for example, have adjusted to *Miranda* v. *Arizona*, 384 U.S. 436 (1966); the *Miranda* rules educated American citizens as to their rights upon arrest, and they have established an accepted, working framework in which both law enforcement and adjudication have come to function. The political structure assumes the continued validity of one-person-one-vote. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The entire political and social fabric of the country accepts

Brown v. *Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955). These decisions may have been controversial in their time, but even those who may have disagreed with them now recognize their firm place in American law. When an expansion of constitutional rights has so worked itself into society's machinery, respect for *stare decisis* must be accorded potent consideration even by those who strenuously disagree with the initial decision. *Orozco* v. *Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., dissenting) (acquiescing in *Miranda*). The presumption of long-term adherence to such cases is critical to the authority of this Court and indeed of the Constitution itself. Its dilution would carry with it the significant danger that those who disagree with such decisions will feel increasingly justified in refusing to accept them. The power of precedent is an important enforcement weapon for the branch of the government that has no direct force at its command.

For these and other reasons, the Court has consistently held that, even in constitutional cases, "any departure from *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). With respect to *Roe* v. *Wade*, however, there are special—indeed unique—circumstances compelling adherence to *stare decisis*.

II

ROE V. *WADE* IS ENTITLED TO STRONG RESPECT UNDER THE PRINCIPLES OF *STARE DECISIS* THAT HAVE BEEN FOLLOWED BY THIS COURT

A. The Overruling of *Roe* v. *Wade* Would Have Practical Consequences Unlike Those That Have Followed Any Other Decision of This Court.

1. Overruling *Roe* v. *Wade* would produce the unprecedented effect of the criminalization of previously constitutionally protected conduct.

Never in two hundred years of constitutional jurisprudence has this Court decided a case as certain to lead to widespread disobedience of criminal laws by otherwise law-abiding citizens as would be a decision overruling *Roe* v. *Wade*. Law enforcement officials will be far less able to cope with such disobedience than they were before *Roe* was decided, when unlawful abortions were disturbingly common—perhaps in excess of one million per year. Report of the Surgeon General to the President 12 (January 9, 1989) (reasonable annual estimate of illegal abortions prior to 1973 would be 200,000 to 1,200,000). *See also* Cates & Rochat, *Illegal Abortions in the United States*, 8 Family Planning Perspectives 2 (1976). Disrespect for the rule of law will be inevitable since an entire generation of women has come to maturity believing that the right to reproductive choice was part of the fundamental freedom guaranteed to them by our Constitution. It is unquestionable that hundreds of thousands of women would be subject to criminal sanctions if abortion were criminalized in the states where they live. We can contemplate no constitutional means for policing the actions of individual women seeking secretly to terminate a pregnancy. *See Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965).

Not since the adoption of the Eighteenth Amendment would the country be faced with so sudden a conversion of hundreds of thousands of citizens into law-breakers. Nor is it women

alone who would be turned into law-breakers, but also physicians, nurses, and family and friends who would help arrange for abortions. Poor women will inevitably be least able to bear the costs of disobedience, both in price and in health, but there is little doubt that the disobedience will be widespread.

To be sure, all laws are broken to one degree or another, and the fact that theft is so common is by no means an argument for constitutionalizing larceny. But the disobedience that would follow the overturning of *Roe* v. *Wade* presents a different issue for the Court. In pondering the role of *stare decisis* in constitutional decisionmaking, this Court should consider very seriously whether it is appropriate to permit the criminalization of conduct which, by the Court's own decision, has been properly perceived by millions of citizens not only as acceptable, but as protected by a fundamental right.

2. The right of reproductive freedom is particularly ill-suited to a multiplicity of state regulation.

As members of Congress, we reject the suggestion of the brief of the Acting Solicitor General that this Court return the abortion issue to the political agendas of 50 state legislatures, plus perhaps thousands of local governments (*cf. Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)). It would plainly be an unacceptable, indeed irresponsible, application of principles of federalism to permit virtually unrestricted regulation of a choice protected at a minimum against undue burdens imposed by state or local law, as this Court has solidly and repeatedly reaffirmed. For clearly the state regulation envisioned by the Acting Solicitor General would include, in many cases, an outright prohibition of the abortion procedure, possibly with some exceptions, varying from place to place, from the moment of conception. The notion that states would be able to prohibit their citizens from obtaining abortions should *Roe* be overturned is considerably weakened by the inefficacy—or worse, the unequal efficacy—from which such prohibitions would inevitably suffer in practice.

In the first place, returning the matter to the states would surely lead to an unseemly spectacle of interstate traffic in abortions. Travel by women to distant states to obtain abortions would become a national phenomenon, with abortions most accessible to those with the necessary financial resources and information, while those without such resources and information are relegated to illegality. The phenomenon of an interstate traffic in divorce, which primarily benefitted only some of our citizens, is surely too fresh in the nation's memory to be ignored. And in the case of abortion, those too poor or uninformed to travel would be left, as in the years prior to *Roe*, to seek unlawful and unregulated abortions, performed by incompetent persons and likely to cause permanent physical injury or even death.

Secondly, a controversy removed from the political agenda will become a political battle in all fifty states, and in every congressional, state and local election, including those for judicial office. The political atmosphere of the country is likely to be dominated by the abortion debate once state regulations criminalizing abortions, properly perceived by the people to have been deemed unconstitutional in *Roe* v. *Wade*, is placed on the country's political agenda.

That an issue has generated political controversy should not by itself be considered a ground for judicial intervention, much less constitutional intervention. Indeed, judicial intervention does not assure respite from controversy, whether the Court extends rights (*e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971)) or denies them (*Dred Scott* v. *Sandford*, 60 U.S. 393 (1857)). Thus, in 1973 the *Roe* Court could properly disregard the likelihood that its abortion decision would provoke controversy. In 1989, however, sixteen years after judicial intervention, the situation is quite different.

The Court has adhered to *Roe* even as the predictable controversy has developed into a divisive battle. In considering whether *Roe* v. *Wade* commands deference under *stare decisis*, very weighty consideration should be given by the Court to its responsibility to hold its course. It would have been misguided

federalism, indeed, if the Court had abandoned *Brown* during the 1960's or 1970's, when the impact of the case, particularly in northern cities, had begun to affect politics at all levels of government. We do not suggest that the Court is precluded from abandoning a decision when its factual and legal premises have been undermined simply because of the controversy it may create. *Gobitis* (*Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940)) was properly replaced by *Barnette* (*West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943)). The overruling of *Roe* v. *Wade*, however, is of a different dimension because, by turning this issue back to the states, the stabilizing role that the judicial process plays will be abandoned in favor of political strife necessarily fiercer than existed before the judicial intervention in 1973.

B. OVERRULING *ROE* V. *WADE* WOULD CONSTITUTE AN UNPRECEDENTED WITHDRAWAL OF A FUNDAMENTAL RIGHT AFFECTING MILLIONS OF INDIVIDUALS IN A MATTER OF CRITICAL IMPORTANCE TO THEIR LIVES.

Roe v. *Wade* secured a fundamental right—fundamental not only in the constitutional sense of that term, but also in the sense of the profound role that this right plays in the lives and futures of the women it effects. The right to reproductive choice recognized in *Roe* and related cases (*e.g.*, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)) has enabled women to control a matter critically affecting the rest of their lives.

There is a clear, inevitable difference between overruling past practice to confer a right and doing so to withdraw a right theretofore recognized. In the former context, no expectations have been created and none will, by consequence, be defeated. In the latter context, people have been given to understand that they possess an entitlement, and in the case of a *constitutional* right, an *unabridgeable* entitlement—engendering the firmest possible expectations. While the costs of rejecting *stare decisis* can be substantial even when the Court confers something new

under the authority of the Constitution, they are infinitely greater when it takes back what it has previously given.

This Court's history contains no precedent in which a constitutional right protecting conduct so determinative of so many individuals' futures was first bestowed and then withdrawn. *See* Appendix, "Survey of Overruled Supreme Court Decisions."[1] Concededly, numerous constitutional decisions of great importance to individuals' lives have later been overruled, superseded by amendment, or effectively discarded. For example, the *Dred Scott* case, *supra*, denied African-Americans a right of citizenship that would have profoundly altered their lives, at least in the territories; *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), enshrined state-imposed racial segregation; the *Civil Rights Cases*, 109 U.S. 3 (1883), extinguished for the moment Congress' power to outlaw segregation in places of public accommodation; *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), approved legislation that imposed on women a stereotype of dependency and inadequacy; and *Korematsu* v. *United States*, 323 U.S. 214 (1944), upheld the exclusion of Japanese-Americans from their areas of residence during World War II. These were cases, however, in which the Court declined to recognize a constitutional right and thereby left social practices and institutions unaltered.

Comparing *Roe* v. *Wade* to these instances in which constitutional precedents did not survive serves only to highlight the difference between *Roe* and the decisions that were later overruled or discarded. For the groups affected, these decisions created

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1 To be sure, this Court has on occasion overruled prior decisions that had expanded constitutional rights. *Hudgens* v. *NLRB*, 424 U.S. 507 (1976) overruled *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), finding that private shopping malls were not the equivalent of "company towns" for First Amendment purposes, and *Miller* v. *California*, 413 U.S. 15 (1973) overruled *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1977), adjusting the constitutional test for obscenity. But in no such cases was the Court withdrawing an immunity conferred upon conduct that could in any meaningful sense have come to be central to the lives and futures of those affected. These are hardly precedents, therefore, for the complete eradication of the underlying right to terminate a pregnancy.

no better way of life, no release from legal restraints, and no reasonable expectation that new liberties could continue. *Roe* v. *Wade*, on the other hand, has substituted choice for state compulsion for millions of women for whom the inability to terminate an unwanted pregnancy had posed a barrier to their full participation in American life. Women throughout the country, and their families, have ordered their lives around the right to reproductive autonomy. Once a decided case has constitutionally secured certain essential choices affecting the lives and relationships of millions of individuals, that case has implicated the weightiest of *stare decisis* concerns.

This Court's rejection of *Lochner* v. *New York*, 198 U.S. 45 (1905), cannot conceivably justify an overruling of *Roe* v. *Wade*. It is true that the *Lochner* Court spoke of a "right" of individuals to "make contracts . . . upon such terms as they think best." In reality, however, *Lochner* established no such right. Subsequent to *Lochner*, the Court upheld a large number of regulations of prices, wages, rates, and entry into businesses.[2] Thus *Lochner*, unlike *Roe* v. *Wade*, created no general expectation of the right of freedom from governmental restraint in a critically important area of human conduct. Justice Peckham's majority opinion in *Lochner* asserted no general "freedom of contract." Rather, it emphasized the rights of individuals "to make contracts regarding labor upon such terms as they may think best" and the "freedom of master and employee to contract with each other" with regard to employment. *Lochner* was wrong in viewing New York's maximum hour law for bakers as essentially a redistributive statute that transferred property from employers to employees. The cases that followed *Lochner* were wrong in giving such short shrift to the states' justifications for their restrictions on the use of prop-

2 *See, e.g., The Shreveport Rate Case, Houston, E & W.T.R. Co.* v. *United States*, 234 U.S. 342 (1914); *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Bunting* v. *Oregon*, 243 U.S. 426 (1917). In fact, while this Court struck down almost 200 state laws in the period from 1905 to 1936, a comprehensive survey concludes that "most challenged laws withstood attack." Gunther, *Constitutional Law* 453-54 (11th ed. 1985).

erty. These cases typified an era during which the Court often demonstrated a hostility to economic regulation by striking a very pro-business balance between the interest of the state and those of business. This period reached its culmination in the 1930's when the same hostility toward governmental regulation surfaced in a series of cases restricting the power of Congress to deal with the Great Depression. *See, e.g., A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). When, in the spring of 1937, the Court embarked upon a new era of constitutional interpretation, it was not because a "right" was no longer recognized; rather, the Court decided to strike a different balance between governmental and business interests.

The repudiation of the *Lochner* era was, therefore, a repudiation of the Court's ability to second-guess legislatures as to whether given economic regulations genuinely furthered the public good. It was not the withdrawal of a fundamental freedom remotely comparable to the right established in *Roe*. To overrule *Lochner* and hold that states could require bakery owners to operate with 10-hour maximum shifts might have cost the bakery owners money, but it would not have deprived them of a fundamental liberty central to their basic life choices, their most intimate relationships, their very ability to participate in the economic and political sectors of society, and, in many cases, their entire future role in life.

One other case decided by this Court—*Brown* v. *Board of Education*, *supra*—is comparable with *Roe* in regard to its degree of affirmative impact on the daily lives of American citizens. *Brown* struck down legally mandated public school segregation and held out the promise, soon fully realized, of the end of all legally mandated segregation in public facilities. The right announced by *Brown* has become a part of the expectations and the lives of millions of Americans. The overruling of *Brown* would be as unthinkable to all Americans as the overruling of *Roe* is to the millions of American women, and for untold millions whose lives are affected by the right recognized in *Roe*.

This Court has created a substantial body of case law since 1973 delineating the contours of the right recognized in *Roe* v. *Wade*. In the course of doing so it has continued to honor the expectations of untold numbers of women that the fundamental right to decide whether to bear a child is constitutionally protected and continues into pregnancy. To eliminate the ground for those expectations would be an unprecedented event in American Constitutional history. *Stare decisis* "provides the stability and predictability required for the ordering of human affairs over the course of time."[3] We should not take lightly the expectation of our people, based on nearly two centuries of experience, that fundamental rights, once granted, will not be taken away.

III

WHEN THIS COURT HAS OVERTURNED CONSTITUTIONAL PRECEDENTS, IT HAS NOT DONE SO ON THE BASIS OF MERE DISAGREEMENT WITH AN EARLIER CASE, BUT ONLY IN THE PRESENCE OF SPECIAL CIRCUMSTANCES THAT DO NOT APPLY TO *ROE* V. *WADE*

The Court has recently said that "special justification" is necessary to permit the overturning of Constitutional prece-

3 *Williams* v. *Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). *See also Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940) ("*[S]tare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations."); *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) ("[V]ery weighty considerations [underlying principle of *stare decisis* include] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise"); Wasserstrom, *The Judicial Decision* 66-67 (1961) (adherence to *stare decisis* is important where people commit themselves to "far-reaching, far from trivial, often irrevocable course of action" in reliance upon the law.) Moreover, arguments for *stare decisis* take on a certain "moral character": "Having induced persons to act in a certain manner, the legal system could only be blameworthy if it subsequently sought to punish or in any other way thwart the previously announced consequences of action." *Id.* at 68. The law is bound, in some sense, to respect the moral obligation to keep a promise.

dent. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). *See also*, *Vasquez* v. *Hillery*, 474 U.S. 254, 267 (1986) (O'Connor, J., concurring). No rigid test exists to determine when such special justification is present. Nevertheless, the case law reveals certain recurring patterns of either factual or legal development that have operated to render precedent particularly susceptible to overruling. We are aware of no case where mere disagreement with an earlier case, absent such factual and legal developments, has been the basis for overturning precedent.[4]

A. Changed Conditions.

In the very opinion in which Justice Brandeis cogently articulated the reasons why *stare decisis* must not be absolute in Constitutional adjudication, he also set forth a framework through which the Court might determine whether a particular constitutional precedent should be open to reconsideration. *See*, *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting). Justice Brandeis observed that with respect to many constitutional issues—for example, whether a given

4 There are three instances which might be argued to qualify this conclusion marginally. We believe, however, that none contradicts basic principles of *stare decisis*. In *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869), this Court rejected certain "remarks" in the earlier case *Allen* v. *Newberry*, 21 How. (62 U.S.) 244 (1858), on grounds that those remarks "must be regarded as incorrect." 7 Wall. (74 U.S.) at 641. However, the Court in *The Belfast* observed that those earlier remarks "were not necessary to [the earlier] decision." *Id.* The *Legal Tender Cases*, *Knox* v. *Lee*, 12 Wall. (79 U.S.) 457, 553 (1871), overruled *Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870), apparently because the earlier case was, in this Court's view, incorrectly decided. As the Court observed, however, *Hepburn* was decided "by a court having a less number of judges than the law then in existence provided this court shall have," and that the type of questions, concerning "constitutional power," at issue in the case normally are not to be decided "in the absence of a full court." 12 Wall. (79 U.S.) at 553-554. In *United States* v. *Classic*, 313 U.S. 299, 317 (1941), this Court reached a conclusion different from the plurality opinion in *Newberry* v. *United States*, 256 U.S. 232 (1921). However, because no majority opinion was promulgated for the Court in *Newberry*, the Court in *Classic* stated that the constitutional issue in question had "not been prejudged by any decision of this Court." 313 U.S. at 317.

statutory classification has a rational basis under the Equal Protection Clause—the Court's decision:

> is dependent upon the determination of what in legal parlance is called a *fact*, as distinguished from the declaration of a *rule of law*. When the underlying fact has been found, the legal result follows inevitably. The circumstance that the decision of that fact is made by a court, instead of by a jury, should not be allowed to obscure its real character.

Id. at 410-11 (emphasis added). In such instances, Justice Brandeis reasoned, the doctrine of *stare decisis* ought not to apply with full force.

> But the decision of the court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. *For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile.*

Id. at 412 (emphasis added) (citations omitted).

Consistent with Justice Brandeis' view, many of the cases in which this Court has exercised the power to overrule constitutional precedent have been instances in which the Court has had to come to grips with changing national conditions. Thus the inescapable fact of the Great Depression overtook the *Lochner* era, and in the same period, a different understanding of the degree to which each state's economy was tied to the economy as a whole led to the discarding of narrow constructions of the Commerce Clause. *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Factual developments may also weaken precedents when a case implicitly rested on assumptions about the future that prove to be untrue. This Court reversed its decision not to enter the legislative reapportionment fray when it became apparent that state legislatures themselves were incapable of correcting their malapportioned structure. *See Baker* v. *Carr*, 369 U.S. 186

(1962), *rev'g Colegrove* v. *Green*, 328 U.S. 549 (1946). Similarly, the denial of the exclusionary rule in state criminal cases was overruled when the Court became convinced that the underlying factual assumption of *Wolf* v. *Colorado*, 338 U.S. 25 (1949)—that the guarantees of the Fourth Amendment would be secured by other, less drastic remedies—had proven false in practice. *See, Mapp* v. *Ohio*, 367 U.S. 643 (1961).

By contrast, the recognition of a fundamental right under the Constitution is, in Justice Brandeis' phrase, "a proposition purely of law." Such was the holding of *Roe* v. *Wade*: that a woman has a fundamental right under the Constitution to make her own child-bearing decisions, and that, until the fetus has attained viability, her right to terminate a pregnancy is constitutionally guaranteed against state proscription or undue regulation. Even after viability, this court has held, where a woman's life or health is endangered, the woman's ability to safeguard her life or health must take precedence. Applications of this legal rule—questions of ascertaining viability or analyzing the burdensomeness of particular regulations—may be factual, but the critical holding of *Roe* v. *Wade* was without question "a declaration of a rule of law." *Burnet, supra*, 285 U.S. at 410-11 (Brandeis, J., dissenting). As such it is entitled to the strongest deference under the doctrine of *stare decisis*. *Id.*

As a rule of law, moreover, the central holding of *Roe* is not, and need not be, dependent on transitory factual assumptions. *Roe* determined that "[a]t some point in pregnancy, [the State's] respective interests [in safeguarding health, in maintaining medical standards, and in protecting potential life] become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." 410 U.S. at 154. The point prior to which no such state interest is sufficiently compelling *can* be defined without reference to developments in technology or medical opinion, for there is an unalterable point in pregnancy—a biological developmental threshold—prior to which fetal organ systems are simply insufficiently developed to

allow survival outside a womb.[5] Now, as in 1973, "[n]eonates less than 24 weeks gestational age have close to a 0% survivability rate."[6] While "it is likely that technological advances in the care of newborns will enhance survival at each gestational age above 24 weeks," such technology "will not lower the threshold for fetal extrauterine survival."[7] Thus, *Roe*'s holding—that there is a point prior to which no state interest will justify an infringement on a woman's right to reproductive choice—has not been undermined by any medical or technological development.

B. Legal Developments.

There are also instances in which the legal framework surrounding a precedent has led inexorably to its overruling. Such is the case where a precedent has become a mere "sport in the law, . . . inconsistent with what preceded and what followed." *Screws* v. *United States*, 325 U.S. 91, 112 (1945) (plurality opinion); *see also United States* v. *Darby*, 312 U.S. 100 (1941), overruling *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918). Similarly, where a previously announced legal standard is upheld only in principle and invariably excepted in practice, the Court has seen fit to revisit the prior decision. *See, e.g., Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (overruling *Betts* v. *Brady*, 316 U.S. 455 (1942)).

In some instances, subsequent decisions will have convincingly "undermined the reasoning" of an earlier one; then, too, the older case may be cast aside. *See, Hudgens* v. *NLRB*, 424 U.S. 507 (1976) (overruling *Amalgamated Food Employees*

5 Prior to the twenty-third week of gestation, the brain, the kidneys, and the lungs are not sufficiently matured to perform the mutually sustaining functions that allow extra-wombal survival. *See Fetal Extrauterine Survivability*, Report to the New York State Task Force on Life and Law 9 (January 1988); Goldstein, *Mother-Love and Abortion*, 25 (1988). *See also* Brief *Amicus Curiae* of the American Medical Association.

6 *Fetal Extrauterine Survivability*, *supra*, at 10.

7 *Id.* at 12.

Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)); *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams* v. *Tanner*, 244 U.S. 590 (1917)); *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 57, 77 (1964) (overruling *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), and *Feldman* v. *United States*, 322 U.S. 487 (1944)); *Puerto Rico* v. *Branstad*, 107 S. Ct. 2802, 2808 (1987) (overruling *Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66 (1861)). Similarly, in the area of state taxation of interstate businesses, the rules in earlier cases were found, by experience, to have no relationship to their objective of protecting such businesses from burdensome state taxes. *See Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977) (overruling *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951)); *Dept. of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (overruling *Puget Sound Stevedoring Co.* v. *Tax Com.*, 302 U.S. 90 (1937) and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). In all these cases, the Court is in effect burying a doctrine or decision that is already legally dead.

The same cannot be said of the woman's right to autonomy in her reproductive decisions recognized in *Roe* v. *Wade*. *Roe* did not deviate from prior law, nor has it been followed by inconsistent law. *Roe* recognized a right to choose whether to bear a child, which stems directly from the Court's previous decisions identifying the right to procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), rights to child-rearing, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), rights to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967), and rights to contraceptive choice, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). Subsequently, *Roe* has been used repeatedly by this Court to overturn legislation,[8] unlike *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which was never used by this Court to strike another law before

8 *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Assoc.* v. *Ashcroft*, 462 U.S. 476 (1983); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

it was overturned by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).[9] Cases holding that public funding of abortions is not required by *Roe* did not question the fundamental right to choose recognized in *Roe*, but simply concluded that this right did not preclude the state from allocating public funds in accordance with a preference for childbirth over abortion. *Roe* is clearly a step in the development of a larger body of law and, as such, fits neatly into an institutional continuum. *See* Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445, 485-86 (1984).

The core principle of *Roe* v. *Wade* is that the right to decide whether or not to bear a child is a fundamental right, protected against state laws by the due process clause of the Fourteenth Amendment, and that it survives the onset of pregnancy. It cannot seriously be argued that, by identifying as "fundamental" a right not specifically enumerated in the constitution, the Court departed from its constitutional role. In addition to the rights pertaining to family and stated decisions already referred to, the Court has through its history identified and protected many unenumerated rights not supported by specific text or history. Among them are the important right of freedom of association (*e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958), progressing to the rights identified in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-8 (1984)), the equal protection component of the Fifth Amendment (*e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954)), the right to travel between states (*Shapiro* v. *Thompson*, 394 U.S. 618 (1969)), *Crandall* v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868)), the right to attend and report on criminal trials (*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980)), and the right to choose and follow a profession (*Gibson* v. *Berryhill*, 411 U.S. 564 (1973), *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)). Surely the right to decide whether to bear a child is as fundamental, and of as compelling importance, to the

9 *National League of Cities* deviated from prior law, and was not strengthened by later decisions. *See* Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col. L. Rev. 1, 12-13 (1988).

woman as any of these rights to the individuals and institutions involved.

Nor can it persuasively be argued that *Roe* has been unworkable or unmanageable. *Roe* had been consistently applied by this Court to overturn state requirements for spousal consent,[10] parental consent to abortions for minors,[11] particular procedures regarding "viable" fetuses,[12] requirements unrelated to maternal health for second trimester abortions,[13] and dissemination of information for consent or information to discourage women choosing abortions.[14] The Court has scrutinized regulation based on the state interest in maternal health without difficulty, resulting in consistent holdings.[15] These holdings are not

10 *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

11 *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), *Bellotti* v. *Baird*, 443 U.S. 622 (1979), *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

12 *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

13 *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Assoc.* v. *Ashcroft*, 462 U.S. 476 (1983); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

14 *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

15 For example, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 101-2 (1976), Justice Stevens, concurring in this part of the Court's opinion, stated that "a prohibition of the saline amniocentesis procedure was almost tantamount to a prohibition of any abortion in the State after the first 12 weeks of pregnancy", and therefore could not stand. The Court has consistently held that regulations requiring second trimester abortions to take place in hospitals are unconstitutional, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Assoc.* v. *Ashcroft*, 462 U.S. 476 (1983), but has upheld regulation requiring second trimester abortions to take place in a hospital *or clinic*. *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983).

made unworkable by any technological advances increasing the safety of abortion that may in time extend the period in which a woman's right to choose to bear a child may not be curtailed by the state's concern for maternal health.[16] The funding cases[17] turned on the majority's conclusion that the funding regulations did not unduly burden the right recognized in *Roe*. Disagreement within this Court in these cases does not mean that *Roe* is "unworkable," but instead reflects disagreement over the scope of *Roe*'s holding. In contrast to *Roe*, *National League of Cities*, *supra*, was found unmanageable both by the lower courts and by the Supreme Court because courts were unable to draw any principled distinction between traditional government functions and non-traditional government functions. Later decisions only confused that distinction, leading to the demise

16 Nor has *Roe* proven unworkable to the lower courts. It has been cited by them in various contexts approximately 2000 times, and has been relied on in numerous published opinions of the state attorneys general. Courts have found *Roe* useful in developing meaningful and reliable legal distinctions. An unpublished Rutgers-based survey, supervised by Professor Norma Davenport, shows that hundreds of state and lower federal courts have interpreted *Roe* not only to support a woman's right to choose to have an abortion, but also to provide authority for the determination of other privacy rights. *See, e.g., Drollinger* v. *Millingan*, 552 F.2d 1220, 1227 (7th Cir. 1977) (fundamental right to family relationship); *Owens* v. *Jennings Municipal Fire & Police Civil Service Bd.*, 454 So.2d 426 (La. App. 1984) (right of female police officer to continue work after unwed pregnancy); *Kewin* v. *Board of Education*, 65 Mich. App. 472, 237 N.W.2d 514, 519 (1975) (mandatory pregancy leave overburdens constitutional right). Concurrently, courts have used *Roe* to distinguish this privacy right from other claims presented to the courts. For example, courts have found that the constitutional right to privacy does not encompass the right to smoke marijuana, *see, e.g., Ravin* v. *State*, 537 P.2d 494, 500, 502 (Alaska 1975); *State* v. *Murphy*, 117 Ariz. 57, 570 P.2d 1070 (1977); *State* v. *Baker*, 56 Hawaii 271, 535 P.2d 1394, 1401 (1975), or the right to prostitution, *see, e.g., State* v. *Mueller*, 66 Hawaii 616, 671 P.2d 1351, 1355, 1359 (1983); *Lutz* v. *United States*, 434 A.2d 442, 445 (Dist. Col. App. 1981); *State* v. *Henderson*, 269 N.W.2d 404, 406 (Iowa 1978).

17 *Maher* v. *Roe*, 432 U.S. 464 (1977), *Harris* v. *McRae*, 448 U.S. 297 (1980).

of *National League of Cities* in *Garcia* v. *Antonio Metropolitan Transit Authority*, *supra*.

* * * * *

Thus the cases are varied, but "the careful observer" of this Court's constitutional decisions "will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' " *Vasquez*, *supra*, 474 U.S. at 266 (quoting *Burnet*, *supra*, 285 U.S. at 412 (Brandeis, J., dissenting)). *Roe* v. *Wade* agrees today as fully as it did in 1973 with both the experience and the facts of criminalized abortion. Neither factual nor legal developments have in any way weakened its fundamental holding.

Conclusion

There is no precedent in the two hundred years of this Court's history for overruling a decision recognizing a fundamental right. *Roe* v. *Wade* recognized a fundamental right solidly based in constitutional principles and precedent. There are present here none of the reasons, such as changed circumstances or legal doctrine, relied on by this Court in the past for departing from the principles of *stare decisis*. We urge, therefore, that *Roe* v. *Wade* should be re-affirmed, as it was in 1983 and 1986, in *Akron* and *Thornburgh*, and that the debate over the continued validity of its core principles be put to rest.

Respectfully submitted,

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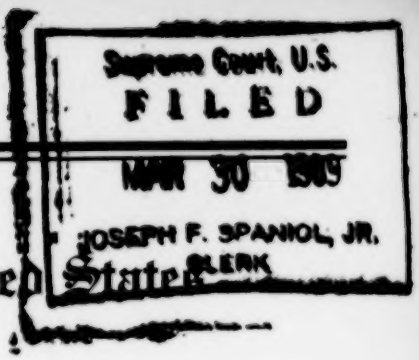
APPENDIX

No. 88-605



IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX
TO THE BRIEF FOR CERTAIN MEMBERS OF THE CONGRESS OF THE UNITED STATES: SENATOR HOWARD METZENBAUM (D. OH.), SENATOR BOB PACKWOOD (R. OR.), SENATOR BARBARA MIKULSKI (D. MD.), REPRESENTATIVE DON EDWARDS (D. CA.), REPRESENTATIVE BILL GREEN (R. NY), REPRESENTATIVE PATRICIA SCHROEDER (D. CO.), REPRESENTATIVE OLYMPIA SNOWE (R. ME.), AND CERTAIN OTHER MEMBERS OF CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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March 30, 1989

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Explanation of Symbols A-1

Survey of Overruled Supreme Court Decisions A-2

SURVEY OF OVERRULED SUPREME COURT DECISIONS*

Categories of Cases:

COM. = Common law question
STAT. = Statute under consideration
CONST. = Constitutional question

Codes (For Constitutional Cases Only):**

I = overruled case inconsistent with other authorities (usually prior or subsequent U.S. Supreme Court cases, Congress or "other English-speaking courts")
C = changed conditions (social, economic, etc.) since date of overruled case
L = overruling based on lessons of experience (e.g. unworkable rules of overruled case)
D = divided court (or court with less than full allotment of justices) reached overruled decision
F = lack of full consideration of issue in overruled case
W = overruled case widely criticized

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* Based on research undertaken by Carl Willner, Esq., Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037. This Appendix contains a summary of cases overruled by decisions of this Court. It is intended to be inclusive, although the determination of whether a decision overrules an earlier one is frequently a matter of interpretation. It is therefore possible that some overrulings have been omitted because the overruling decisions did not explicitly indicate the Court's intention, or for some other inadvertent reason.

** Codes are in parentheses where the Court's opinion does not state grounds for overruling an earlier decision, but where the grounds for overruling are implicit in the context of the opinion.

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
1. COM.	*Hudson & Smith* v. *Guestier*, 6 Cr. (10 U.S.) 281, 285 (1810)	*Rose* v. *Himley*, 4 Cr. (8 U.S.) 241 (1808)	Whether French tribunal had seizure jurisdiction over vessel and cargo condemned and sold at auction while in port of another nation. (yes)
2. STAT.	*Gordon* v. *Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830)	*Wilson* v. *Daniel*, 3 Dall. (3 U.S.) 401 (1798)	Whether, when plaintiff moves to dismiss appeal to Supreme Court for lack of jurisdictional amount, the amount in controversy is determined by judgment actually recovered rather than amount plaintiff had sought. (yes)
3. STAT.	*Greene* v. *Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832)	*Patton's Lessee* v. *Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell* v. *Harmon*, 2 Pet. (27 U.S.) 241 (1829)	Whether statute of limitations in Tennessee for adverse possession of land requires that the possessor show a connected title to a grant. (no)
4. STAT.	*United States* v. *Percheman*, 7 Pet. (32 U.S.) 51 (1833)	*Foster* v. *Elam*, 2 Pet. (27 U.S.) 253 (1829)	Whether language in treaty ceding Florida to the United States providing that grants of land "shall be ratified and confirmed" to persons in possession of them was self-executing rather than contractual commitment requiring further legislative action. (yes)
5. CONST. L, I	*Louisville, C. & C.R. Co.* v. *Letson*, 2 How. (43 U.S.) 497, 554-556 (1844)	*Commercial & Railroad Bank* v. *Slocomb*, 14 Pet. (39 U.S.) 60 (1840); *Strawbridge* v. *Curtiss*, 3 Cr. (7 U.S.) 267 (1806); and qualifying, *Bank of U.S.* v. *Deveaux*, 5 Cr. (9 U.S.) 61 (1809)	Whether federal courts have jurisdiction over a suit between a citizen of one state and a corporation created by and transacting business in another state, without regard to the citizen-

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			ship of the corporation's members. (yes)
6. CONST. C	*The Propeller Genessee Chief* v. *Fitzhugh*, 12 How. (53 U.S.) 443, 456 (1852)	*The S.B. Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The S.B. Orleans* v. *Phoebus*, 11 Pet. (36 U.S.) 175 (1837)	Whether the admiralty jurisdiction of the federal courts extends to all lakes and navigable waters rather than merely the high seas and tidewaters. (yes)
7. STAT.	*Gazzam* v. *Lessee of Phillips*, 20 How. (61 U.S.) 372, 377-378 (1858)	*Lessee of Brown* v. *Clements*, 3 How. (44 U.S.) 650 (1845)	Whether surveyor-general required to lay out fractional section of land grant in half-quarter sections in all practicable cases. (no)
8. COM.	*Suydam* v. *Williamson*, 24 How. (65 U.S.) 427, 431-35 (1861)	*Williamson* v. *Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson* v. *Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson* v. *Ball*, 8 How. (49 U.S.) 566 (1850)	Whether life tenant conferred valid title to property in New York upon purchaser. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
9. COM.	*Mason* v. *Eldred*, 6 Wall. (73 U.S.) 231, 236-38 (1868)	*Sheehy* v. *Mandeville & Jameson*, 6 Cr. (10 U.S.) 253 (1810)	Whether a judgment against one party to a joint contract bars subsequent action against the other parties to that contract under common law. (yes)
10. CONST. D	*The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869)	*Allen* v. *Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)	Whether admiralty jurisdiction extends to commerce on navigable waters within a single state. (yes)
11. CONST. D	*Knox* v. *Lee (Legal Tender Cases)*, 12 Wall. (79 U.S.) 457, 553 (1871)	*Hepburn* v. *Griswold*, 8 Wall. (75 U.S.) 603 (1870)	Whether Legal Tender Acts authorizing use of paper money as legal tender are constitutional as to contracts made before their enactment. (yes)
12. STAT.	*Trebilcock* v. *Wilson*, 12 Wall. (79 U.S.) 687 (1872)	*Roosevelt* v. *Meyer*, 1 Wall. (68 U.S.) 512 (1863)	Whether Supreme Court had jurisdiction, under judiciary Act if 1867,

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			over appeal from state court judgment in which constitutional issue raised by defendant unsuccessfully to challenge federal statute. (yes)
13. CONST. I	*Thompson* v. *Whitman*, 18 Wall. (85 U.S.) 457, 464 (1874)	*Landes* v. *Brant*, 10 How. (51 U.S.) 348 (1850)	Whether full faith and credit precludes collateral attack on another state's judgment for want of jurisdiction. (no)
14. STAT.	*Hornbuckle* v. *Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874)	*Noonan* v. *Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard* v. *Hughes*, 1 Wall (68 U.S.) 73, 77 (1864); *Dunphy* v. *Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)	Whether territorial courts are permitted by Congress to combine legal and equitable jurisdiction in one action. (yes)
15. STAT.	*Railway Co.* v. *McShane*, 22 Wall. (89 U.S.) 444 (1874)	*Railway Co.* v. *Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)	Whether lands granted to railroad were exempt from state taxation

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			because of the government's contingent right of preemption. (no)
16. CONST. of state I	*County of Cass* v. *Johnston*, 95 U.S. 360 (1877)	*Harshman* v. *Bates County*, 92 U.S. 569 (1876)	Whether state statute authorizing townships to subscribe to railroad stock following a popular vote violated provisions of the Missouri constitution. (no)
17. CONST. of state I	*Fairfield* v. *County of Gallatin*, 100 U.S. 47 (1879)	*Concord* v. *Portsmouth Sav. Bank*, 92 U.S. 625 (1876)	Whether donations by counties and municipalities to railroad companies prohibited by Illinois constitution even where authorized by popular vote under preexisting law before constitutional restriction adopted. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
18. STAT.	*Tilghman* v. *Proctor*, 102 U.S. 707 (1881)	*Mitchell* v. *Tilghman*, 19 Wall. (86 U.S.) 287 (1874)	Whether a patent was properly granted for a manufacturing process, regardless of the particular mode or apparatus specified for putting it into effect. (yes)
19. CONST. I	*Kilbourn* v. *Thompson*, 103 U.S. 168, 196-200 (1881)	*Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204 (1821)	Whether Congress has a general power to punish for contempt. (no)
20. STAT.	*United States* v. *Phelps*, 107 U.S. 320, 323 (1883)	*Shelton* v. *Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)	Whether claim for reduction of customs duty on goods by reason of damage sustained during voyage of importation could be allowed after goods already entered at full value at customs. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
21. STAT.	*Kountze* v. *Omaha Hotel Co.*, 107 U.S. 378, 387 (1883)	*Stafford* v. *Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1854)	Whether appeal bond in foreclosure suit in federal courts operates as security for entire amount of mortgage debt. (no)
22. COM.	*Morgan* v. *United States*, 113 U.S. 476, 496 (1885)	*Texas* v. *White*, 7 Wall. (74 U.S.) 700 (1869)	Whether legislature could limit negotiability of bonds payable to bearer by statute of which all subsequent purchasers charged with notice. (no)
23. CONST. F, I	*Wabash, S.L. & P. R. Co.* v. *Illinois*, 118 U.S. 557, 567 (1886)	*Peik* v. *Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) (substantially though not expressly overruled)	Whether portion of interstate railroad transportation within a state is "interstate" commerce for which states may not regulate charges. (yes)
24. CONST. I	*Philadelphia & Southern Mail S.S. Co.* v. *Pennsylvania*, 122 U.S. 326, 340-46 (1887)	*State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) (basic grounds of decision repudiated)	Whether state tax upon gross receipts of steamship company engaged in interstate commerce is

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			prohibited by commerce clause. (yes)
25. CONST. I	*In re Ayers*, 123 U.S. 443 (1887)	*Osborn* v. *Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)	Whether applicability of 11th Amend. is limited to situations where state is a party on record. (no)
26. CONST. I	*Leloup* v. *Port of Mobile*, 127 U.S. 640, 647 (1888)	*Osborne* v. *Mobile*, 16 Wall. (83 U.S.) 479 (1873)	Whether state license tax imposed on all operations of a company engaged in interstate commerce violates commerce clause. (yes)
27. CONST. I	*Leisy* v. *Hardin*, 135 U.S. 100, 118 (1890)	*Thurlow* v. *Massachusetts*, 5 How. (46 U.S.) 504 (1847)	Whether state prohibition of sale of intoxicating liquors, as applied to imported liquors in original containers, violates commerce clause. (yes)
28. STAT.	*Brenham* v. *German-American Bank*, 144 U.S. 173, 187 (1892)	*Rogers* v. *Burlington*, 3 Wall. (70 U.S.) 654 (1866); *Mitchell* v. *Burlington*, 4 Wall. (71 U.S.) 270 (1867)	Whether city had power to issue negotiable bonds, based on general authority to borrow, absent spe-

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			cific authority granted by legislature. (no)
29. STAT.	*Roberts* v. *Lewis*, 153 U.S. 367, 377 (1894)	*Giles* v. *Little*, 104 U.S. 291 (1881)	Whether under Nebraska law a will devising property should be construed to devise a fee simple estate, even absent specific words of inheritance. (yes)
30. CONST. I	*Pollock* v. *Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895)	*Hylton* v. *United States*, 3 Wall. (3 U.S.) 171 (1796)	Whether a tax on property, or income from property, is a direct tax that must be apportioned among the states. (yes)
31. CONST. C	*Garland* v. *Washington*, 232 U.S. 642, 646 (1914)	*Crain* v. *United States*, 162 U.S. 625 (1896)	Whether failure to arraign defendant in state criminal proceedings is deprivation of due process. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
32. CONST. STAT. I	*United States* v. *Nice*, 241 U.S. 591, 601 (1916)	*Re Heff*, 197 U.S. 488 (1905)	Whether an Indian who had received a land allotment pursuant to the General Allotment Act of 1887 was released from national guardianship and became subject to state jurisdiction, so that federal prohibition on sale of liquor to him was unconstitutional. (no)
33. CONST. I	*Pennsylvania R. Co.* v. *Towers*, 245 U.S. 6, 17 (1917)	*Lake Shore & M.S. R. Co.* v. *Smith*, 173 U.S. 684 (1899) (in part)	Whether state regulation of carrier's intrastate rates so as to impose special charges for certain customers, where rates imposed are reasonable and carrier had initially voluntarily established rates for service, is deprivation of property without due process. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
34. COM.	*Rosen* v. *United States*, 245 U.S. 467, 470 (1918)	*United States* v. *Reid*, 12 How. (53 U.S.) 361 (1851)	Whether witness previously convicted of crime was competent to testify against his co-defendants although such testimony not allowed at common law in 1789. (yes)
35. STAT.	*Boston Store of Chicago* v. *American Graphophone Co.*, 246 U.S. 8, 25 (1918); and *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917)	*Henry* v. *A. B. Dick Co.*, 224 U.S. 1 (1912)	Whether patent holder may continue to impose restrictions on use or resale of patented machine after sale. (no)
36. CONST. I	*Eisner* v. *Macomber*, 252 U.S. 189 (1920)	*Collector* v. *Hubbard*, 12 Wall. (79 U.S.) 1 (1871)	Whether Congress has power to tax stock dividends or accumulated earnings as income of the stockholder without apportionment. (no)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
37. CONST. I	*Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 533 (1922)	*Doyle* v. *Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U.S. 246 (1906)	Whether a state law revoking a foreign corporation's license to do business because the corporation resorts to federal courts in the state violates right of access to federal courts. (yes)
38. STAT.	*Lee* v. *Chesapeake & O.R. Co.*, 260 U.S. 653, 659 (1923)	*Ex Parte Wisner*, 203 U.S. 449 (1906); and qualifying, *In re Moore*, 209 U.S. 490 (1908)	Whether an action brought by citizens of different states in a court of a state where neither is a citizen is removable to federal court in district where suit pending. (yes)
39. CONST. I	*Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, 218 (1925)	*Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68 (1913)	Whether a state excise tax imposed on a foreign corporation which does only interstate business within the state violates

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			the commerce clause and 14th Amend. in taxing property beyond state's borders. (yes)
40. COM.	*Gleason* v. *Seaboard A.L.R. Co.*, 278 U.S. 349, 357 (1929)	*Friedlander* v. *Texas & P.R. Co.*, 130 U.S. 416 (1889) (in part)	Whether principal is exempted from responsibility for representations of agent where agent has secret purpose to be benefit himself. (no)
41. CONST. L, I	*Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204, 209 (1930)	*Blackstone* v. *Miller*, 188 U.S. 189 (1903)	Whether inheritance tax imposed on negotiable bonds and certificates of indebtedness by issuing state violates 14th Amend. due process where bonds and certificates are owned by person domiciled in another state and kept there. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
42. CONST. I, F	*East Ohio Gas Co.* v. *Tax Com. of Ohio*, 283 U.S. 465, 472 (1931)	*Pennsylvania Gas Co.* v. *Pub. Service Com.*, 252 U.S. 23 (1920)	Whether gas flowing through pipelines from outside state ceases to constitute interstate commerce and becomes subject to state excise tax when it passes into local distribution systems for delivery to customers. (yes)
43. STAT.	*Chicago & E.I.R. Co.* v. *Industrial Com. of Illinois*, 284 U.S. 296 (1932)	*Erie R. Co.* v. *Collins*, 253 U.S. 77 (1920); *Erie R. Co.* v. *Szary*, 253 U.S. 86 (1920)	Whether railway employee who suffered injury in oiling motor used to hoist coal into chute for locomotives was engaged in interstate transportation within coverage of FELA. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
44. CONST. I	*Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932)	*Long* v. *Rockwood*, 277 U.S. 142 (1928)	Whether royalties on copyrights and patents may be taxed by the states. (yes)
45. COM.	*Funk* v. *United States*, 290 U.S. 371, 373, 386 (1933); *See also*: *Hawkins* v. *United States*, 358 U.S. 74, 76 (1958)	*Stein* v. *Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix* v. *United States*, 219 U.S. 79 (1911); *Jin Fuey Moy* v. *United States*, 254 U.S. 189 (1920)	Whether in federal court the spouse of a criminal defendant is competent to testify on the defendant's behalf. (yes)
46. STAT.	*United States* v. *Hastings*, 296 U.S. 188, 194 (1935)	*United States* v. *Stevenson*, 215 U.S. 190 (1909)	Whether government can appeal from district court decision quashing an indictment upon an independent ground in addition to invalidity or construction of statute. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
47. CONST. I, C	*West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937)	*Adkins* v. *Children's Hospital of District of Columbia*, 261 U.S. 525 (1923); *Morehead* v. *N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)	Whether state regulation of minimum wages for women violates 14th Amend. substantive due process. (no)
48. CONST. I	*Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938)	*Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)	Whether profits of private party from operations under a government lease or contract may be subjected to nondiscriminatory tax by other governmental units. (yes)
49. CONST. L	*Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 69, 79 (1938)	*Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842)	Whether federal court exercising diversity jurisdiction must apply substantive law of state rather than federal common law. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
50. CONST. I	*Graves* v. *New York*, 306 U.S. 466 (1939)	*Dobbins* v. *Commissioners of Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector* v. *Day*, 11 Wall. (78 U.S.) 113 (1871); *N.Y. ex rel. Rogers* v. *Graves*, 299 U.S. 410 (1937); *Brush* v. *Commissioner*, 300 U.S. 352 (1937)	Whether income of government employees may be subject to nondiscriminatory income tax by other governmental units. (yes)
51. CONST. STAT. L, I	*Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939)	*Procter & Gamble Co.* v. *United States*, 225 U.S. 282 (1912)	Whether federal courts have jurisdiction to review "negative orders" of administrative agencies which refuse to direct conduct by a third person with respect to complainant. (yes)
52. CONST. I, W	*O'Malley* v. *Woodrough*, 307 U.S. 277 (1939)	*Evans* v. *Gore*, 253 U.S. 245 (1920); *Miles* v. *Graham*, 268 U.S. 501 (1925)	Whether federal government may impose nondiscriminatory federal

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			income taxation on income of federal judge. (yes)
53. CONST. I	*Madden* v. *Kentucky*, 309 U.S. 83 (1940)	*Colgate* v. *Harvey*, 296 U.S. 404 (1935)	Whether state statute imposing higher tax on its citizens' deposits in banks outside state than on deposits within states violates equal protection, or violates privileges and immunity clause by abridging right to carry on business outside state of residence. (no)
54. STAT.	*Helvering* v. *Hallock*, 309 U.S. 106 (1940)	*Helvering* v. *St. Louis Union Trust Co.*, 296 U.S. 39 (1935); *Becker* v. *St. Louis Union Trust Co.*, 296 U.S. 48 (1935)	Whether remainder interest in trust for wife created during lifetime of decedent, the corpus of which was to pass to decedent's wife if she

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			survived him but to revert to him if he survived, should be included in decedent's estate for tax purposes where wife survived. (yes)
55. CONST. I	*Tigner* v. *Texas*, 310 U.S. 141 (1940)	*Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902)	Whether state statute exempting agricultural activities from prohibition on conspiracies in restraint of trade violates equal protection. (no)
56. CONST. I	*United States* v. *Darby*, 312 U.S. 100 (1941)	*Hammer* v. *Dagenhart*, 247 U.S. 251 (1918)	Whether federal minimum wage and maximum hours restrictions on employers under FLSA are excluded from Congress' power under commerce clause as regulation of "production." (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
57. CONST. I, D	*United States* v. *Chicago, M. S. P. & P.R. Co.*, 312 U.S. 592 (1941)	*United States* v. *Lynah*, 188 U.S. 445 (1903) (in part); *United States* v. *Heyward*, 250 U.S. 633 (1919) (not recorded)	Whether federal government must compensate riparian owner for injury to structures between high and low water mark caused by government's raising of water level in navigable stream. (no)
58. STAT.	*Nye* v. *United States*, 313 U.S. 33 (1941)	*Toledo Newspaper Co.* v. *United States*, 247 U.S. 402 (1918)	Whether Congress, in the Act of March 2, 1831 (Section 268 of Judicial Code), limited the power of the courts to punish criminal contempt to misconduct within the vicinity of the court. (yes)
59. CONST. I	*California* v. *Thompson*, 313 U.S. 109 (1941)	*Di Santo* v. *Pennsylvania*, 273 U.S. 34 (1927)	Whether states are prohibited by commerce clause from nondiscrimi-

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			natory regulation of interstate transportation on matters of local concern, in absence of legislation of Congress. (no)
60. CONST. D	*United States* v. *Classic*, 313 U.S. 299, 317 (1941)	*Newberry* v. *United States*, 256 U.S. 232 (1921)	Whether party primary election for United States Congress is an election subject to Congressional regulation under Article I, Sections 2 and 4 of Constitution. (yes)
61. CONST. I	*Olsen* v. *Nebraska*, 313 U.S. 236 (1941)	*Ribnik* v. *McBride*, 277 U.S. 350 (1928); *Tyson & Brother* v. *Banton*, 273 U.S. 418 (1927); *Williams* v. *Standard Oil Co.*, 278 U.S. 235 (1929); *Morehead* v. *New York*, 298 U.S. 587 (1936)	Whether state statute limiting maximum compensation that employment agency could collect from applicable violated 14th Amend. substantive due process. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
62. CONST. I	*Alabama* v. *King & Boozer*, 314 U.S. 1 (1941)	*Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218 (1928); *Graves* v. *Texas Co.*, 298 U.S. 393 (1936)	Whether nondiscriminatory state sales taxes may be imposed on materials purchased by contractor in performing "cost-plus" contract for federal government. (yes)
63. STAT.	*Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941)	*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921)	Whether federal court, under Section 265 of Judicial Code, can stay proceeding in state court on the basis of prior adjudication of claim by federal court. (no)
64. CONST. C	*Edwards* v. *California*, 314 U.S. 160, 176-77 (1941)	*New York* v. *Miln*, 11 Pet. (36 U.S.) 102 (1837)	Whether state statute prohibiting bringing of indigent person into state violates commerce clause. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
65. CONST. I	*Graves* v. *Shmidlapp*, 315 U.S. 657 (1942)	*Wachovia Bank & Trust Co.* v. *Doughton*, 272 U.S. 567 (1926)	Whether state taxation of domiciliary's exercise of power of appointment of intangibles in trust, which he held under will of resident of another state, violated 14th Amend. due process. (no)
66. CONST. I	*State Tax Com.* v. *Aldrich*, 316 U.S. 174 (1942)	*First Nat. Bank* v. *Maine*, 284 U.S. 312 (1932)	Whether 14th Amend. prohibits state from imposing inheritance transfer tax on shares of stock in a corporation of that state where stockholder's domicile and stock itself were in another state at time of death. (no)
67. CONST. L, I	*Williams* v. *North Carolina*, 317 U.S. 287 (1942)	*Haddock* v. *Haddock*, 201 U.S. 562 (1906)	Whether full faith and credit clause requires decree of divorce granted

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			to a domiciliary in a proceeding consistent with due process to be treated as binding by courts of other states. (yes)
68. STAT.	*Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575 (1943)	*Johnson* v. *U.S. Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930)	Whether suits in Admiralty Act precludes suit against private corporation for maritime tort where corporation operates vessel owned by government agency and may have right of indemnity against government under contract. (no)
69. CONST. I	*Oklahoma Tax Com.* v. *United States*, 319 U.S. 598 (1943)	*Childers* v. *Beaver*, 270 U.S. 555 (1926)	Whether states may impose estate taxes on personal property and lands held by Indians. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
70. CONST. (L) (including reexamination of premises of earlier holding)	*West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943)	*Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940)	Whether First Amend. prohibits school children from being compelled to salute flag and pledge allegiance. (yes)
71. STAT.	*Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	*United R. & Electric Co.* v. *West*, 280 U.S. 234 (1930) (in part)	Whether annual depreciation, for ratemaking purposes under Natural Gas Act, is properly based on cost. (yes)
72. STAT.	*Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1944)	*Leeds & Catlin Co.* v. *Victor Talking Machine Co.* (No. 2), 213 U.S. 325 (1909) (limited)	Whether defense of misuse of patent to protect unpatented element from competition is available to contributory infringer in action for infringement of a combination patent. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
73. COM.	*Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944)	*Plamals* v. *Pinar Del Rio*, 277 U.S. 151 (1928) (in part)	Whether owner could be held liable in admiralty for injuries to seaman, based on unseaworthiness of vessel, even if unseaworthy condition was caused by negligence of ship's officers or fellow servants in maintaining vessel. (yes)
74. CONST. I	*Smith* v. *Allwright*, 321 U.S. 649 (1944)	*Grovey* v. *Townsend*, 295 U.S. 45 (1935)	Whether exclusion of Negroes from voting in party primary to select candidates for general election, pursuant to pary rule limiting membership of whites, was "state action" for purposes of 14th Amend. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
75. CONST. I	*United States* v. *South-Eastern Underwriters Asso.*, 322 U.S. 533 (1944)	*Paul* v. *Virginia*, 8 Wall. (75 U.S.) 168 (1869); *Hooper* v. *California*, 155 U.S. 648 (1895)	Whether engaging in insurance business is a transaction of commerce subject to regulation by Congress. (yes)
76. STAT.	*Girouard* v. *United States*, 328 U.S. 61 (1946)	*United States* v. *Schwimmer*, 279 U.S. 644 (1929): *United States* v. *Macintosh*, 283 U.S. 605 (1931): *United States* v. *Bland*, 283 U.S. 636 (1931)	Whether alien who is willing to take oath of allegiance and perform non-combatant service but is unwilling to bear arms for religious reasons may be admitted to citizenship. (yes)
77. CONST. I	*Angel* v. *Bullington*, 330 U.S. 183 (1947)	*David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489 (1912) (rendered obsolete by change in law)	Whether federal court sitting in diversity barred from entertaining case already adjudicated in state court and held barred by state statute. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
78. CONST. I	*Sherrer* v. *Sherrer*, 334 U.S. 343 (1948)	*Andrews* v. *Andrews*, 188 U.S. 14 (1903) (in part)	Whether full faith and credit precludes a collateral attack against a divorce decree on jurisdictional grounds by a party who participated in the divorce proceedings and had opportunity to raise jurisdictional issues, if courts of state that granted divorce would not allow collateral attack. (yes)
79. CONST. I	*Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *See also*: *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941)	*Adair* v. *United States*, 208 U.S. 161 (1908); *Coppage* v. *Kansas*, 236 U.S. 1 (1915)	Whether state right-to-work laws deny due process right under 14th Amend. by precluding employers from discriminating based on union membership. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
80. STAT.	*Commissioner* v. *Estate of Church*, 335 U.S. 632, 637 (1949)	*May* v. *Heiner*, 281 U.S. 238 (1930)	Whether corpus of trust properly included in estate for tax purposes where decedent who created trust had reserved income from trust property for life. (yes)
81. CONST. I	*United States* v. *Detroit*, 355 U.S. 466, 472 n.2 (1958)	*Macallen Co.* v. *Massachusetts*, 279 U.S. 620 (1929)	Whether state may include in income for purposes of tax measured by net income the interest earned from federal securities. (yes)
82. CONST. I	*Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 173 (1949)	*St. Louis* v. *Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co.* v. *Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co.* v. *Kentucky*, 202 U.S. 409 (1906)	Whether state ad valorem taxes imposed on foreign corporations operating barge lines on inland waters in interstate commerce, based on ratio of miles of line within state

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			to total line, violated 14th Amend. due process or commerce clause. (no)
83. CONST. I	*Oklahoma Tax Com.* v. *Texas Co.*, 336 U.S. 342 (1949)	*Choctaw, O. & G. R. Co. & Gulf R.R.* v. *Harrison*, 235 U.S. 292 (1914); *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916); *Howard* v. *Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co.* v. *Howard*, 248 U.S. 549 (1919); *Oklahoma ex rel. Oklahoma Tax Com.* v. *Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936)	Whether lessee of mineral rights in allotted and restricted Indian lands has constitutional immunity from payment of nondiscriminatory state production and excise taxes. (no)
84. STAT.	*Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949)	*Hust* v. *Moore-McCormack Lines, Inc.*, 328 U.S. 707 (1946)	Whether agent employed under wartime general agency agreement to manage ship owned by United States liable

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CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			under Jones Act to crew members who suffered injury from negligence of master and officers. (no)
85. CONST. L	*United States* v. *Rabinowitz*, 339 U.S. 56, 66, 85 (1950), *overruled*, *Chimel* v. *California*, 395 U.S. 752 (1969)	*Trupiano* v. *United States*, 334 U.S. 699 (1948)	Whether search of entire room where defendant arrested was reasonable "search incident to lawful arrest" under Fourth Amend. regardless of practicability of obtaining warrant. (yes)
86. STAT.	*Darr* v. *Burford*, 339 U.S. 200, 208-10 (1950), *overruled*, *Fay* v. *Noia*, 372 U.S. 391 (1963)	*Wade* v. *Mayo*, 334 U.S. 672 (1948)	Whether habeas petitioner required to petition Supreme Court for certiorari in order to exhaust all available remedies on direct review. (yes)

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CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
87. CONST. C, I	*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952)	*Mutual Film Corp.* v. *Idustrial Com. of Ohio*, 236 U.S. 230 (1915)	Whether motion pictures protected by First Amend. against state censorship. (yes)
88. CONST. C	*Brown* v. *Board of Education*, 347 U.S. 483, 491, 494-495 (1954)	*Cumming* v. *Board of Education*, 175 U.S. 528 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78 (1927)	Whether "separate but equal" public education on basis of race violates equal protection. (yes)
89. CONST. (no reason given but (I), see Brown)	*Gayle* v. *Browder*, 352 U.S. 903 (1956)	*Plessy* v. *Ferguson*, 163 U.S. 537 (1896) (also substantially overruled by *Brown* v. *Board of Education*, 347 U.S. 483 (1954))	Whether "separate but equal" public transportation on basis of race violates equal protection. (yes)
90. CONST. I	*Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 419 (1957); *See also*, *Armstrong* v. *Armstrong*, 350 U.S. 568, 581 (1956)	*Thompson* v. *Thompson*, 226 U.S. 551 (1913)	Whether state judgment violated full faith and credit in awarding alimony to wife after divorce had been granted to husband in another state in ex parte proceed-

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			ing where wife not subject to court's jurisdiction. (no)
91. CONST. I	*United States* v. *Raines*, 362 U.S. 17, 24-26 (1960)	*United States* v. *Reese*, 92 U.S. 214, 220-221 (1876); *Barney* v. *New York*, 193 U.S. 430 (1904)	Whether court entitled to consider unconstitutionality of criminal statute as to persons or situations not before the court where statute is clearly constitutional as applied (no); whether action by state officials is "state action" even if not authorized by state law. (yes)
92. CONST. L, I	*Elkins* v. *United States*, 364 U.S. 206, 210, 212-213, 233 (1960); *Rios* v. *United States*, 364 U.S. 253 (1960)	*Weeks* v. *United States*, 232 U.S. 383, 398 (1914) (in part); *Center* v. *United States*, 267 U.S. 575 (1925); *Byars* v. *United States*, 273 U.S. 28, 33 (1927) (in part)	Whether evidence obtained by state officers in search which would have violated defendant's Fourth Amend. rights if conducted by federal

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			officers must be excluded upon timely objection in federal criminal trial. (yes)
93. STAT.	*James* v. *United States*, 366 U.S. 213, 215, 221, 223, 241 (1961)	*Commissioner* v. *Wilcox*, 327 U.S. 404 (1946)	Whether embezzled money is taxable income of the embezzler in the year of embezzlement. (yes)
94. CONST. L, I	*Mapp* v. *Ohio*, 367 U.S. 643, 653-655 (1961); *See also Ker* v. *California*, 374 U.S. 23, 45, 53, 59 (1963)	*Wolf* v. *Colorado*, 338 U.S. 25 (1949) (in part); *Irvine* v. *California*, 347 U.S. 128 (1954) (in part)	Whether evidence obtained by searches and seizures in violation of Fourth Amend. is admissible in criminal trial in state court. (no)
95. CONST. I	*Baker* v. *Carr*, 369 U.S. 186, 277, 280 (1962)	*Colegrove* v. *Green*, 328 U.S. 549 (1946) (in part); *Colegrove* v. *Barrett*, 330 U.S. 804 (1947)	Whether challenge on equal protection grounds to apportionment of state legislature among counties is justiciable cause of action. (yes)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
96. STAT.	*Smith* v. *Evening News Asso.*, 371 U.S. 195, 199 (1962); *See also Truck General Drivers, W. & H.* v. *Riss & Co.*, 372 U.S. 517, 520 (1963)	*Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 344 U.S. 437 (1955) (in part)	Whether courts have jurisdiction under § 301 of the Labor Management Relations Act over cases involving breach of individual employee rights contained in collective bargaining contract. (yes)
97. STAT.	*Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 552, 554 (1963)	*Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178 (1952) (in part)	Whether Supreme Court may review erroneous assertion of jurisdiction by state court to enter a preliminary injunction in a labor dispute. (yes)
98. CONST. I	*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)	*Betts* v. *Brady* 316 U.S. 455 (1942)	Whether indigent defendant entitled under Sixth and Fourteenth Amends. to appointed counsel in state felony trial. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
99. CONST. I	*Gray* v. *Sanders*, 372 U.S. 368, 383 (1963)	*Cook* v. *Fortson* and *Turman* v. *Duckworth*, 329 U.S. 675 (1946); *South* v. *Peters*, 339 U.S. 276 (1950); *Cox* v. *Peters*, 342 U.S. 936 (1952); *Hartsfield* v. *Sloan*, 357 U.S. 916 (1958)	Whether county unit system in state primary violates equal protection because it fails to follow standard of one-person, one-vote. (yes)
100. STAT.	*Fay* v. *Noia*, 372 U.S. 391, 435 (1963)	*Darr* v. *Burford*, 339 U.S. 200 (1950) (in part)	Whether habeas petitioner first required to seek certiorari in Supreme Court from adverse decision. (no)
101. CONST. I	*Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963)	*Adams* v. *Tanner*, 244 U.S. 590 (1917)	Whether statute prohibiting engaging in debt adjusting business vio-
102. CONST. I	*Wesberry* v. *Sanders*, 376 U.S. 1 (1964)	*Colegrove* v. *Green*, 328 U.S. 549 (1946)	Whether challenge to apportionment of Congressional districts under one-man, one-vote principle is a justiciable cause of action. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			lates substantive due process. (no)
103. CONST. I	*Schneider* v. *Rusk*, 377 U.S. 163, 170 (1964)	*Mackenzie* v. *Hare*, 239 U.S. 299 (1915)	Whether deprivation of citizenship for naturalized citizens who reside in country of origin violates due process where no restriction on foreign residence applies to native-born citizens. (yes)
104. CONST. I	*Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964)	*Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Adamson* v. *California*, 332 U.S. 46 (1947)	Whether Fifth Amend. privilege against self-incrimination applies to states through 14th Amend. (yes)
105. CONST. I	*Murphy* v. *Waterfront Com. of New York Harbor*, 378 U.S. 52, 57, 77 (1964)	*Jack* v. *Kansas*, 199 U.S. 372 (1905); *United States* v. *Murdock*, 284 U.S. 141 (1931); *U.S.* v. *Murdock*, 290 U.S. 389 (1933); *Feldman* v. *United*	Whether state witness may be compelled to give testimony which may incriminate him under federal law where he has

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
		States, 322 U.S. 487 (1944); *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958)	not been granted immunity from federal use of testimony; whether federal gov't. may use such evidence. (no)
106. CONST. L, I	*Jackson* v. *Denno*, 378 U.S. 368, 391 (1964)	*Stein* v. *New York*, 346 U.S. 156 (1953)	Whether court may receive confession into evidence and allow jury deciding merits of case also to determine voluntary character where "fair question" of voluntariness exists. (no)
107. CONST. L	*Escobedo* v. *Illinois*, 378 U.S. 478, 491-492 (1964)	*Crooker* v. *California*, 357 U.S. 433 (1958); *Cicenia* v. *Lagay*, 357 U.S. 504 (1958)	Whether confession admissible when obtained after suspect in police custody has requested and been denied assistance of counsel. (no)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
108. CONST. I	*McLaughlin* v. *Florida*, 379 U.S. 184 (1964)	*Pace* v. *Alabama*, 106 U.S. 583 (1883)	Whether cohabitation statute that applies only to interracial relationships violates equal protection. (yes)
109. CONST. I	*Pointer* v. *Texas*, 380 U.S. 400, 406 (1965)	*West* v. *Louisiana*, 194 U.S. 258 (1904)	Whether right of confrontation and cross-examination in 6th Amend. applies to state through 14th Amend. (yes)
110. CONST. (I)	*Gold* v. *Di Carlo*, 380 U.S. 520 (1965)	*Tyson & Brother—United Theatre Ticket Office, Inc.*, v. *Banton*, 273 U.S. 418 (1927)	Whether prohibition on scalping tickets violates 14th Amend. substantive due process. (no)
111. STAT.	*Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965)	*Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962)	Whether three-judge court requirement applies in Supremacy Clause preemption cases where constitutional issue apparent

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			without statutory construction. (no)
112. STAT.	*Harris* v. *United States*, 382 U.S. 162 (1965)	*Brown* v. *United States*, 359 U.S. 41 (1959)	Whether criminal contempt may be punished summarily without notice and a hearing in the absence of exceptional circumstances posing threat to judicial procedures. (no)
113. CONST. C, I	*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966)	*Breedlove* v. *Shuttles*, 302 U.S. 277 (1937); *Butler* v. *Thompson*, 341 U.S. 937 (1951)	Whether poll tax violates equal protection. (yes)
114. CONST. I	*Spevak* v. *Klein*, 385 U.S. 511 (1967)	*Cohen* v. *Hurley*, 366 U.S. 177 (1961)	Whether privilege against self-incrimination applies to lawyers in state disciplinary proceedings. (yes)
115. CONST. F	*Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967)	*Adler* v. *Board of Education*, 342 U.S. 485 (1952)	Whether public employment may be conditioned

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			on surrender of constitutional rights under First Amend. that government may not directly abridge. (no)
116. CONST. I, D	*Afroyim* v. *Rusk*, 387 U.S. 253 (1967)	*Perez* v. *Brownell*, 356 U.S. 44 (1958)	Whether Congress has power to divest a person of United States citizenship absent voluntary renunciation. (no)
117. CONST. I, L	*Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294 (1967)	*Gouled* v. *United States*, 255 U.S. 298 (1921)	Whether search may be used to secure evidence that does not constitute instrumentalities, fruits or contraband of crime. (yes)
118. CONST. I, D	*Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967)	*Frank* v. *Maryland*, 359 U.S. 360 (1959)	Whether Fourth Amend. requires warrant for government inspection of personal residence to

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			enforce housing and health code. (yes)
119. CONST. I	*Berger* v. *New York*, 388 U.S. 41 (1967)	*Olmstead* v. *United States*, 277 U.S. 438 (1928) (in part)	Whether electronic wire surveillance of telephone conversation is a search within meaning of 14th Amend. (yes)
120. CONST. I	*Katz* v. *United States*, 389 U.S. 347 (1967)	*Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 316 U.S. 129 (1942)	Whether fourth Amendment violation requires a physical intrusion or "trespass." (no)
121. CONST. I	*Marchetti* v. *United States*, 390 U.S. 39 (1968)	*Lewis* v. *United States*, 348 U.S. 419 (1955); *United States* v. *Kahriger*, 345 U.S. 22 (1953)	Whether statutory requirements of occupational tax and registration imposed on wagering violate privilege against self-incrimination. (yes)
122. STAT.	*Peyton* v. *Rowe*, 391 U.S. 54 (1968)	*McNally* v. *Hill*, 293 U.S. 131 (1934)	Whether prisoner may challenge on federal habeas consecutive senten-

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			ces that he has not yet begun to serve. (yes)
123. CONST. I	*Bruton* v. *United States*, 391 U.S. 123 (1968)	*Delli Paoli* v. *United States*, 352 U.S. 232 (1957)	Whether admission of co-defendant's confession in joint trial with instructions to disregard as to defendant violated right of confrontation and cross-examination. (yes)
124. CONST. I, F	*Duncan* v. *Louisiana*, 391 U.S. 145 (1968)	*Maxwell* v. *Dow*, 176 U.S. 581 (1900)	Whether right of trial by jury applies to state criminal proceedings to same extent as federal ones. (yes)
125. STAT.	*Carafas* v. *La Vallee*, 391 U.S. 234 (1968)	*Parker* v. *Ellis*, 362 U.S. 574 (1960)	Whether release of prisoner from custody defeats jurisdiction to adjudicate federal habeas claim. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
126. STAT.	*Lee* v. *Florida*, 392 U.S. 378 (1968)	*Schwartz* v. *Texas*, 344 U.S. 199 (1952)	Whether telephone communications unlawfully intercepted in violation of Section 605 of the communications Act can be admitted in evidence at state criminal trials. (no)
127. CONST. I	*Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441-443 (1968)	*Hodges* v. *United States*, 203 U.S. 1 (1906)	Whether 13th Amend. empowers Congress to outlaw not only slavery itself but also all "badges and incidents" of slavery. (yes)
128. CONST. I	*Moore* v. *Ogilvie*, 394 U.S. 814 (1969)	*MacDougall* v. *Green*, 335 U.S. 281 (1948)	Whether nominating procedure for elections which gives disproportionate power to less populous counties violates equal protection. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
129. CONST. I	*Bradenburg* v. *Ohio*, 395 U.S. 444 (1969)	*Whitney* v. *California*, 274 U.S. 357 (1927)	Whether criminal syndicalism statute punishing mere advocacy of violent means to achieve political or economic change violates First. Amend. (yes)
130. CONST. L, I, W	*Chimel* v. *California*, 395 U.S. 752 (1969)	*Harris* v. *United States*, 331 U.S. 145 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56 (1950)	Whether search incident to arrest can extend beyond person and areas within his immediate control. (no)
131. CONST. I	*Benton* v. *Maryland*, 395 U.S. 784 (1969)	*Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Brock* v. *North Carolina*, 344 U.S. 424 (1953)	Whether double jeopardy prohibition applies to states through 14th Amend. (yes)
132. CONST. I	*Ashe* v. *Swenson*, 397 U.S. 436 (1970)	*Hoag* v. *New Jersey*, 356 U.S. 464 (1958)	Whether double jeopardy embodies collateral estoppel requirement. (yes)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
133. STAT.	*Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970)	*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962)	Whether federal district court can enjoin strike in breach of no-strike clause in collective bar gaining agreement containing binding arbitration provisions. (yes)
134. CONST. I	*Price* v. *Georgia*, 398 U.S. 323, 329-330 (1970)	*Brantley* v. *Georgia*, 217 U.S. 284 (1910)	Whether double jeopardy prohibits retrial on greater offense following successful appeal of conviction on lesser included offense. (yes)
135. COM.	*Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970)	*The Harrisburg*, 119 U.S. 199 (1886)	Whether maritime law affords a cause of action for wrongful death. (yes)
136. CONST. F	*Williams* v. *Florida*, 399 U.S. 78 (1970)	*Thompson* v. *Utah*, 170 U.S. 343 (1898) (in part); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Rassmussen* v. *United States*,	Whether guarantee of jury trial requires 12-person jury. (no)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
		197 U.S. 516 (1905) (in part); *Catham* v. *U.S.*, 281 U.S. 276 (1930)	
137. COM.	*Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	*Triplett* v. *Lowell*, 297 U.S. 638 (1936)	Whether determination of patent invalidity can be res judicata in subsequent litigation against different defendant for infringement. (yes)
138. STAT. CONST. I, L	*Perez* v. *Campbell*, 402 U.S. 637 (1971)	*Kesler* v. *Dept. of Public Safety*, 369 U.S. 153 (1962)	Whether state statute providing that discharge in bankruptcy does not relieve debtor of obligations under financial responsibility laws is unconstitutional as conflicting with Bankruptcy Act. (yes)
139. STAT.	*Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)	*Collins* v. *Hardyman*, 341 U.S. 651 (1951) (in part)	Whether 42 U.S.C. § 1985(3) reaches private

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			conspiracies in the absence of state action. (yes)
140. CONST. I	*Dunn* v. *Blumstein*, 405 U.S. 330, 337 n.7 (1972)	*Pope* v. *Williams*, 193 U.S. 621 (1904) (in part)	Whether duration of residence requirements for voting violate equal protection. (yes)
141. STAT. CONST. I	*Andrews* v. *Louisiana & N.R. Co.*, 406 U.S. 320 (1972)	*Moore* v. *Illinois C. R. Co.*, 312 U.S. 630 (1941)	Whether railroad employee allowed to file state court action challenging discharge where he has not exhausted grievance and arbitration procedures of Railway Labor Act. (no)
142. CONST. I, D	*Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)	*Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928)	Whether subjecting corporations to ad valorem taxes on personal property where individuals are exempt from such

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			taxes violates equal protection. (no)
143. STAT.	*Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973)	*Ahrens* v. *Clark*, 335 U.S. 188 (1948)	Whether habeas corpus petitions must be brought in district of the petitioner's confinement. (no)
144. CONST. L, I, D	*Miller* v. *California*, 413 U.S. 15 (1973)	*A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966)	Whether sexual materials can be treated as obscene under First Amend. even if not "utterly without redeeming social value." (yes)
145. CONST. I	*In re Griffiths*, 413 U.S. 717 (1973)	*Clarke* v. *Deckebach*, 274 U.S. 392 (1927)	Whether state's exclusion of aliens from practice of law violates equal protection. (yes)
146. CONST. I	*North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973)	*Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1929)	Whether state requirement that a pharmacy be owned or controlled by

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			pharmacists violates substantive due process. (no)
147. CONST. F	*Edelman* v. *Jordan*, 415 U.S. 651, 670-71 (1974)	*Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (in part); *State Dept. of health & Rehabilitation Services* v. *Zarate*, 407 U.S. 918 (1972); *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U.S. 809 (1973)	Whether 11th Amend. prohibits retroactive award of monetary benefits to private parties against state for violation of federal law. (yes)
148. CONST. (no reason given apart from superficially differing circumstances)	*Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974)	*Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (in part) (not formally overruled)	Whether sequestration of property on ex parte application of creditor without prior notice or opportunity for hearing violates due process. (no)
149. CONST. C	*Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *see also Duren* v. *Missouri*, 439 U.S. 357 (1978)	*Hoyt* v. *Florida*, 368 U.S. 57 (1971) (in effect)	Whether automatic exemption of women from jury service violates fair cross section requirement of Sixth Amend. (yes)

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
150. COM.	*United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	*Schooner Catharine* v. *Dickinson*, 17 How. (58 U.S.) 170 (1854)	Whether comparative fault should replace equal division of liability for property damages among parties guilty of contributory fault in admiralty. (yes)
151. CONST. W, F, I	*Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976)	*Low* v. *Austin*, 13 Wall. (80 U.S.) 29 (1871)	Whether state's nondiscriminatory ad valorem property tax as applied to imported goods violates Import-Export Clause. (no)
152. COM.	*Dove* v. *United States*, 423 U.S. 325 (1976)	*Durham* v. *United States*, 401 U.S. 481 (1971)	Whether petitioner's death pending certiorari requires dismissal of petition to review criminal conviction. (yes)
153. CONST. I	*Hudgens* v. *NLRB*, 424 U.S. 507 (1976)	*Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968)	Whether First Amend. confers right to picket employer within pri-

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			vately owned shopping center. (no)
154. CONST. I	*Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)	*Valentine* v. *Chrestensen*, 316 U.S. 52 (1942)	Whether "commercial speech" enjoys First Amend. protection. (yes)
155. CONST. L	*National League of Cities* v. *Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia* v. *San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985)	*Maryland* v. *Wirtz*, 392 U.S. 183 (1968)	Whether "traditional government functions" of State and local governments are exempt from federal regulation pursuant to commerce clause. (yes)
156. STAT. CONST. I	*International Assoc. of Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976)	*UAWA* v. *WERB*, 336 U.S. 245 (1949)	Whether federal labor policy preempts state authority to enjoin union and its members from engaging in partial strike. (yes)
157. CONST. I	*City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976)	*Morey* v. *Doud*, 354 U.S. 457 (1957)	Whether "grandfather provision" in state eco-

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			nomic regulation violates equal protection. (no)
158. CONST. I	*Gregg* v. *Georgia*, 428 U.S. 153, 195 n.47 (1976)	*McGautha* v. *California*, 402 U.S. 183 (1971)	Whether due process requires that juries be provided with standards to guide death penalty decision. (yes)
159. CONST. I	*Craig* v. *Boren*, 429 U.S. 190, 210 n.23 (1976)	*Goesaert* v. *Cleary*, 335 U.S. 464 (1948)	Whether gender-based differential in state restrictions on age for purchase of alcoholic beverages violates equal protection. (yes)
160. CONST. I	*G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 355-56 (1977)	*Boyd* v. *United States*, 116 U.S. 616 (1886) (in part)	Whether Fourth Amend. warrant requirement applies to intrusions into privacy for enforcement of tax laws. (yes)
161. COM.	*Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)	*Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973)	Whether ownership of riverbed lands in navigable rivers that are not

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			interstate boundaries should be determined by state law rather than federal common law. (yes)
162. CONST. L, I	*Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977)	*Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951)	Whether tax on privilege of doing business in a state is prohibited when applied to interstate commerce. (no)
163. CONST. I, F	*Trimble* v. *Gordon*, 430 U.S. 762 (1977)	*Labine* v. *Vincent*, 401 U.S. 432 (1971)	Whether state law allowing illegitimate children to inherit by interstate succession only through their mothers violated equal protection. (yes)
164. STAT.	*Continental T.V.* v. *GTE Sylvania*, 433 U.S. 36, 58 (1977)	*United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)	Whether retail location restrictions constitute a per se violation of Section 1 of the Sherman Act. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
165. CONST. I, W	*Shaffer* v. *Heitner*, 433 U.S. 186 (1977)	*Pennoyer* v. *Neff*, 95 U.S. 714 (1878)	Whether jurisdiction can be based on presence of property within forum without regard to "minimum contacts" needed for personal jurisdiction. (no)
166. CONST. I	*Dept. of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978)	*Puget Sound Stevedoring Co.* v. *Tax Com.*, 302 U.S. 90 (1937); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)	Whether state business and occupations tax violates commerce clause by taxing interstate commerce activity of Stevedoring within state. (no)
167. STAT.	*Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978)	*Monroe* v. *Pape*, 365 U.S. 167 (1961) (in part); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) (in part); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973) (in part)	Whether local governments and municipalities are immune from suit under 42 U.S.C. § 1983. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
168. CONST. I (including reexamination of premises of earlier holding)	*Burks* v. *United States*, 437 U.S. 1 (1978)	*Bryan* v. *United States*, 338 U.S. 552 (1950) (in part); *Yates* v. *United States*, 354 U.S. 298 (1957) (in part); *Foreman* v. *United States*, 361 U.S. 416 (1960) (in part)	Whether defendant by having moved for new trial, waives right to judgment of acquittal on ground that reviewing court found insufficient evidence. (no)
169. CONST. I, C	*United States* v. *Scott*, 437 U.S. 82 (1978)	*United States* v. *Jenkins*, 420 U.S. 358 (1975); *United States* v. *Wilson*, 420 U.S. 332 (1975)	Whether government appeal from dismissal of indictment on defendant's motion is barred by double jeopardy. (no)
170. CONST. I, C	*Duren* v. *Missouri*, 439 U.S. 357, 370-76 (1979)	*Hoyt* v. *Florida*, 368 U.S. 57 (1961)	Whether exemption of women from jury service on request violates "fair cross section" requirement of Sixth Amend. (yes)
171. CONST. I	*Hughes* v. *Oklahoma*, 441 U.S. 322, 614-17 (1979)	*Geer* v. *Connecticut*, 161 U.S. 519 (1896)	Whether wild game is an article of commerce sub-

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
			ject to federal regulation under Commerce Clause. (yes)
172. COM.	*Trammel* v. *United States*, 445 U.S. 40 (1980)	*Hawkins* v. *United States*, 358 U.S. 74 (1958)	Whether defendant's consent required for spouse to testify against defendant. (no)
173. CONST. I	*United States* v. *Salvucci*, 448 U.S. 83 (1980)	*Jones* v. *United States*, 362 U.S. 257 (1960)	Whether defendants charged with crimes of possession may claim benefits of exclusionary rule where their own Fourth Amend. rights are not violated. (no)
174. CONST. I, L, W	*Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981)	*Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922)	Whether state severance tax exempt from Commerce Clause review because it is imposed before goods enter the stream of interstate commerce. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
175. CONST. F, D (overturning recent decision)	*United States* v. *Ross*, 456 U.S. 798, 824-25 (1982)	*Robbins* v. *California*, 453 U.S. 420 (1981)	Whether police who have probable cause to conduct warrantless search of an automobile may search entire vehicle's contents, including containers and packages. (yes)
176. CONST. I, F	*Sporhase* v. *Nebraska*, 458 U.S. 941 (1982)	*Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908)	Whether ground water is an article of commerce subject to federal regulation under Commerce Clause. (yes)
177. CONST. L, I, W, D	*Illinois* v. *Gates*, 462 U.S. 213 (1983)	*Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969)	Whether determination of probable cause for search based on informant's tip turns on "totality of the circumstances" rather than two-pronged "knowledge" and "veracity" test. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
178. CONST. I	*Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984)	*Rolston* v. *Missouri Fund Comm'rs.*, 120 U.S. 390 (1887) (in part); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) (in part); *Atchison, T. & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912) (in part); *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1917) (in part); *Johnson* v. *Lankford*, 245 U.S. 541 (1918) (in part); Numerous other cases fall more or less under the Pennhurst doctrine. See 465 U.S. 109-111 nn. 17-21, 117-121 (maj. op.), and id., 130-37, 159-163, 165-166 nn.50 & 52 (dissent) (listing 28 cases)	Whether 11th Amend. prohibits federal courts from granting injunctive relief against state officials for violations of state law, including state claims based on pendent jurisdiction. (yes)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
179. CONST. I	*United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)	*Coffey* v. *United States*, 116 U.S. 436 (1886)	Whether double jeopardy or collateral estoppel bars civil forfeiture proceeding following acquittal on related criminal charges. (no)
180. CONST. I	*Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984)	*Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945)	Whether assessment of personal property tax on imported fibers in original packages for future manufacturing use violates Import-Export Clause. (no)
181. STAT.	*Cooperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 760-62, 777 (1984)	*United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (in part); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948); *Kiefer-Stewart Co.* v.	Whether a corporation and its wholly owned subsidiary can engage in a "conspiracy" under Section 1 of the Sherman Act. (no)

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		Jos. E. Seagram & Sons, 340 U.S. 211 (1951)	
182. CONST. L, I	*Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	*National League of Cities* v. *Usery*, 426 U.S. 833 (1976)	Whether "traditional governmental functions" of state and local governments are exempt from federal regulation pursuant to Commerce Clause. (no)
183. CONST. I	*United States* v. *Miller*, 471 U.S. 130 (1985)	*Ex parte Bain*, 121 U.S. 1 (1887) (in part)	Whether narrowing of an indictment is an "amendment" that renders indictment void. (no)
184. CONST. I	*Daniels* v. *Williams*, 474 U.S. 327 (1986)	*Parratt* v. *Taylor*, 451 U.S. 527 (1981) (in part)	Whether lack of due care by state official can constitute deprivation of life, liberty or property under 14th Amend. (no)
185. CONST. I	*Batson* v. *Kentucky*, 476 U.S. 79 (1986)	*Swain* v. *Alabama*, 380 U.S. 202 (1965) (in part)	Whether equal protection prohibits prosecutor

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			from using peremptory challenges to remove potential jurors solely on account of their race. (yes)
186. CONST. I	*Attorney-General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986)	*August* v. *Bronstein*, 417 U.S. 901 (1974)	Whether prior residence requirement for civil service preference violates equal protection. (yes)
187. CONST. I	*Puerto Rico* v. *Branstad*, 107 S.Ct. 2802, 2807-10 (1987)	*Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66 (1861) (in part)	Whether federal courts have power to require performance of the duty of state officers to honor a fugitive extradition warrant from another state. (yes)
188. CONST. I	*Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810 (1987)	*General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) (in part)	Whether "multiple activities exemption" in business and occupations tax creating distinctions be-

CATEGORY	OVERRULING CASE	OVERRULED CASE(S)	ISSUE
			tween in-state and out-of-state status violates commerce clause. (yes)
189. CONST. I	*Welch* v. *State Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S. Ct. 2941 (1987)	*Parden* v. *Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964)	Whether 11th Amend. prohibits suits by state resident against state under FELA and Jones Act. (yes) (plurality opinion)
190. CONST. I, L	*Solorio* v. *United States*, 483 U.S. 435, 107 S. Ct. 2924 (1987)	*O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Relford* v. *Commandant*, 401 U.S. 355 (1971)	Whether military tribunal can try serviceman for crime without service connection. (yes)
191. STAT.	*Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133 (1988)	*Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449 (1935)	Whether denial of stay of federal case sought because of pendency of related state suit is immediately appealable. (no)

CATEGORY	*OVERRULING CASE*	*OVERRULED CASE(S)*	*ISSUE*
192. CONST. I	*South Carolina* v. *Baker*, 108 S. Ct. 1355 (1988)	*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)	Whether interest on state and local bonds is constitutionally immune from federal taxation. (no)

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,

Appellants,

—v.—

REPRODUCTIVE HEALTH SERVICES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CATHOLICS FOR A FREE CHOICE, CHICAGO CATHOLIC WOMEN, NATIONAL COALITION OF AMERICAN NUNS, WOMEN IN SPIRIT OF COLORADO TASK FORCE, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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McCartney, "Some Roman Catholic Concepts and Their Implications for the Ontological Status of the Unborn" in Abortion and the Status of the Fetus (Bondeson, et al. eds. 1984).....10

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INTEREST OF AMICI

This brief amici curiae is submitted in support of appellees Reproductive Health Services, Inc. et al. By letters filed with the Clerk of the Court, appellants and appellees have consented to the filing of this brief.

Amici submit this brief limited to the question of the constitutionality and moral significance of Sec. 1.205 of the Missouri statute, which declares, as a matter of civil law, inter alia:

(1) The life of each human being begins at conception;

(2) Unborn children have protectable interests in life, health, and well-being.

Amici are individuals and organizations of persons of the Catholic faith who are committed to principles of religious liberty

and constitutional privacy. The religious and moral beliefs and values of amici, which are deeply rooted in Catholic theology, include the beliefs that the abortion decision is a highly personal one made in the exercise of conscience, informed by an individual's religious and moral teachings and values, and that the individual woman's conscience is the final arbiter of any abortion decision. Amici recognize that other religious faiths permit, counsel and even mandate abortion in some circumstances. Amici strongly believe that a woman's decision about childbearing must be free of government burden, interference or coercion.

Amici believe that freedom of religious belief and conscience are protected by the constitutional doctrines of religious liberty and privacy which mandate invalidation of Sec. 1.205. The United States Constitu-

tion, as consistently interpreted by this Court, expressly denies to civil government the power to decide what is correct in debates over moral or religious values.

Amici strongly oppose reconsideration or overruling of Roe v. Wade, 410 U.S. 113 (1973). The Constitutional principles of privacy and neutrality enunciated in Roe are sound and deserving of judicial respect. There are no medical advances or biological facts which compel reconsideration of Roe. Nor do the plethora of religious arguments advanced in support of appellants suggest a need for reconsideration of Roe. In Roe, this Court found that the question of beginning of personhood was not amenable to legislative or judicial resolution:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at

> any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.
>
> It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question.

410 U.S. at 159.

Today, as in 1973, the question of whether abortion is morally right or wrong in particular circumstances is a matter which involves competing claims based on divergent moral and religious beliefs. The disciplines of medicine, philosophy and theology remain unable to arrive at a consensus on the question of when life begins. Roe, 410 U.S. at 159. The virulent theological and policy debate over the definition and value to be imputed to prenatal life underscores the religious or metaphysical nature of the inquiry. The State of Missouri cannot by legislative

fiat put an end to the debate over abortion, as evidenced by the plethora of briefs filed in this case. The adoption by government of one competing religious viewpoint over others which are equally sincere, and equally rooted in serious theological tradition, violates the Constitution's prohibition to the states against taking sides in such religious and moral controversies.

SUMMARY OF ARGUMENT

There is no constant teaching in Catholic theology on the commencement of personhood. At the core of the Roman Catholic belief system are the tenets that the question of personhood is spiritual, not scientific, and that personhood commences upon the infusion of the soul into the body. For many centuries Catholic theologians, including Thomas Aquinas, held that infusion of the soul

is possible only when the embryo begins to show human form, i.e., a point after conception. Today a diversity opinion among committed Catholics on the subject of abortion.

Catholic tradition teaches probabilism as a method of moral decision-making. The teaching of Aquinas and others, and the scientific evidence regarding fetal development provide "good and solid reasons" for believing that the early embryo is not ensouled and thus not a person. These views are solidly rooted in Catholic theology and deeply held. Further, Catholic tradition and theology teach that on issues involving moral decision-making the conscience of the individual is supreme, and that once a conscientious decision is reached persons must be permitted to act in accordance with his or her conscience, especially on religious matters.

The right of reproductive autonomy is essential to the moral independence of women. The burdens of unwanted pregnancy fall entirely on the pregnant woman, affecting her health, her ability to provide care for her family and her ability to participate in society.

Constitutional mandates of privacy and religious neutrality require government to be completely neutral in the face of competing religious beliefs and claims of moral conscience. Sec. 1.205 is profoundly inconsistent with this Court's First Amendment decisions. In Roe v. Wade, 410 U.S. 113 (1973), this Court recognized that the question of the beginning of personhood is a religious and moral inquiry. Sec. 1.205 attempts to coerce uniformity on the subjects of fetal personhood and the morality of abortion. The First Amendment protects the exercise of conscience

in daily life. The right of reproductive choice is a fundamental right which the Constitution protects from the "vicissitudes of political controversy."

This Court's formulation of the right of privacy in reproductive decision-making underscores the primacy of individual decision-making.

I.

THERE IS NO CONSTANT TEACHING IN CATHOLIC THEOLOGY ON THE COMMENCEMENT OF PERSONHOOD

Many faiths hold as a matter of theological truth that abortion is permissible or even mandated in certain circumstances.[1] Most religions, including the Roman Catholic Church, have not defined the moment when

[1] Amici respectfully refer this Court to the brief amici curiae filed by the Religious Coalition for Abortion Rights et al. in support at appellees.

personhood begins. There is no scriptural evidence of divine revelation on the question of the beginning of personhood.[2] There is no reference to abortion in the New Testament of the Bible. In the Old Testament, Exodus 21:22-25 indicates that under Hebrew law the fetus was not a rights-bearing individual.[3]

The finding contained in Sec. 1.205 that a full rights-bearing person exists from the moment of conception is not now, nor has

[2] The Sacred Congregation for the Doctrine of Faith confirmed this observation in its Declaration on Abortion, n. 5 (1975): "The authors of Scripture do not make any philosophical observations on when life begins . . . ."

[3] That passage states that if two men are fighting and wound a pregnant woman, they shall have to pay her husband a fine if she miscarries, but they will have to give a life for her life if she dies. While this passage is obviously not a reference to voluntary abortion, it clearly establishes that a fetus was not equivalent to a person. If the fetus possessed the degree of personhood conferred by the Missouri statute, the two fighting men would have to give a life, not a fine, for the miscarried fetus.

it ever been the constant teaching of the Roman Catholic Church. Historically the Roman Catholic Church has been indifferent to the question of the beginning of personhood. The official teaching of the Roman Catholic Church on prenatal life has not been uniform:

> Many people believe that the Roman Catholic Church's opposition to abortion stems from its conviction that a new human person exists from the first moment of conception and that this newly formed person has as much a right to exist as anyone else. It is clear that this is not now, nor ever has been, official church teaching on the matter.

McCartney, "Some Roman Catholic Concepts of Person and Their Implications for the Ontological Status of the Unborn", in Abortion and the Status of the Fetus 313 (Bondeson et al. eds. 1984) (emphasis added).

Catholic tradition has always held that the question of personhood is spiritual, not scientific. The Sacred Congregation for

the Doctrine of Faith shares that view in stating:

> It is not up to biological sciences to make a definitive judgment on questions which are properly philosophical and moral such as the moment when a human person is constituted or the legitimacy of abortion.

Declaration on Abortion 6 (1975).

At the core of the belief system of Roman Catholics is the tenet that God grants to each person an immortal soul. Possession of a soul is the characteristic that distinguishes persons from nonpersons. Before there is a soul there is no person. For centuries, Catholic theologians, including Thomas Aquinas, held that a human soul cannot be infused into a non-human shape. Aquinas required that the body-soul comprise one human substance. Under this theory "the human soul, which is a rational soul, can only exist in a highly organized body, probably one which

contains the basic structure of a human cerebral cortex." Tauer, "The Tradition of Probabilism and the Moral Status of the Human Embryo" in Abortion and Catholicism: The American Debate 57 (Jung and Shannon eds. 1988). The human soul is not capable of either twinning or recombining as embryos are.

> The soul is indivisible and indestructible and souls cannot split, fuse or disappear. The soul is the principle of selfhood, which, like it, is a unique and indivisible manner.

Id. at 76.

Applying the most basic belief of Roman Catholic faith, ensoulment (and thus personhood) probably could not occur before that point in the pregnancy where twinning or recombination of embryos is no longer possible.

While there has been disagreement through the centuries about the exact point of ensoulment, the great weight of Catholic theo-

logical authority places the point well after conception for that reason: "Since the human soul is characteristically rational, it appears necessary that the physical structures be developed to the level where there is some capability for supporting minimal rational activity." Tauer, supra at 77.

For many centuries Catholic theology and philosophy held that personhood (i.e., infusion of the soul into the body) was possible only when the embryo began to show a distinctly human outline and possessed the basic human organs.

Thomas Aquinas articulated this theory called delayed animation. Aquinas held that "the human soul was infused into the body only when the latter began to show a human shape or outline and possessed the basic human organs." Donceel, "A Liberal Catholic's View"

in Abortion and Catholicism: The American Debate 48 (Jung and Shannon eds. 1988).

From 1140 through 1869 Canon law "distinguished between the unensouled and the ensouled fetus in its treatment of the gravity of abortion and the penalties to be imposed." Tauer, supra at 58.

Analytical theology on the ethics of abortion began during the fifteenth century. Antoninus, the archbishop of Florence, and John of Naples allowed early abortions of unanimated fetuses to save the pregnant woman. Approval of direct early abortion became common in the church. Maguire, "The Catholic Legacy and Abortion," 114 Commonweal 657, 660 (1981) (hereafter "Catholic Legacy"). Theologian J. Connery notes: "From the time the case was introduced by John of Naples in the early 14th century abortion of the unanimated fetus to save the life of the mother won con-

siderable support from theologians. Abortion: The Development of the Roman Catholic Perspective 122 (1977).

Sixteenth century Catholic theologian Antoninus de Corduba justified use of medicine to benefit the health of a woman even if the treatment caused the abortion of an animated fetus. De Corduba argued that the woman had a "prior right" to the preservation of her health. Maguire, "Catholic Legacy" at 660.

Late sixteenth century Jesuit theologian Sanchez confirmed that his contemporaries permitted early abortion to save the pregnant woman. Sanchez formulated a theological theory of the fetus as a "quasi-aggressor" Id.

The Catechism of the Council of Trent published in 1566 and republished continuously through 1923 taught that only in the

miraculous conception of Jesus was a soul joined to a body at the moment of conception:

> As soon as the Blessed Virgin gave her consent to the Angel's words . . . at once the most holy body of Christ was formed and a rational soul was joined to it. . . . Nobody can doubt that this was something new and an admirable work of the Holy Spirit, since, in the natural order, no body can be informed by a human soul except after the prescribed space of time.

Cited in Tauer, supra at p. 77 (emphasis added).

Clearly the existence and content of these published and widely disseminated theological discussions by important Catholic theologians belie the existence of a factotum principle that defines and resolves all abortion questions. Maguire, "Catholic Legacy" at 660.

The Vatican II commission which developed a statement on prenatal life expressly refused to define the point of

ensoulment for purposes of the abortion discussion. Acknowledging the canonical and theological history summarized above, the Sacred Congregation for the Doctrine of the Faith stated: "This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are in disagreement. For some it dates from the first instant, for others it could not at least precede nidation." Sacred Congregation for the Doctrine of the Faith, Declaration on Abortion n. 19 (1975).

There is not now and never has been an infallible proclamation on abortion.

Those who proclaim that Sec. 1.205 is reflective of the clear and constant teaching of the Roman Catholic Church ignore, insult or are unaware of the historical data and Catholic tradition set forth above.

Today a diversity of opinion exists among committed Catholics on the subject of abortion. There is "no basis for saying there is only one Catholic position on the legal aspects of abortion in this country." J. Curran, Towards an American Catholic Moral Theology 29 (1987). Many Catholic philosophers and theologians still hold with Aquinas' position on delayed animation. The soul requires appropriate physical development. Many modern Catholic theologians believe that adequate brain development is the necessary component of human form for ensoulment. The advancement of science and knowledge of fetal development strongly suggest that the point of ensoulment must be later than Aquinas posited, at a point closer to viability.

Joseph F. Donceel, contemporary theologian and an expert on Aquinas concludes that the theory of delayed animation is sound

and reflective of other evident truths of personal development:

> Nobody can tell with certitude when a child is capable of performing his first free moral choice, but all of us are quite certain that, during the first months or years of his life, a human baby is not yet a free moral agent. Likewise, I do not know when the human soul is infused, when the embryo becomes human. But I feel certain that there is no human soul, hence no human person, during the first few weeks of pregnancy, as long as the embryo remains in the vegetative stage of its development.

Donceel, supra at 50.

Thus, for Donceel and other serious Catholic believers "the embryo is certainly not a person during the early stages of pregnancy and that consequently it is not immoral to terminate pregnancy during this time provided there are serious reasons for such termination." Id. at 32.

Another contemporary theologian, Charles E. Curran, holds: "In conflict situa-

tions I would allow abortion to save human life or for values that are commensurate with human life. This would obviously include grave but real threats to the psychological health of the woman and could also include other values of a socio-economic nature in extreme situations." Quoted in Maguire, The Moral Revolution, 152 (1986).

Catholic tradition and theology teach methods of moral decision-making for individuals on issues of liberty and law. Probabilism is the method of decision-making taught by the Catholic Church which is most appropriate in this context.

The theory of probabilism is stated as follows: "If there exists a really probable opinion in favor of liberty. . . . although the opinion in favor of the law is more probable I may use the former opinion and disregard the latter." Tauer, supra at 64.

An opinion is probable if there are "good and solid" reasons for holding it.

> Historically probabilistic methods have not only been used by theologians but have been recognized by the Church magisterium as a legitimate way of handling a doubt of law in some cases where a right to life or another basic human right is involved.

Tauer, supra at 72.

Indeed the Church has indicated that on questions where there is a doubt of law involving human rights probabilism offers the only possible guideline. Id. at 73.[4] Questions on the beginning of personhood and the morality of abortion are questions of both law and fact in the Catholic moral tradition.

Probabilism is the most appropriate method of decision-making for individuals facing difficult moral questions. Probabilism

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[4] Probabalism was the method used by Church in issuing opinions on such subjects as castration of boys to preserve their high pitched voices for religious choirs and slavery. Tauer, supra at 72.

as a method is highly favored in pastoral counseling because of its sensitivity to individual conscience. Tauer, supra at 65.

The theological teachings of Aquinas, the theorists of delayed animation who followed him, and the contemporary scientific evidence regarding fetal development (e.g., capacity for twinning and recombination) provide "good and solid reasons" for believing that the early embryo is not ensouled and thus not a person. It may be said that the theory of immediate ensoulment, which is enacted by Sec. 1.205, is highly improbable to Catholics.

Personhood cannot be observed or measured. It is a non-physical quality or characteristic which may be made up of a group of attributes such as consciousness, self-awareness or possession of an immortal soul. In our society the status of person confers on

a being certain rights, and requires other individuals in the society to act in a certain way toward that being. Sec. 1.205, in ascribing full personhood status to the conceptus, embryo and fetus would require Catholics to act in a manner which is contrary to their religious teachings. It had been widely accepted Catholic teaching over the centuries that embryos and fetuses which lack human shape or form may not be baptized, because those entities do not possess a soul. Donceel, supra at 49. It is not Catholic practice to hold funerals after miscarriages.

The search for truth on subjects of moral importance is a dynamic process in the Catholic Church. Declarations of the Church hierarchy, even by the Pope, on moral issues are not infallible.[5] Moreover, the content of

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[5] Many moral theologians believe that it would be impossible for a Pope to issue an infallible teaching on a moral question (footnote continued)

Church teaching on moral issues involving serious claims of liberty and life change over time as a result of argument and reflection and no position should be taken as final. Popes from 650 through 1866 issued affirmations of the moral justification of slavery. Today that is not an approved or acceptable moral teaching. Similarly, for many years Popes issued opinions permitting castration of boys for religious choirs. That, too, is a practice not considered morally correct today.

Dissent, from even authoritative teaching, and debate on issues of moral significance is part of the tradition of the Catholic Church. Theologian Charles Curran notes that such debate is part of a dynamic process which has seen authoritative teaching change and corrections made in errors of moral

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(footnote continued from previous page)
because morality involves circumstances and no one can know the circumstances of each person. McBrian, R., Catholicism 1004 (1981).

judgment: "[I]n specific moral judgments on complex matters one cannot hope to attain a degree of certitude that excludes the possibility of error." Curran, "Abortion", cited in Tauer, supra at 62. Just as the Church cannot hope to correct errors in moral judgment without the debate and dissent which is part of its tradition, the civil government must allow the possibility of different moral and scientific truths by permitting free exchange of ideas and the exercise of conscience. (See Point III, infra).

The theological views held by Catholics who believe that the soul is infused at some point after conception and thus that embryos and early fetuses are not "persons" are solidly rooted in Catholic theology and deeply held. These views are of equal theological and moral weight as those expressed in Sec. 1.205. It is contrary to Catholic moral

tradition to cut off debate, decision and reflection on a subject or moral significance by legislative fiat.

The morality of abortion is a subject of "respectable debate" within the Catholic Church just as it is within the society at large. "A moral option comes within respectable debate if it is supported by serious reasons which commend themselves to many people, and if it has been endorsed by a number of authorities in the field of ethics, and if it has been approved by reputable religious and other humanitarian bodies." D. Maguire, The New Subversives 121 (1982).

Catholic theology and tradition teach that in matters involving moral decision-making the conscience of an individual is supreme. "To obey [conscience] is the very dignity of man; according to it he will be judged. Conscience is the most secret

core and sanctuary of a man. There he is alone with God whose voice echoes in his depths." Pastoral Constitution on the Church in the Modern World, ¶ 16.

For Catholics the question of abortion is a matter of conscience to be resolved by reference to theology, church tradition and individual contemplation and prayer. Further, Catholic teaching is that once a conscientious decision has been reached a person must be permitted to act in a manner consistent with the dictates of conscience: No one is "to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience especially on matters religious." Declaration on Religious Freedom, ¶ 13.

Sec. 1.205 denigrates the process of conscientious decision-making for Catholic

women by declaring the correctness of one theory of life. For Catholics, this weighty question must be examined by each individual in the exercise of conscience. Sec. 1.205, if upheld, would act as a serious inhibitor of the theological mandate for Catholics to act in accordance with the dictates of conscience.

In Roe v. Wade, 410 U.S. 113 (1973), this Court recognized that there exists respectable debate on the issue of abortion. In the face of respectable debate on issues of religious, moral and metaphysical significance our Constitutional system does not permit civil authority, either legislative or judicial, to decide which view is correct or to impose one view over others which are equally sincerely held. See Point III, infra.

II.

REPRODUCTIVE AUTONOMY IS FUNDAMENTAL TO THE MORAL INDEPENDENCE OF WOMEN

The right of reproductive autonomy is essential to the moral independence of women. The decision to bear a child is at the core of the concept of human and civil rights concerning personal relationships. Skinner v. Oklahoma, 316 U.S. 535 (1942), Roe v. Wade, 410 U.S. 113 (1973), Eisenstadt v. Baird, 405 U.S. 438 (1972).

Since Roe, this Court has consistently recognized the fundamental importance to women's lives of the right to choose abortion. The decision whether to terminate a pregnancy is encompassed by the "right of privacy, grounded in the concept of personal liberty, guaranteed by the Constitution." Akron v. Akron Center for Reprod. Health, 462

U.S. 416, 419 (1983); Roe v. Wade, 410 U.S. 113 (1973).

Restricting the ability to make reproductive choices "dramatically impairs a woman's capacity for self-determination." Law, "Rethinking Sex and the Constitution", 132 U. Pa. Law Rev. 955, 1017 (1984). Unwanted pregnancy touches every aspect of a woman's life -- affecting her physical health and well being, her ability to create and maintain social relationships (including family) and her ability "to contribute through wage work and public life." Id.

The burdens of unwanted pregnancy are enormous and fall entirely on the pregnant woman. Neither society nor any other individual bears the physical risks of pregnancy. The physical burdens of unwanted pregnancy range from minor physical discomfort to serious risk of health impairment. The health

risks of childbearing are heightened significantly when in an unwanted pregnancy. Cates, "Legal Abortion: The Public Health Record," 215 Science 1587, 1589 (1982). There is no instance in our society where a person is compelled to subject herself or himself to significant health impairment or risk for the sake of the health or even the life of another person.[6] The physical burdens imposed by pregnancy may also affect a woman's ability to provide physical, emotional and financial care to her existing children and other family members.

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6 Constitutional concerns of privacy protect bodily integrity of persons and do not require exceptional samaritanism. A parent cannot be compelled to save the life of a born child by organ donation, transfusion or other invasive practice; nor could a fetus compel anyone (including the biological "father" of the fetus) to provide a blood transfusion in utero or after birth. There is no question that the individual's rights of privacy and physical integrity would prevail over the child's or the fetus' claim for assistance.

Sec. 1.205, with its implied condemnation of abortion fails, at a deep ethical level, to take seriously the moral independence of women. A pregnant woman in the exercise of her conscience takes into account the many factors relevant to the decision, which may include the consideration of the needs and relations of persons (including the pregnant woman herself and her already born children). "The decision to have an abortion or a child requires consideration of relations with existing people as well as the capacity to provide care for the child." Law, supra at 1018.

Sec. 1.205 equates fetal life and adult life for purposes of civil and criminal law. This equation ignores the unique relationship between the pregnant woman and the fetus. "Fetal life is starkly different from all other forms of human life in that the

fetus is completely dependent upon the body of the woman who conceived it. It cannot survive without her." Law, supra, at 1023. Society cannot provide support, care or nurturance to a fetus. In all other instances where born persons (including infants, the infirm and the elderly) make claims for assistance, no other person is required by law to provide the requested assistance if the cost is the life, health or autonomy of the person called upon to assist.

The ability to make reproductive choice is essential to a woman's capacity to live as an equal person in this society. Professor Sylvia Law has described the important values of equality, the ability to act as moral beings and participate in society are at stake when reproductive choice is limited:

> If and when it becomes technologically possible to grow children outside of a woman's body, the moral and constitutional issues we confront in relation to abortion will

> be categorically different than they are today. But for today, reproductive freedom is, inescapably, the core issue of women's equality and liberty.

Law, supra at 1023 (footnote omitted).

Abortion must remain a legal option for women to even begin to make a moral choice with real freedom.

III.

CONSTITUTIONAL MANDATES OF PRIVACY AND RELIGIOUS NEUTRALITY REQUIRE THAT WOMEN BE PERMITTED TO MAKE REPRODUCTIVE CHOICES FREE FROM GOVERNMENT INTRUSION OR COERCION

It is a fundamental precept of the American constitutional system that where competing religious beliefs and claims of moral conscience are concerned, the government is obliged to be rigorously neutral. Missouri's legislature violated this fundamental principle of neutrality when it enacted a statute which codifies a religious belief.

The principles of constitutional neutrality embodied in the First Amendment's free exercise and establishment clauses secure for the people the fullest scope for the exercise of moral choice. D. Richards, Toleration and the Constitution (1986) at 268. This constitutional neutrality requires that government and the law show equal respect for the moral independence of each person seeking truth on a fundamental moral issue such as abortion. Id. at 269. Sec. 1.205 debases the search for moral truth by Catholics and others.

The First Amendment's free exercise clause guarantees freedom of conscience by preventing government complusion in matters of belief. School District Abington v. Schemp, 374 U.S. 203 (1963). The clear intent of Sec. 1.205 is to compel conformity on the subject of the beginning of personhood.

The Constitution requires that "government must pursue a course of complete neutrality toward religion." Wallace v. Jaffree, 472 U.S. 38, 60 (1985). Here, as in Jaffree, the state itself has "spoken" on a religious subject, and that speech "intends to convey a message of endorsement." Id. at 60-61. As this Court noted in Jaffree, the values protected by First Amendment religion clauses are "fundamental" and the values may be eroded in "myriad, subtle ways." Id. at 61, citing Lynch v. Donnelly, 465 U.S. at 694.

Upholding this statute would be profoundly inconsistent with this Court's First Amendment decisions. In Jaffree, this Court stated: "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Wallace v. Jaffree, 472 U.S. at 50. There can be no doubt that

our society is divided on religious and conscientious grounds concerning the question of when personhood begins and the morality of abortion.

In Roe, this Court recognized that the point at which personhood begins is fundamentally a religious and moral inquiry. If there was ever any question that denominations or sects view issues of personhood of the fetus and the morality of abortion as essentially theological, the briefs submitted in this case on both sides provide proof beyond peradventure. That being so, it is proper and necessary to inquire whether Sec. 1.205 effects a "symbolic union of church and state" and further whether such union is "sufficiently likely to be perceived by adherents or [controlling] denominations as an endorsement and by nonadherents as a disapproval of their individual religious choices." Grand Rapids

School Dist. v. Ball, 473 U.S. 373, 390 (1985). Clearly Sec. 1.205 is a state endorsement of the explicitly religious beliefs of some denominations or groups. Concomitantly, amici and other religious groups and denominations perceive disapproval by the state of Missouri of their individual religious choices and the value of their search for religious truth. Enactment of legislation is quintessential government activity. When government activity "conveys a message of government endorsement or approval of religion, a core purpose of the establishment clause is violated." Id. at 389.

This Court has recognized that there will be controversy over issues of political, religious, and metaphysical significance and that the Constitution protects the right to believe, controvert others' beliefs, and to

act in accordance with the dictates of one's own conscience:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time have been waged by many good as well as evil men . . . Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of the opinion achieves only the unanimity of the graveyard.
>
> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943).

Sec. 1.205 is unquestionably an attempt to coerce uniformity on the subject of fetal personhood and the morality of abortion.

As such it violates this most basic constitutional principle.

The First Amendment protects the exercise of conscience in daily life:

> The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. . . . [W]hen the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.

Wallace v. Jaffree, 472 U.S. at 52-53 (footnotes omitted).

This principle of voluntarism is a central First Amendment concern. The Free Exercise clause is violated when a state, purposefully or not, puts "substantial pressure on an adherent to modify his behavior and to violate his belief." Thomas v. Review Board, 450 U.S. 707, 718 (1981), Sherbert v. Verner, 374 U.S. 398, 404-07 (1963). Sec. 1.205 clearly intends to put pressure on women who do not conscientiously believe that personhood begins at conception to modify their behavior and perhaps violate their own deeply held moral or religious beliefs.

In codifying the belief that the fetus is an actual human life from conception, Sec. 1.205 goes "beyond legitimate legislative concern." It intrudes into "the specific but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea . . . ." McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring); School District of Abington v. Schempp, 374 U.S. at 244-45 (Brennan, J., concurring). "The realm of

religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the state for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J. concurring and dissenting, quoting Clarence Darrow, Tr. of Oral Arg. at 7, Scopes v. State.) Sec. 1.205 enacts a particular religious view of the creation of personhood just as the Arkansas legislature enacted a preference for the theory of the divine creation of the world. Epperson v. Arkansas, 393 U.S. 97 (1968).

When values that are or were originally religious become widely accepted by social consensus and where they serve legitimate ends of civil governance (such as proscription of murder or the benefit of a day of rest) they become part of the secular fabric

of society. School District of Abington v. Schempp, 374 U.S. at 264. (Brennan, J. concurring); McGowan v. Maryland, 366 U.S. at 445. At this point in American history there is no such social consensus on matters of abortion. Indeed, in the years since Roe was decided there has been increasing social and moral debate on the issue. Nor is there a legitimate end of civil governance to be served by disfavoring or restricting abortion.

The belief that the fetus is a person from the moment of fertilization is identified with one group of religious teachings, and is sincerely rejected by other denominations including mainstream Jewish and Protestant denominations. (See Brief submitted by Religious Coalition for Abortion Rights). This significant and sincere division among religious faiths (and within denominations) makes clear that there is no moral

consensus. And even if the religious belief reflected in Sec. 1.205 was shared by a majority, which amici contend clearly is not the case, its imposition as a matter of civil law is nonetheless a violation of the First Amendment. See, Epperson v. Arkansas, 393 U.S. 97 (1968).

Sec. 1.205 enacts as a matter of civil law a theory of life which is fundamentally religious in nature. In 1983 this Court reaffirmed the critical holding of Roe that a "state may not adopt one theory of when life begins to justify its regulation of abortions." Akron v. Akron Center for Reprod. Health, 472 U.S. 416, 444 (1983). In Akron, the state attempted to justify its unconstitutional regulation by reference to "medical" findings. This Court rejected that justification, as it must here.

Our constitutional system of government was structured to insulate the exercise fundamental rights from the changing tides of the political process: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . [F]undamental rights may not be submitted to a vote. They depend on the outcome of no elections. . ." West Virginia State Board of Education v. Barnette, 319 U.S. at 638. The rights involved in this case -- to make an individual decision regarding childbearing free from government coercion and to the exercise of one's religious beliefs and conscience free from government endorsement or disapproval -- are fundamental rights, as this Court has recognized in a series of decisions over the last half-century, including Skinner v. Oklahoma, Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438

(1972), Wallace v. Jaffree, 472 U.S. 38 (1985) and Roe v. Wade 410 U.S. 113 (1973).

This Court's formulation of the right to privacy underscores the significance of independence for the "individual in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

In Skinner v. Oklahoma, 316 U.S. 35 (1942), this Court recognized that the state's usurpation from the individual of decision-making on the issue of whether to beget or bear a child risks invidious discrimination, even genocide. Skinner is an acknowledgment of the "fundamental personal character of the right to reproductive autonomy", that the people and the Constitution do not entrust to government for regulation. L. Tribe, Constitutional Law 1339 (2d ed. 1987).

In Eisenstadt v. Baird, 405 U.S. 438 (1974) a case involving contraception this

Court noted that decisions regarding child-bearing are at the core of constitutionally protected privacy concerns: "If the right of privacy means anything it is the right to the individual, married or single, to be free from unwanted government intrusions so fundamentally affecting a person as the decision whether to bear or beget a child." (Id. at 453 emphasis in the original.)

The constitutional guarantees of privacy and religious liberty protect the right of Catholics and others to refuse to consider abortion. The same protections must be preserved to protect equally the rights of Catholics and others whose moral and religious beliefs concerning the well-being of existing life and of responsible parenthood counsel that abortion is an appropriate choice for the realization of important moral goals. "[W]here moral values are in such sharp con-

flict the First Amendment requires respect for diversity." Law, supra at 1026.

CONCLUSION

For all of the foregoing reasons, amici respectfully request this Court affirm the decision of the Eighth Circuit Court of Appeals holding Sec. 1.205 unconstitutional.

Respectfully submitted,

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APPENDIX

STATEMENT OF INDIVIDUAL AMICI

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December (1965) which declares

> ". . . the civil authority must see to is that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

Chicago Catholic Women is an organization committed to working toward structural change within church and society in order to promote the full giftedness and personhood of women and a world of justice for all. We know that a woman's choice regarding her body must be respected. We have heard the pain of women who had illegal abortions before 1973 and we will work to keep a woman's choice legal.

Feminist Action Coalition/New Jersey is a coalition of members from Emmaus Community of Christian Hope, the New Jersey National Assembly of Religious Women, New Jersey Network and New Jersey Women's Ordination Conference. We work together on issues affecting women in church and society.

The Loretto Women's Network is a voluntary association of feminists in the Loretto Community committed to act for the empowerment of women. Among other things, we agree women are, and of right ought to be, the primary agents of moral decision-making in matters of reproduction.

The National Coalition of American Nuns is an organization of 1800 Roman Catholic sisters from different orders from over the United States. NCAN was organized in 1969 "to speak, study and work for social justice and human rights." NCAN is directed by a board of 24 sisters who set the policies based on the opinions registered by its members.

Women in Spirit of Colorado Task Force is a covenant community of prophetic persons committed to supporting and facilitating individual and collective journeys of faith from bondage to liberation. The complexity and pluralism of religious and medical viewpoints regarding when life begins are so varied in U.S. society that any governmental attempt to legislate a "single mindset morality" is a violation of basic American freedoms. Every child should be a wanted child; the morality and responsibility of that decision is a private, not governmental, matter. We view

with great suspicion and alarm the motives of those who feel they have the right to make this weighty decision for others.

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BRIEF

FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

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Becker v. Schwartz, 46 N.Y. 2d 401, 386 N.E. 2d 807 (1978) 24

Bellotti v. Baird, 428 U.S. 132 (1976) 12

Bellotti v. Baird, 443 U.S. 622 (1979) 12

Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) 24

Betesh v. United States, 400 F. Supp. 238 (D.D.C. 1974) 23

Bigelow v. Virginia, 421 U.S. 809 (1975) 25

Board of Education v. Pico, 457 U.S. 853 (1982) 27

Bonaparte v. Floyd, 291 S.C. 427, 354 S.E.2d 40 (Ct. App. 1987) 23

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Brown v. Board of Education, 347 U.S. 483 (1954) 15

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Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980)	26
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DKT Memorial Fund Ltd. v. Agency for International Development, 691 F. Supp. 137 (D. Mass. 1988)	26
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Gay & Lesbian Law Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988)	27
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H.L. v. Matheson, 450 U.S. 398 (1981)	12
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Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981)	24
Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986)	26
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	12
Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976)	26
Planned Parenthood Ass'n v. Kempiners, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983)	26

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Planned Parenthood Ass'n, Inc. v Ashcroft, 462 U.S. 476 (1983) 12

Planned Parenthood Fed'n v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988) 26

Police Department v. Mosley, 408 U.S. 92 (1972) 22

Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) 27, 28

Reproductive Health Service v. Webster, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989) 5, 18, 21

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Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 12, 17, 19

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... *passim*

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Union Carbide & Carbon Corp. v. Stapleton, 237 F.2d 229 (6th Cir. 1956) 23

United States v. Darby, 312 U.S. 100 (1941) 15

Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981) 26

Vasquez v. Hillery, 474 U.S. 254 (1986) 10, 11

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West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 15

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Wooley v. Maynard, 430 U.S. 705 (1977) 27-28

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Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, Prof. Psychology 12 (1981) 25

American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920 (1979) 23

American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (6th ed. 1985) 23

American Medical Association, *Current Opinions on Ethical and Judicial Affairs* (1986) 23

American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981) 23

	Page
American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580 (1981)	23
American Public Health Association, *Recommended Program Guide for Abortion Services* (Revised 1979), 70 Am. J. Pub. Health 652 (1980)	23
Birdsall & Chester, *Contraception and the Status of Women: What is the Link?*, 19 *Fam. Plan. Persp.* 14 (1987)	25
H. P. David, *et al.*, ed., *Born Unwanted* § 17 (1988)	14
President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, Vol. 1 at 69 (1982)	25
Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force in Life and the Law (Jan. 1988)	15
Sen. Com. on the Judiciary, (afternoon Sess., Dec. 14, 1987) (Transcript of Proceedings, Miller Reporting Co., Inc., Washington, D.C.)	10
Sen. Com. on the Judiciary, S. Hrg. 99-1064, Serial No. J-99-119, 99th Cong., 2d Sess. (Aug. 5 and 6, 1986)	10
Sen. Com. on the Judiciary, S. Hrg., Serial No. J-97-51, 97th Cong., 1st Sess. (Sept. 9, 10 and 11, 1981)	10

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The Committees on Civil Rights, Medicine and Law, and Sex and Law of The Association of the Bar of the City of New York (the "Association") and others, with the consent of counsel to both parties, respectfully submit this brief in support of appellees.

INTEREST OF *AMICI CURIAE*

The Association of the Bar of the City of New York ("the Association"), chartered by the State of New York in 1871, is an organization of over 18,000 attorneys. While most of its members practice in the New York City metropolitan area, the Association has members in nearly every state and in 40 foreign countries. Two important purposes of the Association, as set forth in its Constitution, are "promoting reforms in the law" and "facilitating and improving the administration of justice". The Association accordingly has devoted itself to supporting and defending reforms in the law in cases of substantial public importance before the courts, including this Court.

The Association is committed to the principle of individual liberty enunciated in *Roe v. Wade*. In addition, as a professional group of practicing attorneys, the Association is always troubled when well settled cases of the Court, like *Roe v. Wade*, are threatened by litigants such as appellants, who would have the Court repudiate over 16 years of its own jurisprudence and that of the lower courts as well. Principles of *stare decisis* mandate that the continuity of well established decisions like *Roe v. Wade* should not be undermined by the considerations upon which the current challenge is grounded.

The Association is also committed to the right of women to secure information relating to reproductive decisions free from governmental coercion. The Association is particularly concerned that the questions presented by this appeal, if resolved in the way in which appellants suggest they should be resolved, would substantially curtail, if not altogether eliminate, the rights of women in this critical area of private concern.

The Association is equally committed to the right of freedom of expression, and believes that the statute at issue impinges upon the free speech rights of both physicians and their patients. Physicians and their patients share a relationship similar to that which exists between lawyers and their

clients. The Association's long–standing concern with legislation, like that at issue here, which interferes with the abilities of physicians and their patients to speak freely about reproductive alternatives compels it to urge affirmance of the decision below.

All of these issues are of great significance to the Association. It therefore urges that the Court uphold *Roe v. Wade* and the judgment of the court of appeals finding the Missouri statute in part unconstitutional.

The Arizona Attorneys Action Council is an organization of lawyers dedicated to the preservation of women's rights to the free exercise of family planning decisions, including the right to an abortion. The Council views any limitations on these rights as an invasion of women's right to privacy as protected by the United States Constitution.

The Beverly Hills Bar Association ("BHBA") is a voluntary bar association formed on December 2, 1931 which currently has 3,000 members. The members of BHBA practice in and around the City of Beverly Hills, California. BHBA is committed to the protection of individual liberties and to the promotion of respect for the legal system. BHBA believes that a reversal of the landmark decision in *Roe v. Wade* would impinge on individual liberties and would undermine public confidence in the legal system.

The Committee on Women's Rights of the New York County Lawyers' Association ("NYCLA") is a committee composed of both female and male attorneys who concentrate their efforts on the elimination of discrimination against women. Founded in 1908, NYCLA is a Bar Association with a membership of approximately 11,000 attorneys, most of whom live or work in New York County. NYCLA's concerns include civil liberties, among other issues of social and legal significance. The Committee on Women's Rights, created in 1972, has prepared reports, commented on legislation, organized forums on issues of concern to the legal

profession and participated as *amicus curiae* in litigation directed to the furtherance of women's and civil rights.

Lawyers Club of San Diego, Inc. ("Lawyers Club") is a California bar association founded in 1872, with current membership of almost 700 men and women, most of whom practice and reside in San Diego County, California. The purpose of Lawyers Club is "to advance the status of women in the law, to support and improve the administration of justice and to promote equality of the sexes in our society." The rights of liberty and privacy are key to equality of the sexes. Lawyers Club believes that any encroachment on the protections afforded by the Constitution and *Roe v. Wade* would destroy the fundamental rights of women to control their pregnancies and their bodies.

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and to maintain the honor and dignity of the legal profession. WBAI's 1,000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference. WBAI has filed briefs *amicus curiae* before this Court on behalf of parties whose rights were in jeopardy, most recently on behalf of respondent in *Hishon v. King & Spaulding*, October Term, 1982, No. 82-940.

The Women's Bar Association of the State of New York ("WBASNY") is an organization of over 3,000 attorneys comprising fifteen chapters throughout the State. Founded in 1980, its stated purposes include the following: to cooperate with, aid and support organizations and causes which advance the status and progress of women in the society; to facilitate the administration of justice; and to cultivate the science of jurisprudence. The members of WBASNY support the principles enunciated in *Roe v. Wade*, including the recognition of a constitutionally guaranteed right to privacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the lower court was correct in all respects.[1] This brief addresses those issues on appeal of particular concern to *amici*: whether the Court should reconsider and overrule *Roe v. Wade*, 410 U.S. 113 (1973), and whether the lower court correctly held unconstitutional the Missouri statute's prohibition on "encouraging and counseling" a woman concerning abortion when her life is not at risk. *Amici* submit that the decision of the court of appeals should be affirmed for at least three reasons.

First, *Roe v. Wade* was correctly decided and has become a decision of great significance to millions of Americans who have premised their expectations about reproductive choices upon it. Principles of *stare decisis* dictate that this Court uphold *Roe v. Wade*. Indeed, in prior decisions reaffirming *Roe v. Wade* and applying its principles, the Court has expressly indicated its respect for *stare decisis*. Appellants have presented no evidence of changes in law or experience that now would warrant a different result. In addition, settled expectations premised upon *Roe v. Wade* also favor the Court's continued adherence to *stare decisis* and to the principles of *Roe v. Wade*.

Second, the court of appeals correctly applied the Court's principles in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), in holding unconstitutional that part of the Missouri statute which prohibits state and state-funded health care providers from "encouraging and counseling" a woman to have an abortion not necessary to save her life. *See Reproductive Health Service v. Webster*, 851 F.2d 1071, 1077-80 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989). The Missouri statute clearly violates a woman's First and Fourteenth Amendment rights to liberty

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1 *Amici* assume that the parties will brief all issues before this Court on appeal and confine their focus to the three points addressed below.

and privacy. The Court has consistently held that the government may not interfere with a woman's fundamental right to decide, in consultation with her doctor, whether to terminate a pregnancy by precluding her from obtaining the very information necessary to make that decision. Missouri's statutory prohibition on the provision and receipt of information about abortion places an impermissible restriction on the counseling relationship and on a woman's range of choices.

Third, by prohibiting physicians from "encouraging and counseling" a woman to have an abortion not necessary to save her life, the Missouri statute violates the First Amendment free speech rights of health care providers and their patients by discriminating on the basis of viewpoint. While professional standards require that a physician disclose all relevant information to a patient, the Missouri statute would compel a health care provider to compromise professional obligations in the service of the state's views on abortion. The restrictions on disclosure also would have serious impact on the relationship between physician and patient, in which uncensored communication is essential to maternal and fetal health. The Court has held that dissemination of information about abortion is a protected form of speech. By providing public funding for reproductive health services but prohibiting dissemination by health care professionals of information about abortion, the Missouri statute unconstitutionally censors speech based on viewpoint.

I. *ROE v. WADE* SHOULD BE UPHELD.

A. *Roe v. Wade* was correctly decided.

Roe v. Wade, 410 U.S. 113 (1973), is a decision of great significance—both to the millions of women who rely on the constitutional protections recognized by the case and as the proclamation of a rule that sets the rights of the individual above the views of the state. As Justice Blackmun eloquently wrote, over a decade after *Roe v. Wade*:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

In lieu of analyzing all the decisions that came after *Roe v. Wade*, all the commentary about the decision, and the suggested alternative grounds for the decision, we observe three important aspects of the decision that are as sound today as they were 16 years ago. First, the Court in *Roe v. Wade* was determined to resolve the issue "free of emotion" and based on the Constitution. 410 U.S. at 116-17. Second, both the majority and the dissenters believe that there is a fundamental constitutional right to liberty, which includes a woman's decision whether or not to bear a child. And third, a survey of the legal history of abortion indicates that only in modern times have there been statutes outlawing abortion.

In the current climate, it may be easy to forget that the controversy over abortion long preceded the decision in *Roe v. Wade*. As the Court wrote at the outset in *Roe v. Wade*:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.
>
> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.

410 U.S. at 116-17.

This sentiment was echoed by the Court in 1986, in *Thornburgh v. American College of Obstetricians and Gynecologists*, when it said:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. . . . We recognized at the very beginning of our opinion in *Roe*, . . . that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.

476 U.S. 747, 771-72 (citations omitted).

Thus the continuing controversy over abortion is nothing new, and does not suggest a lack of constitutional validity in *Roe v. Wade*. Indeed, the fact that abortion is so controversial and that any decision on abortion is so deeply rooted in personal, moral and religious beliefs, argues in favor of leaving the choice to the individual—free from governmental actions that burden or restrict individual choices and possibilities.

Further, the legal basis for a constitutional liberty right is indisputably sound. The dissenters in *Roe v. Wade* have fully supported the Court's decisions recognizing a right to privacy and have accepted the precedent of *Griswold v. Connecticut*, 381 U.S. 479 (1965), from which *Roe v. Wade* evolved. *See Thornburgh*, 476 U.S. at 773-76 (Stevens, J., concurring). The *Roe* dissenters agreed that "a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause". *Id.* at 776 (quoting *id.* at 790 (White, J., dissenting)).

Absent adoption of the view that life begins at conception, which would effectively create a federal law outlawing abortions in almost all circumstances—and which no Justice of this Court has ever accepted[2]—our constitutional system mandates that the abortion decision be left to the individual, not to state legislatures.

In addition, the Court in *Roe v. Wade* did an extensive survey of legal history in this area, which among other things uncovered that at common law, an abortion performed before "quickening", movement of the fetus in utero, was generally not a crime. After quickening, if abortion was a crime at all, it was a minor crime. *Id.* at 132-36.[3] Such was the law in the United States when the Constitution was written. *Id.* at 138, 140. This remained the law in all but a few states until the mid-19th century. *Id.* at 138. Gradually, beginning in the the mid-19th century, state statutory law replaced the common law, first imposing, then increasing the penalties on abortions. By the end of the 1950s, a large majority of states had statutes banning abortions other than those done to preserve the life of the mother. *Id.* at 139.[4]

Accordingly, three predicates of *Roe v. Wade*—the sensitive and controversial nature of the issue, the constitutional

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2 The *Roe v. Wade* dissenters refused to adopt the view that life begins at conception, instead positing a state interest in the potentiality of life represented by a fetus. *Id.* at 779 (Stevens, J., concurring) (citing *id.* at 792 (White, J., dissenting)).

3 As the Court wrote, anti-abortion legislation was "of relatively recent vintage". *Roe v. Wade*, 410 U.S. at 129.

4 See Brief *Amicus Curiae* of American Historians.

right to privacy, and the legal history of abortions—were sound when this Court rendered its decision and are equally sound today.

B. Principles of *stare decisis* dictate that *Roe v. Wade* should be upheld.

1. *Stare decisis* plays a crucial role in this case.

The doctrine of *stare decisis* is vital to maintain the appearance and actuality of fairness and impartiality by preserving the continuity of the Court's legal principles. In addition, *stare decisis* furthers the important goal of stability in the law, allowing individuals to rely on established legal principles to guide their behavior and affairs. The doctrine also promotes expeditious adjudication by limiting the need to relitigate issues. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

As the Court has made clear, *stare decisis* is not to be departed from lightly:

> *[S]tare decisis*, [is] the means by which we insure that the law will not merely change erratically, but will develop in a principled and intelligent fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).[5]

The Court has stressed that the doctrine shields the Court and its decisions "from the vicissitudes of political

5 The crucial role of *stare decisis* has been repeatedly affirmed by the Court and by its Justices. *See, e.g.*, Sen. Com. on the Judiciary (afternoon sess., Dec. 14, 1987) (Transcript of Proceedings at 212, Miller Reporting Co., Inc., Washington, D.C.); Sen. Com. on the Judiciary, S. Hrg. 99-1064, Serial No. J-99-119, 99th Cong., 2d sess., at 32, 38 (Aug. 5 and 6, 1986); Sen. Com. on the Judiciary, S. Hrg., Serial No. J-97-51, 97th Cong., 1st Sess., at 83 (Sept. 9, 10 and 11, 1981).

controversy". As Justice Stevens wrote in a decision reaffirming *Roe v. Wade*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.

Thornburgh, 476 U.S. at 782 n.12 (Stevens, J., concurring) (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403.

As the Court recognized in *Roe v. Wade*, cases involving abortion should be decided "free of emotion and of predilection". 410 U.S. at 117. Adherence to *stare decisis* serves this purpose.

2. No change in law or experience has occurred to justify re-examining, much less overruling, *Roe v. Wade*.

As a general rule, *stare decisis* requires a significant change in facts or experience in order to overrule settled precedent. As the Court recently observed:

> While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

Vasquez v. Hillery, 474 U.S. at 266.

In rare cases, the Court has declined to apply the doctrine of *stare decisis* and have overruled a precedent when evolving law has so eroded the precedent or made it so inconsistent with other law that it has become a destabilizing and confusing aberration. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272-77 (1980) (overruling decision interpreting full faith and credit clause because it had been previously narrowed so that it "no longer had any significant practical impact" and because other courts had "overwhelmingly" failed to follow it); *see also Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391-93 (1983); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240-41 (1970).

Just the opposite has occurred with *Roe v. Wade*. In the over 16 years since the decision, the Court has reaffirmed and applied the holding that women have a constitutional right to make private choices on terminating pregnancy at least 13 times. *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H. L. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n. v. Ashcroft*, 462 U.S. 476 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

The Court has also cited *Roe v. Wade* as precedent in every term of the Court. Shepard's lists 177 entries for citations of *Roe* by this Court alone.[6]

Indeed, in two of the cases explicitly reconsidering and upholding *Roe v. Wade*, the application of *stare decisis* is discussed. *See Thornburgh*, 476 U.S. at 780-82; *City of Akron*,

6 Shepard's United States Citations, entry for *Roe v. Wade*, 410 U.S. 113 (1973) (LEXIS, through 2/89 Supp.).

462 U.S. at 419-20 & n.1 (1982). In *City of Akron*, the Court wrote:

> [T]he doctrine of *stare decisis* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*. . . .
>
> There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. [Citations omitted.]

462 U.S. at 419-20 & n.1. The principles set forth in *City of Akron* in 1982, for applying *stare decisis* to uphold *Roe v. Wade* are equally compelling today. *Roe* remains a carefully considered, albeit controversial, opinion. And since 1982, it has been repeatedly reaffirmed.

Further, the principle of *stare decisis* was invoked as recently as 1986, in reaffirming *Roe v. Wade*, and discussed at some length. Justice Stevens wrote:

> Nor does the fact that the doctrine of *stare decisis* is not an absolute bar to the reexamination of past interpretations of the Constitution mean that the values underlying that doctrine may be summarily put to one side. There is a strong public interest in stability, and in the orderly conduct of our affairs that is served by a consistent course of constitutional adjudication. Acceptance of the fundamental premises that underlie the decision in *Roe v. Wade*, as well as the application of

those premises in that case, places the primary responsibility for decision in matters of childbearing squarely in the private sector of our society. The majority remains free to preach the evils of birth control and abortion and to persuade others to make correct decisions while the individual faced with the reality of a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul—remains free to seek and to obtain sympathetic guidance from those who share her own value preferences.

In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. . . . the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Thornburgh, 476 U.S. at 780-82 (1986) (Stevens, J., concurring). In the majority opinion in *Thornburgh*, Justice Blackmun wrote:

> [I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Id. at 759 (Blackmun, J.) (quoting *Brown v. Board of Education*, 349 U.S. 294, 300 (1955)).[7]

Moreover, in the international arena, we are aware of only two nations that have recently drastically restricted abortions after initial liberalization: Rumania in 1984, and Iran after the fall of the Shah. H.P. David, *et al.*, ed., *Born Unwanted* § 17 (1988). Few governments more repressive and more antithetical to American democracy could be found.

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7 Moreover, Justice Stevens responded to the dissenting opinion in *Thornburgh*, which urged that *stare decisis* not be applied because the original decision in *Roe* was "mistaken." 476 U.S. at 787. The dissent had stated that "history has been far kinder to those who departed from precedent" that was incorrect, citing as examples the 1930s unwarranted restrictions on governmental power to enact social and economic legislation (*see United States v. Darby*, 312 U.S. 100 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)); and rejection of racially segregated schools (*see Brown v. Board of Education*, 347 U.S. 483 (1954)). *Id.* at 788 (White, J., dissenting). In addition to the response given by Justice Stevens, 476 U.S. at 779-82, it should be pointed out that in neither of the examples cited in the *Thornburgh* dissent was a decision overruled merely because it was mistaken; in each example there were also changes in law or experience. The decision in *United States v. Darby*, 312 U.S. at 115-17, cited the changing law in upholding a wage and hour statute. The decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. at 397-400, cited the recent experience of the Depression and the exploitation of those with weak bargaining powers in upholding the minimum wage for women. The Court stated that the decisions those cases overruled were aberrations from established legal principles and precedents. Further, *Brown v. Board of Education* was expressly based on the prior erosion of the separate but equal doctrine in cases involving graduate education, 347 U.S. at 491-92, and the then current experience in public education, *id.* at 492-95.

In short, neither evolving law nor changing experience supports departure from the doctrine of *stare decisis* with respect to *Roe v. Wade*.[8]

3. Settled expectations militate against overruling *Roe v. Wade*.

One principle underlying *stare decisis* is the need for stability in the law, so that settled expectations are not thrown

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8 Appellants rely upon medical evidence of fetal viability to justify revisiting and overruling *Roe v. Wade*, suggesting that this evidence constitutes a change in facts sufficient to overcome *stare decisis*. This approach is erroneous for two reasons. First, the earliest time at which a fetus can survive has changed little since *Roe v. Wade*. *See* Brief *Amicus Curiae* of the American Medical Association *et al.* *See also* Report of The Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law (Jan. 1988). Second, *Roe v. Wade* does not turn upon a particular point of viability; it simply permits abortions up to the point of viability, as determined by the physician. *See* 410 U.S. at 164-65. Thus, Missouri's attempt to use fetal viability as a lever to overturn *Roe v. Wade* must fail, as the profferred evidence does not undermine the principle of the case. The other change, the increasing safety of abortions, only supports *Roe*. *See City of Akron*, 462 U.S. at 429 n. 11.

into chaos. As the Court described this principle, termed "the mainstay of *stare decisis*":

> [it is] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . .

Moragne v. States Marine Lines, Inc., 398 U.S. at 403.

The need for preserving settled expectations is particularly acute in the context of *Roe v. Wade*. Decisions involving pregnancy, children, marriage and relationships have long-term consequences that cannot easily be undone. Moreover, such decisions impact more strongly on the lives of the women and men who make them than decisions in any other sphere.

There are many circumstances in which the decision about whether to carry a fetus to term impacts irrevocably on the lives of the woman involved. *See* Brief *Amicus Curiae* of Women Who Have Had Abortions and Others Who Have Supported Them in That Choice in Support of Appellees.

Roe v. Wade has become an accepted part of the judicial landscape. Expectations premised upon it should not be overturned, nor should the case.

4. The overruling of *Roe v. Wade* would place an extraordinary burden on New York State.

As an organization chartered by the State of New York and composed of a membership largely residing in or practicing in the New York City area, the Association is particularly concerned with the impact on New York City and New York State were the Court to overrule *Roe v. Wade*, as are other New York *amici*. That impact may be gauged by the burden resulting from the large number of nonresident women seeking abortion in New York State subsequent to the State's 1970 amendment of its penal law to permit abortion under certain circumstances and prior to the Court's decision in *Roe v. Wade*.[9] In the face of a reversal of *Roe v. Wade*, New York and other states whose laws permit abortion would once again be overburdened with nonresidents seeking abortion. In all likelihood, that burden would be even greater today, given the increased acceptance of abortion since *Roe v. Wade*.

* * *

In sum, any decision overruling *Roe v. Wade* would be a departure from the Court's long history of adhering to its prior positions, absent compelling reasons to do otherwise. Neither changes in the law nor experience since *Roe* support its overruling. Further, it is important to maintain settled expectations with regard to family life and pregnancy. As Justice Holmes wrote:

> [I]mitation of the past, until we have a clear reason for a change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want.

Thomas v. Washington Gas Light Co., 448 U.S. at 272 n.17 (1980) (quoting O. Holmes, Collected Legal Papers 290 (1920)). Holmes's words are as apt today—in the context of *Roe v. Wade*—as when he first penned them.

II. THE MISSOURI STATUTE IMPERMISSIBLY BURDENS A WOMAN'S FUNDAMENTAL PRIVACY RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS.

The Court has consistently recognized that a woman's fundamental right to decide, in consultation with her doctor, whether to terminate a pregnancy is part of her constitutionally protected right to liberty and privacy. *Roe v. Wade*, 410

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9 *See* Brief of the Attorneys General of the States of New York *et al.* as *Amici Curiae* in Support of Appellees for a discussion of the history of New York's abortion legislation and the significant number of nonresident women obtaining abortions in New York State subsequent to adoption of that legislation and prior to *Roe v. Wade*.

U.S. 113 (1973); *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). In order to protect this fundamental right, the Supreme Court has consistently struck down laws that would obstruct the decision-making process by requiring that health care providers disseminate incomplete information designed to steer a woman's choice in favor of childbirth.

In *Akron*, the Court declared unconstitutional a statute compelling physicians to communicate specific information "designed to influence the woman's informed choice between abortion or childbirth". 462 U.S. at 444. The Court explained: "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision". *Id.* at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)).

The principle that the government may not unduly interfere with a woman's right to privacy by precluding her from obtaining the very information necessary for her to make constitutionally protected reproductive choices was reaffirmed in *Thornburgh*. There, the Court struck down a state statute requiring a physician to provide a woman with a list of agencies offering alternatives to abortion as "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician". 476 U.S. at 762.

The court of appeals correctly followed the principles of *Thornburgh* and *Akron* in holding that the part of the Missouri statute prohibiting state and state-funded health care providers from "encouraging or counseling" a woman to have an abortion not necessary to save her life is unconstitutionally vague and an impermissible invasion of a woman's First and Fourteenth Amendment rights to liberty and privacy. *See Reproductive Health Service v. Webster*, 851 F.2d at 1077-80.

The statute's prohibition of encouraging or counseling women about abortion as an option to childbirth is directly at odds with *Akron* and *Thornburgh*. Through this prohibition, Missouri interferes with the woman's decision-making process, and places an impermissible "straitjacket" on the counseling relationship, thus precluding the right to informed consent. *Thornburgh*, 476 U.S. at 762, (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

The Court's decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), relied upon erroneously by appellants, are in fact supportive of appellees. Both *McRae* and *Maher* stand for the proposition that although the state does not have to provide the benefit of abortion services through subsidy of abortion procedures, it cannot unduly burden a woman's decision whether to have an abortion. In both cases, the statutes involved funded childbirth but not abortion, but neither statute prevented a woman from exercising her constitutional right to have an abortion. As the Court observed in *McRae*, an indigent woman was left with "at least the same range of choice in deciding whether to obtain a[n] . . . abortion as she would have had if Congress had chosen to subsidize no health care costs at all". *Id.*, 448 U.S. at 317.

Unlike the restrictions at issue in *Maher* and *McRae*, the Missouri law would not leave a woman with the same range of choices she otherwise has because it would drastically restrict the information that a woman may receive regarding reproductive options. Under the Missouri statute, a doctor would be prohibited from "counseling" a woman about her option to have an abortion even when the doctor believes the procedure is medically indicated, although not technically necessary to save her life.

Women are entitled to obtain all medical information relevant to a diagnosed pregnancy. *Roe v. Wade* recognized that carrying a pregnancy to term is generally more dangerous

than a first trimester abortion. 410 U.S. at 149.[10] Pregnant women are entitled to know this and any other relevant medical information. In addition, the pregnant woman who suffers from diabetes, hypertension or sickle-cell anemia would not be told that carrying the fetus to term is a serious threat to her future health and that termination of the pregnancy is a medically indicated option. Such a woman would have no opportunity to decide whether to terminate her pregnancy, a decision protected by the Constitution. She would be denied information or deliberately misinformed, because for her doctor to share such information might well be construed to be "counseling an abortion". Under Missouri's law, women's trust in their doctors would be dangerously misplaced, and women would be misled by partial information, dangerously eroding the physician-patient relationship. *See Cobbs v. Grant*, 8 Cal. Rptr. 229, 243, 104 Cal. Rptr. 505, 514, 502 P.2d 1, 9 (1972).[11]

Equally important, the Court in *Roe v. Wade* recognized the unconditional and constitutionally protected right of a woman to consider and have an abortion up to the point of fetal viability. This right would be substantially impaired by the Missouri statute.

Missouri's statute would create an unwarranted burden on a woman's constitutional right of privacy and would differ substantially from a state's simple refusal to subsidize a

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10 In *Akron*, the Court recognized that since *Roe*, "the safety of second-trimester abortions has increased dramatically". 462 U.S. at 435-36. Recent medical literature indicates that the risk of death from legal abortion is no higher at any point in gestation than in carrying a pregancy to term. *See* Brief *Amicus Curiae* of National Abortion Rights Action League and authorities cited therein.

11 The doctor-patient relationship is based on trust and recognized by law as a fiduciary relationship. Because patients must be able to rely on their physicians to act in good faith and in their best interest, principles of law and ethics require physicians to do so. The physician thus has an obligation to be truthful, to respect the rights of the patient, and to disclose to the patient all pertinent facts regarding the patient's condition and treatment options including the risks and benefits of each.

woman's right to terminate her pregnancy. It would cast its net much further than either *McRae* or *Maher* permits. Under those cases, a woman is free, after obtaining the information upon which to make a decision, to proceed to obtain medical assistance outside of a government subsidized program. In this case, however, women, and particularly the many pregnant teenagers who avail themselves of public services, would be kept ignorant, or worse, would be misled about their options. The court of appeals was therefore correct when it said:

> Missouri is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth. The state's limitation on doctor-patient discussions reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice.

Webster, 851 F.2d at 1080.

The "blackout" on abortion information that would be imposed by the Missouri law strikes at the heart of the right announced in *Roe v. Wade* and reaffirmed in *Akron* and *Thornburgh*: the right to be free from unwarranted governmental interference in the inherently private process of deciding, in consultation with experts, whether or not to bear a child. By requiring physicians and health professionals in state funded programs to withhold relevant health information from pregnant women, the Missouri statute would mislead women and prevent them from freely making an informed choice between childbirth and abortion.

III. THE MISSOURI STATUTE VIOLATES THE FIRST AMENDMENT FREE SPEECH RIGHTS OF HEALTH CARE PROVIDERS AND THEIR PATIENTS BY DISCRIMINATING ON THE BASIS OF VIEWPOINT.

A. Medical standards of care require speech about all reproductive alternatives, including abortion.

The First Amendment issue raised by the Missouri statute is simple and significant. The Missouri statute would compel what the First Amendment expressly forbids by restricting expression "because of its message, its ideas, its subject matter, or its content". *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

The Missouri statute makes it "unlawful" for a doctor, nurse, social worker or other health care provider "who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life". Mo. Ann. Stat. § 188.210. This provision would have a devastating impact on the First Amendment rights of government-funded health care providers as well as their patients.[12] By requiring physicians and other health care professionals to withhold information from their patients, contrary to standards promulgated by their professional organizations, the statute would interfere with the constitutional rights of health care providers freely to express their professional opinions.

1. Health care providers have a duty to provide information about abortion.

Once a health care provider accepts a patient, he or she must exercise the standard of care expected of a reasonably prudent member of the profession by providing appropriate referrals and seeking informed consent for treatment, such as provision of contraceptives. Professional standards require

12 First Amendment protections extend to the physician as well as the patient who receives the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

performing a pregnancy test before prescribing contraceptives and counseling a patient on health risks and reproductive alternatives, including abortion.[13]

In decision after decision, courts have held that a physician has a duty to disclose all relevant information to a patient. *See, e.g., Betesh v. United States*, 400 F. Supp. 238, 247 (D.D.C. 1974) ("[A] physician undertaking a physical examination has a duty to disclose what he had found and to warn the examinee of any finding that would indicate that the patient is in danger and should seek further medical evaluation and treatment."); *Union Carbide & Carbon Corp. v. Stapleton*, 237 F.2d 229, 232-33 (6th Cir. 1956) (A patient has a right to "rely on the expectation that he would be told of any dangerous condition actually disclosed by [the] examination."); *Bonaparte v. Floyd*, 291 S.C. 427, 354 S.E.2d 40, 45 (Ct. App. 1987) (physician must properly refer patient and provide relevant information); *Truman v. Thomas*, 27 Cal. 3d 285, 293, 165 Cal. Rptr. 308, 312, 611 P.2d 902, 906 (1980) (physician obligated to provide patient "[a]ll the information material to [the patient's] decision"); *Lindquist v. Dengel*, 92 Wash. 2d 257, 595 P.2d 934, 937 (1979) ("[T]o delay a referral . . . could itself be a breach of the general practitioner's duty."); *Lee v. Andrews*, 545 S.W.2d 238, 243 (Tex. Ct. App. 1976) (failure by physician to refer medical problems he cannot treat to specialist may be malpractice). A physician's duty is no less when the information concerns abortion and its alternatives; and a state may not, consistent with constitutional principles, compel a health care provider to com-

13 *See American Public Health Association Recommended Program Guide for Abortion Services (Revised 1979)*, 70 Am. J. Pub. Health 652 (1980); American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (6th ed. 1985), American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920 (1979); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981); American Medical Association, *Current Opinions of the Council on Ethical and Judicial Affairs* (1986); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981).

promise professional obligations in the service of the state's particular views on any subject, including abortion.[14]

2. Uncensored communications between physician and patient are essential to maternal and fetal health.

The right to make fully informed medical decisions is grounded in the "well-recognized common-law right of self-determination that '[e]very human being of adult years and sound mind has a right to determine what shall be done with [her] own body. . . .'" *In re Farrell*, 108 N.J. 335, 347, 529 A.2d 404, 410 (1987) (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914)). The censored speech on the part of health care professionals required by the Missouri statute would have a devastating effect on pregnant women. The relationship between health care provider and patient is generally marked by an imbalance in knowledge. A patient often has a "dependence upon and trust in [her] physician for the information upon which [she] relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions". *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 104 Cal. Rptr. 505, 513, 502 P.2d 1, 9 (1972).

The element of trust in her health care provider is particularly important when a woman has just been told that she is pregnant. At that moment, she may be upset and frightened, uncertain as to what she should do. She will often turn to her health care provider for the accurate, complete, and unbiased information she needs to make decisions. If the government steps between the doctor and patient at the precise moment when she most needs a trusting relationship,

14 Indeed, a number of state courts have found that physicians have a duty to inform parents at risk of giving birth to a child with a disability of prenatal diagnostic tests, if they are available, and of the option of abortion. *See, e.g., Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978).

the relationship is tainted; indeed, it is likely to be destroyed, leaving the client without any assistance and reluctant to seek health care at all.

Good communication between physician and patient promotes a number of important therapeutic goals. Patients who are involved in making decisions about their own treatment are "likely to emerge from therapy in better health". President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, Vol. 1 at 69 (1982). This is because patients who are fully informed by their physicians about their conditions and the treatment alternatives are more likely to comply with proposed therapies, have reduced levels of anxiety, experience speedier recovery, and protect their own well-being by monitoring their medication dosages or by recognizing and reporting any symptoms requiring reevaluation of a particular therapy. *Id.* at 69-70. Moreover, patients who make informed decisions about their health care are more likely to advance their own life plans. *Id.* at 70. In particular, women who have a full range of reproductive options open to them in an environment supportive of their needs are more likely to take charge of their lives and their fertility.[15]

B. Abortion information is a protected form of speech.

The dissemination of information about abortion has been recognized as a protected form of speech. *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Bigelow*, the Court held a state statute making it a misdemeanor to encourage abortion unconstitutional. The Court found that advertisement of

15 *See* Birdsall & Chester, *Contraception and the Status of Women: What is the Link?*, 19 Fam. Plan. Persp. 14, 17 (1987) ("Low fertility . . . is not sufficient or even necessary for improving the status of women. Rather, women's knowledge that they can control the timing of their childbearing enlarges [their] economic choices and enhances their status."); Adler, *Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women*, Prof. Psychology 12, 63 (1981).

abortion services was a form of expression protected by the First Amendment.[16]

The Court consistently has struck down regulations that limit expressions of opinion on issues of public controversy. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). The prohibited information here is similarly of great public interest. Not only would those who need abortion services be denied the information, but those interested in reproductive health also would be deprived of access to unbiased information as well as opinions about abortion.

C. The Missouri statute unconstitutionally censors speech on the basis of viewpoint about abortion.

In funding reproductive health services, Missouri has opened a forum for the discussion of pregnancy and reproductive health. Information is provided through reproductive counseling as well as through libraries in public facilities containing comprehensive references on health care, including books, pamphlets and individual materials for patient and public use. Having opened this forum, the government must maintain strict viewpoint neutrality and ensure that the information given is nondiscriminatory.

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16 Accordingly, other courts have granted First Amendment protection to such speech. *Planned Parenthood v. Arizona*, 718 F.2d 938, 942 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 107 S. Ct. 391 (1986); *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 577-78 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 330-33 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir.), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238, 242 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99(8th Cir. 1981); *DKT Memorial Fund Ltd. v. Agency for International Development*, 691 F. Supp. 394 (D.D.C. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988); *Planned Parenthood Federation v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988). *But see New York v. Bowen*, 690 F. Supp. 1261, 1273 (S.D.N.Y. 1988), *appeal filed*, No. 88-6204 (2d Cir. filed 1988).

For example, in *Board of Education v. Pico*, 457 U.S. 853 (1982), a plurality of the Court held that, despite a school board's broad discretion in determining how to spend its money on books for the school library, if board members ordered the removal of books with the intent "to deny respondents access to ideas with which petitioners disagreed", their action would violate the Constitution. *Id.* at 871.[17]

Constitutional principles of viewpoint neutrality dictate that the allocation of public funds may not be motivated by the desire to suppress "unacceptable" ideas while subsidizing "acceptable" ones. In *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), the Court struck down a ban on editorializing by publicly funded radio stations because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest". *Id. See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (government regulation of publications on the basis of their content violates the First Amendment.)[18] As the Court has observed, "where the State's interest is to disseminate an ideology, no

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17 *See also Gay & Lesbian Law Students Ass'n v. Gohn*, 850 F. 2d 361, 366-68 (8th Cir. 1988) (public university may not withhold funding from student group because it "dislikes their ideas"); *Bullfrog Films v. Wick*, 847 F.2d 502, 509-10 & n.11 (United States Information Agency may not deny various benefits, including certification for exemption from import duties, because of content of films or viewpoints expressed therein); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 815-16 (D.D.C. 1986) (Library of Congress may not stop government-subsidized production of Braille editions of *Playboy* because of the sexual content of the magazine).

18 Missouri argues that its statute simply effects a legislative decision not to fund activities promoting abortion and accordingly does not implicate free speech principles, invoking *Harris v. McRae*, 448 U.S. 297 (1980). *See* Brief for Appellants at pp. 35-38. *McRae* is not supportive of Missouri's position, however, because it is impossible to distinguish family planning counseling that includes information on abortion from counseling that does not without restricting freedom of expression.

Nor do *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) ("*TWR*"), or *Lyng v. United Auto Workers*, 108 S. Ct. 1184 (1988), apply. In *TWR*, the Court upheld against a First Amendment challenge the provision

matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message". *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).[19]

By forcing the physician—viewed by the patient as the source of accurate, impartial medical information—to act as the mouthpiece for the government's disapproval of abortion, Missouri unconstitutionally circumvents the First Amendment while minimizing women's access to abortion information. Its statute simply does not withstand scrutiny.

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of the Internal Revenue Code denying tax-exempt status to organizations, a substantial part of whose activities consists of lobbying. In *Lyng*, the Court found constitutional an amendment to the Food Stamp Act prohibiting a grant of food stamps to a striker's household when need is based on income loss during a strike. In both cases, the Court found that the challenged legislation simply represented a decision not to subsidize particular kinds of activity–political lobbying (*TWR*) and striking (*Lyng*). In contrast, abortion counseling cannot be viewed as a distinct activity, such as lobbying or going on strike, which the government may refuse to subsidize without encroaching on First Amendment concerns. Missouri has decided to provide its citizens with information about reproductive health services. Although it need not pay for abortions, it may not prohibit its employees even from mentioning them.

19 In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985), the Court upheld an Executive Order banning access by legal defense and political advocacy organizations to a forum only because the ban was viewpoint neutral. The Court noted, moreover, that even a facially neutral regulation would fall if it were "in reality a facade for viewpoint-based discrimination". 473 U.S. at 811. The Missouri statute explicitly discriminates on the basis of viewpoint about abortion and thus fails *Cornelius*' test.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold *Roe v. Wade* and to affirm the decision of the Court of Appeals for the Eighth Circuit in this case.

Dated: New York, New York
March 30, 1989

Respectfully submitted,

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FILED
MAR 30
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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City of Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1982) 8, 12
Colautti v. *Franklin*, 439 U.S. 379 (1979) 9
Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*

STATUTES AND LEGISLATIVE MATERIALS:

The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. (1981) 4, 5, 6, 7
The Human Life Bill—S.158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 97th Cong. 1st Sess. (1981) 7

MISCELLANEOUS:

Beddis, Collins, Levy, Godfrey & Silverman, *New technique for servo-control of arterial oxygen tension in preterm infants*, 54 Archives of Disease in Childhood 278 (1979) 10
Buckwald, Zorn & Egan, *Mortality and Follow-up Data for Neonates Weighing 500 to 800 g at Birth*, 138 American Journal of Diseases of Children 779 (1984) 9
M. Flower, *Neuromaturation and the Moral Status of Human Fetal Life* in ABORTION RIGHTS AND FETAL PERSONHOOD 71 (Doerr & Prescott ed. 1989) (forthcoming) 14, 15
Gerdes, Abbasi, Bhutani & Bowen, *Improved Survival and Short-Term Outcome of Inborn "Micropremies,"* 25 Clinical Pediatrics 391 (1986) 9
Koops, Morgan & Battaglia, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 Journal of Pediatrics 969 (1982) 9, 10
Kopelman, *The Smallest Preterm Infants: Reasons for Optimism and New Dilemmas*, 132 American Journal of Diseases of Children 461 (1978) 13

TABLE OF AUTHORITIES—Continued

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Kostovic & Goldman-Rakic, *Transient Cholinesterase Staining in the Mediodorsal Nucleus of the Thalamus and its Connections in the Developing Human and Monkey Brain*, 219 Journal of Comparative Neurology 431 (1983) 15
Kostovic & Rakic, *Development of Prestriate Visual Projections in the Monkey and Human Fetal Cerebrum Revealed by Transient Cholinesterase Staining*, 4 Journal of Neuroscience 25 (1984) .. 15
Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 13, 14
Milner & Beard, *Limit of Fetal Viability*, 1 Lancet 1079 (1984) 9, 12
Molliver, Kostovic & Van Der Loos, *The development of synapses in cerebral cortex of the human fetus*, 50 *Brain Research* 403 (1973) 15
Phillip, Little, Polivy & Lucey, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122 (1981) 12, 13
Pleasure, Dhand & Kaur, *What is the Lower Limit of Viability*, 138 American Journal of Diseases of Children 783 (1984) 9
Pollner, *Abortion: Are medicine and the law on a collision course?*, Medical World News, July 8, 1985 ..... 10, 11
D.P. Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant* in GROWTH AND DEVELOPMENT OF THE BRAIN 33, 46 (M.A.B. Brazier ed. 1975) (examining the visual cortex) 15
Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law, *Fetal Extrauterine Survivability* (1988) 10, 11, 12
Shewmon, Capron, Warwick & Schulman, *The Use of Anencephalic Infants as Organ Donors: A Critique*, 261 Journal of American Medical Association 1773 (1989) 15
Stern, *Intensive Care for the Pre-Term Infant*, 26 Danish Med. Bull. 144 (1979) 13, 14

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AMICI CURIAE BRIEF OF 167 DISTINGUISHED SCIENTISTS AND PHYSICIANS, INCLUDING 11 NOBEL LAUREATES, IN SUPPORT OF APPELLEES

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are distinguished scientists and physicians having specialized training and expertise in, among others, the fields of developmental biology, neurobiology, molecular biology and obstetrics and gynecology. *Amici* have been recognized for their contributions to their respective fields. Eleven of *amici*, for example, have been awarded the Nobel Prize in their respective disciplines. A complete list of *amici* and their professional affiliations appears in the Appendix.

Amici have observed that appellants and some *amici* urging that *Roe* v. *Wade*, 410 U.S. 113 (1973), be overruled have purported to ground their arguments, in part,

upon alleged scientific "truth." For example, appellants characterize the proposition that life begins at conception as a "biological fact," comparable to the "truth" that the "Earth still moves around the sun." (Brief for Appellants, p. 26.) Other *amici* aligned with appellants have asserted that subsequent advancements in science since *Roe* v. *Wade* was decided have rendered the decision obsolete.

As scientists, *amici* have a special ability to provide the Court with accurate scientific information bearing upon such arguments. *Amici* also have a unique interest in seeing that scientific learning is not distorted or misused in arguments concerning abortion. Accordingly, *amici* submit this brief supporting appellees.

SUMMARY OF ARGUMENT

There is no scientific consensus that a human life begins at conception, at a given stage of fetal development, or at birth. The question of "when a human life begins" cannot be answered by reference to scientific principles like those with which we predict planetary movement. The answer to that question will depend on each individual's social, religious, philosophical, ethical and moral beliefs and values.

Science can, however, provide answers to certain concrete questions regarding prenatal development that have arisen in the controversy over abortion and *Roe* v. *Wade*, 410 U.S. 113 (1973). For example, appellants and several *amici* assert that medical advances are undermining *Roe* v. *Wade* by moving the point of fetal viability briskly and inexorably toward the date of conception. Science is capable of addressing—and in this case refuting—such arguments.

The earliest point of viability has remained virtually unchanged at approximately 24 weeks of gestation since 1973, and there is no reason to believe that a change is either imminent or inevitable. The reason that viability

has not been pushed significantly back toward the point of conception is that critical organs, particularly lungs and kidneys, do not mature before that time. Progress in science, therefore, has not made obsolete the trimester framework based on viability articulated in *Roe* v. *Wade*. The trimester framework, moreover, corresponds with another aspect of fetal development—the chronology of human brain development. Not until after 28 weeks of gestation does the fetus attain sufficient neocortical complexity to exhibit those sentient capacities that are present in full-term newborns. In lay terms, the capacity for the human thought process as we know it cannot exist until sometime after 28 weeks of gestation.

This Court's decision in *Roe* v. *Wade* is as well grounded in "biological justifications," 410 U.S. at 163, today as in 1973, and the basic chronology of human development recognized in the Court's opinion remains accurate. Accordingly, the Court should reject arguments for overruling the decision because of alleged inconsistency with scientific advancement or "truth."

ARGUMENT

I. THERE IS NO SCIENTIFIC CONSENSUS ON WHEN A HUMAN LIFE BEGINS

Appellants and several *amici* aligned with them argue that the controversy over abortion and *Roe* v. *Wade*, 410 U.S. 113 (1973), may be resolved by what they contend is scientific "truth." Appellants, for example, contend that, as surely as "[t]he Earth still moves around the sun," it is an undisputed "biological fact" that a human life begins at conception.[1] Certain *amici* likewise argue that *Roe* v. *Wade* is contrary to an alleged "scientific truth" or "fact" that life begins at conception.[2] Others

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[1] Brief for Appellants at 26.

[2] *See, e.g.*, Brief *Amicus Curiae* of Hon. Christopher H. Smith, Hon. Alan B. Mollohan, Hon. John C. Danforth, and Other United

cite alleged technological advances as the justification for reconsidering and overruling *Roe* v. *Wade*.[3]

Amici submit that such arguments are an attempt to distort the teachings of science to fit preconceived conclusions based upon values that science alone does not and cannot dictate. The question of when a human life begins cannot be answered with reference to a scientific law or principle, such as the empirically-testable propositions with which we predict planetary movement. Individual scientists will have individual answers to that question, based upon their individual values and beliefs. These answers do not represent any "scientific" truth, because they are based upon values and beliefs, not upon science alone.

The only "consensus" that may be said to exist among scientists on the question of when a human life begins is that science alone cannot answer that question. This is demonstrated by the response of the scientific community when in 1981 a Senate subcommittee held hearings on a bill to declare "that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." *See, The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Hearings*]. As distinguished scientists testified, science alone does not provide the answer to this question.

States Senators and Members of Congress at 21; Brief *Amici Curiae* of Doctors for Life, Missouri Doctors for Life, Missouri Citizens for Life, Missouri Nurses for Life, and Lawyers for Life, Inc. at 21-23; *Amicus* Alabama Lawyers for Unborn Children, Inc. at 13-17; Brief for *Amicus Curiae*, The New England Christian Action Council, Inc. at 7.

[3] *See, e.g.*, Brief for the United States as *Amicus Curiae* at 19; Brief of the Knights of Columbus as *Amicus Curiae* at 6.

For example, Dr. Leon Rosenberg, then Chairman of the Department of Human Genetics, Yale University Medical School, and a signatory of this brief, testified:

> When does this potential for human life become actual? As a scientist, I must answer I do not know. Moreover, I have not been able to find a single piece of scientific evidence which helps me with that question.
>
> Not surprisingly, a great deal has been spoken and written on the subject. Some people argue, as you have heard, that life begins at conception . . . .
>
> I have no quarrel with anyone's ideas on this matter so long as it is clearly understood that they are personal beliefs based on personal judgments and not scientific truths.

Id. at 50.

Dr. Rosenberg then explained the reason science alone cannot answer the question—the inability to test the hypothesis by the scientific method:

> The scientific method depends on two essential things—a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea. I maintain that concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.

Id.

The National Academy of Sciences was equally emphatic:

> It is the view of the National Academy of Sciences that the statement in [Senate Bill S. 158] cannot stand up to the scrutiny of science. This section reads, "The Congress finds that present day scientific

> evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a person must remain a matter of moral or religious value.

Id. at 74. *See also id.* at 1035-36 (statement of Joseph Boyle, M.D., chairman of the board of trustees of the American Medical Association) (there is no scientific consensus that a human life begins at conception; that question goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns").

As shown in the next section of this brief, science can indeed provide valuable information and can answer concrete questions regarding prenatal development by identifying, for example, the stages of fetal brain development. But the question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life. While science can tell us when certain biological attributes can be detected, science cannot tell us which biological attributes establish the existence of a human being.

Many other physicians and scientists made these observations at the 1981 hearings. *See, e.g., id.* at 68 (statement of Robert H. Ebert, M.D., President of Milbank Memorial Fund, Caroline Shields Walker Professor of Medicine Emeritus, Harvard University) (whether a human life begins at conception is not a medical or scientific question, but a philosophical and religious question that "can be debated endlessly and has to do with how one defines a person and 'self' "); *id.* at 69-70 (statement of Sherman M. Mellinkoff, M.D., Dean of the UCLA

School of Medicine) (same); *id.* at 71 (statement of Arno G. Motulsky, M.D., Professor of Medicine and Genetics, University of Washington) (same); *id.* at 113-14 (statement of Dr. Jessica G. Davis, Director, Child Development Center, Chief, Division of Genetics, North Shore University Hospital) (same). The subcommittee also received hundreds of letters from scientists and physicians across the country echoing Dr. Rosenberg's views. *See e.g., Hearings app.* at 414, 669, 716, 718.[4]

Science cannot define the essential attributes of human life any more than science can define such concepts as love, faith or trust. *Hearings* at 50. This Court was indisputably correct when it observed in *Roe* v. *Wade*, 410 U.S. at 159, that the question of when a human life begins cannot simply be referred to an expert discipline for resolution.

Science can, however, offer to this controversy concrete information concerning the physiology of prenatal development—particularly, scientific observations about viability and brain development. As shown below, these observations support the chronology of fetal development recognized in *Roe* v. *Wade*.

---

[4] The fact that the subcommittee itself could not reach agreement on the question further highlights the inability to find the answer in scientific truth. *The Human Life Bill—S. 158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 39, 41 (1981) (minority view of Senator Baucus) ("If the hearings on S. 158 held by the Separation of Powers Subcommittee were conclusive on any point it is that in 1981 there remains no consensus among scientists, philosophers and theologians on the question of when life begins."). Indeed, the current Commissioner of the Food and Drug Administration, Frank E. Young, M.D., stated in 1981 that "science and medicine cannot unequivocally establish the time in the continuum of development where human life begins"; the decision is "in part moral, ethical, philosophical and religious." *Hearings app.* at 781.

II. *ROE* v. *WADE* HAS NOT BEEN RENDERED OBSOLETE BY SUBSEQUENT ADVANCEMENTS IN SCIENCE

Appellants and several *amici*, including the United States, cite developments in science and technology as a justification for reconsidering and overruling *Roe* v. *Wade*, 410 U.S. 113 (1973). Citing Justice O'Connor's dissenting opinion in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 456-58 (1983), these litigants and aligned *amici* suggest that there has been enormous movement in the point of viability since 1973.[5] Although Justice O'Connor's opinion in *Akron* stated that "fetal viability in the first trimester of pregnancy *may be possible* in the not too distant future," *id.* at 457 (emphasis added), these advocates have tried to use her observations to catapult themselves to the conclusion that the point of viability is marching briskly and inexorably toward the date of conception because of technological change.[6]

Assertions that viability has moved significantly earlier in fetal development are flatly contrary to the scientific evidence. Although advances in technology have improved the chances of survival for premature birth *within* the range of 24 to 28 weeks, the *outer limit* of viability at 24 weeks has not significantly changed. Moreover, there is no reason to believe that a change in this outer limit is either imminent or inevitable.

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[5] *See, e.g.*, Brief for Appellants at 12-14; Brief for the United States as *Amicus Curiae* at 19; Brief of the Association for Public Justice, and the Value of Life Committee, Inc., as *Amici Curiae* at 25; Brief of Catholics United for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, American Baptist Friends of Life, Baptists for Life, Southern Baptists for Life, Lutherans for Life, Moravians for Life, United Church of Christ Friends for Life, Task Force of United Methodists on Abortion and Sexuality, and the Christian Action Council as *Amici Curiae* at 19, 21.

[6] *See, e.g.*, Brief for Appellants at 12-14.

A. The Point Of Viability Has Not Changed Significantly Since 1973 And Such Change Is Not Likely To Occur In The Foreseeable Future

In *Roe* v. *Wade*, 410 U.S. at 160, this Court recognized that viability occurs at approximately 24 to 28 weeks of gestation. In *Colautti* v. *Franklin*, 439 U.S. 379 (1979), the Court emphasized that the date of viability was not intended to be fixed and arbitrary, but rather left "flexible for anticipated advancements in medical skill." *Id.* at 397. The Court further stated: "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Id.* at 388.

Since *Roe* v. *Wade* was decided, great strides have been made in medicine, but the significance of those strides should not be misunderstood. Advances in medical technology have enhanced the probability of survival of infants born prematurely at 24 weeks and later. *See, e.g.*, Gerdes, Abbasi, Bhutani & Bowen, *Improved Survival and Short-Term Outcome of Inborn "Micropremies,"* 25 Clinical Pediatrics 391, 393 (1986); Buckwald, Zorn & Egan, *Mortality and Follow-up Data for Neonates Weighing 500 to 800 g at Birth*, 138 American Journal of Diseases of Children 779 (1984); Pleasure, Dhand & Kaur, *What is the Lower Limit of Viability*, 138 American Journal of Diseases of Children 783 (1984).

However, these advances have *not* significantly changed the earliest date of viability, which remains approximately at the 24-week mark recognized in *Roe* v. *Wade*. *See, e.g.*, Pleasure, Dhand & Kaur, *What is the Lower Limit of Viability*, 138 American Journal of Diseases of Children 783 (1984); Milner & Beard, *Limit of Fetal Viability*, 1 Lancet 1079 (1984); Koops, Morgan & Battaglia, *Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age: Update*, 101 Journal of

Pediatrics 969-77 (1982). Thus, the scientific evidence supports the finding made by the District Court:

> Testimony by medical experts for both plaintiffs and defendants, in addition to recent medical literature, provides clear evidence that 23 1/2 to 24 weeks gestation is the earliest point in pregnancy where a reasonable probability of viability exists.

Reproductive Health Services v. *Webster*, 662 F. Supp. 407, 420 (W.D. Mo. 1987) (citations omitted).

The reason that viability has not advanced to a point significantly earlier than 24 weeks of gestation is that critical organs, particularly the lungs and kidneys, do not mature before that time. While a number of factors, such as immaturity of the immune system, contribute to the mortality rate for premature infants, the most important determinant of viability is lung development—specifically, the development of the air sacs through which gases are passed into and out of the blood stream.

Air sac development sufficient for gas exchange does not occur until at least 23 weeks after gestation and often later. Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law, *Fetal Extrauterine Survivability* 7 (1988) (hereinafter *Fetal Extrauterine Survivability*). Respirators have been developed that significantly enhance the operation of immature air sacs,[7] but no known technology will accelerate the date at which air sacs begin to form and to link up with the crucial blood vessels. For example, Dr. John Kattwinkel, a member of the American Academy of Pediatrics's fetus and newborn committee, has stated:

> At 24 weeks or less, fetal lung development is at a glandular stage and the lung capillaries have not migrated into the airways. You can't force respiration when there is no surface through which to exchange gases. Oxygen simply cannot reach the blood no matter how much air is forced into the lungs by machine.

[7] *See* Beddis, Collins, Levy, Godfrey & Silverman, *New technique for servo-control of arterial oxygen tension in preterm infants*, 54 Archives of Disease in Childhood 278-80 (1979).

Pollner, *Abortion: Are medicine and the law on a collision course?*, Medical World News, July 8, 1985, at 73. *See also Fetal Extrauterine Survivability* at 7 ("Clinical experience and anatomic studies suggest that gas exchange is almost never possible before 23 weeks of gestation, but is not uncommon after 26 weeks.").[8] There are no medical developments anticipated in the foreseeable future that would bring about adequate fetal lung function prior to 23 to 24 weeks of gestation.

A minimal level of kidney development is also a prerequisite of viability. As observed in *Fetal Extrauterine Survivability*:

> Although the maturational limitations in renal function are an important factor in the morbidity and mortality of [premature] infants with a gestational age less than 26 weeks, renal function is generally not the sole determinant of survival—even down to 24 weeks of gestation. In the earlier 20-24 week gestational period, inadequate kidney development potentially determines fetal survivability.

Fetal Extrauterine Survivability at 6 (footnote omitted).

Amici agree with the overall conclusions expressed in *Fetal Extrauterine Survivability*:

> The increasing ability over the past decade to save progressively younger neonates is primarily due to

[8] Air sac development is not the only aspect of lung development that affects viability; it is, however, the factor that sets the outside limit of lung function. For example, the lungs cannot operate without an adequate supply of surfactant, a chemical which prevents the air sacs from collapsing. Inadequate surfactant production is a significant cause of premature infant mortality. The development of surfactant-producing cells cannot be considered an absolute and independent limitation on viability, however, inasmuch as surfactant does not even come into play until the air sacs reach the level of structural sophistication needed to sustain life.

> the ability to support and assist, at an earlier age, the organs already present in the fetus. The developmental biology of the fetus, however, has not changed. After reviewing the developmental biology of several crucial fetal organs, including the brain, the kidneys, and the lungs, the Committee concluded that a point exists before which the fetal organs are too immature to function, even with the assistance of sophisticated medical technology. This point in time is 23-24 weeks of gestation; *prior to that time, fetal life cannot be maintained outside the womb.*

Id. at 9 (emphasis added).[9]

These conclusions are not contradicted by the studies cited in footnote five of Justice O'Connor's dissenting opinion in *Akron*, 462 U.S. at 457 n. 5, which were characterized as having "demonstrated increasingly earlier fetal viability." One study—Phillip, Little, Polivy & Lucey, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122 (1981)—presents data on premature infant mortality at two medical centers. At one center, data were presented for 523 premature infants treated in an intensive care nursery between 1976 and 1979; of these, five were 25 weeks of gestation or less and only one of the five survived. *Id.* at 125, Table 4.[10] The data from a second regional medical center showed that infants born alive with a gestational age of less than 25 weeks and weight between 500 and 1,249 grams had only

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[9] It should also be noted that even the advance of viability from 24 to 23 weeks is still largely hypothetical. In fact, it is very rare for a fetus delivered before 24 weeks to survive. *See, e.g.*, Milner & Beard, *Limit of Fetal Viability*, 1 Lancet 1079 (1984).

[10] Two of these premature babies weighed between 500 and 749 grams and both died; one baby weighed between 750 and 999 grams and died; and two babies weighed between 1,000 and 1,249 grams and one survived.

a 9% survival rate. *Id.* The data in the study do not support the proposition that the point of fetal viability has been moved significantly closer to conception.

The same observations apply to other studies cited in the footnote, and two authors of studies cited there have disassociated themselves from any attempt to use their work as a basis for inferring a shift of the point of viability. For example, Dr. Arthur E. Kopelman, Head of Neonatology at East Carolina School of Medicine—whose study, *The Smallest Preterm Infants: Reasons for Optimism and New Dilemmas*, 132 American Journal of Diseases of Children 461 (1978) is cited at 462 U.S. at 457 n. 5—subsequently commented:

> I would respond emphatically that my article does not in any way, shape or form support such a contention. Furthermore, I know of no current research which would lead me to believe that a fetus of less than 22 weeks of gestation can be or soon will be able to be sustained outside the uterus . . . .
>
> Below 24 weeks of gestation the fetus' lungs are simply not adequately developed to sustain oxygenation even with ventilator support.

Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023-24 n.245 (1984) (quoting Dr. Kopelman's communication).[11]

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[11] Similarly, Dr. Leo Stern, Professor and Chairman of Pediatrics at Brown University and the author of *Intensive Care for the Pre-Term Infant*, 26 Danish Med. Bull. 144 (1979), cited at 462 U.S. at 457 n.5, subsequently wrote:

> It may well be that some of the other references quoted in the footnote have demonstrated "increasingly earlier fetal viability," but that is certainly not what I said in my article . . . . It is highly likely that the lower limit beyond which human gestation is simply incapable of survival has already been virtually reached in its entirety, at least insofar as we intend such survival to be possible without the intervention of some

In short, the basic scientific observations concerning the outer limit of viability recognized in *Roe* v. *Wade* remain accurate.

B. The Organic Capacity For Human Thought Is Absent Until After 28 Weeks Of Gestation

Roe v. *Wade* established a trimester-based framework for evaluating the interests of a state in protecting fetal life. That framework was supported by reference to the concept of viability. While not mentioned by the Court in *Roe* v. *Wade*, it is also true that the trimester-based framework corresponds to the chronology of fetal brain development. It is not until sometime after 28 weeks of gestation that the fetal brain has the capacity to carry on the same range of neurological activity as the brain in a full-term newborn.

Fetal brain development is obviously a long and incremental process. Brain cells in the neocortex, the portion of the brain in which the processes we call thought, emotion and consciousness occur, must be sufficiently developed to permit this kind of neurological activity to take place. At about 28 weeks of gestation, brain development is marked by the sudden emergence of dendritic spines in the neocortex. Dendritic spines are essential components in the brain's cellular circuitry.[12]

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form of artificial extrauterine environment that could be provided by the successful creation of an artificial placenta.

Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023-24 n.245 (1984) (quoting Dr. Stern's communication).

Regarding the development of an artificial placenta, Dr. Stern observed:

> Even if such a procedure could be successfully achieved, not only are its economic costs staggering to imagine but the potential for ever being able to supply the technology in sufficiently large numbers of units to make any kind of impact on the total number of threatened or spontaneously terminated first term gestations would be in practical terms most unlikely.

Id.

[12] M. Flower, *Neuromaturation and the Moral Status of Human Fetal Life* in ABORTION RIGHTS AND FETAL PERSONHOOD 71, 77 (Doerr & Prescott ed. 1989) (emphasis in original) (forthcoming).

One study has indicated that neocortical cells possess no dendritic spines as late as 24 to 27 weeks of gestation.[13] It is also at that time that large-scale neocortical synaptogenesis (the development of neural connections between brain cells in the neocortex) begins,[14] although limited synaptogenesis may begin as early as 19 to 22 weeks of gestation.[15]

Some primitive motor activities, such as swallowing and spontaneous movement of limbs, begin between eight and thirteen weeks of gestation.[16] However, the thalamocortical connections which are prerequisites for neocortical reception of bodily sensation do not begin to develop until approximately 22 or 23 weeks.[17] In addition, regular patterned electroencephalograms (EEGs) with characteristics of an adult EEG appear at approximately 30 weeks.[18] Of course, the fact that the fetus develops the bare biological capacity for crucial neurological processes does not necessarily mean that these neurological processes actually begin to occur in this period. Indeed, the cerebral cortex is relatively nonfunctional even in normal newborns.[19]

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[13] D.P. Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant* in GROWTH AND DEVELOPMENT OF THE BRAIN, 33, 46 (M.A.B. Brazier ed. 1975) (examining the visual cortex).

[14] *Id.* at 45-46.

[15] Molliver, Kostovic & Van Der Loos, *The development of synapses in cerebral cortex of the human fetus*, 50 *Brain Research* 403-07 (1973).

[16] Flower, *supra* note 12, at 75.

[17] Kostovic & Goldman-Rakic, *Transient Cholinesterase Staining in the Mediodorsal Nucleus of the Thalamus and its Connections in the Developing Human and Monkey Brain*, 219 Journal of Comparative Neurology 431-47 (1983); Kostovic & Rakic, *Development of Prestriate Visual Projections in the Monkey and Human Fetal Cerebrum Revealed by Transient Cholinesterase Staining*, 4 Journal of Neuroscience 25-42 (1984).

[18] Flower, *supra* note 12, at 79.

[19] Shewmon, Capron, Warwick & Schulman, *The Use of Anencephalic Infants as Organ Donors: A Critique*, 261 Journal of American Medical Association 1773-81 (1989).

The neurobiological data indicate that the fetus lacks the physical capacity for the neurological activities we associate with human thought until sometime after 28 weeks of gestation. In other words, the capacity for the human thought process as we know it cannot exist before that time. *Amici* believe that these neurobiological facts support the chronology of development this Court recognized in *Roe* v. *Wade*.

CONCLUSION

The parties and the various *amici* in this case may disagree about when a human life begins. Indeed, the signatories of this brief may, as individuals, have different answers to this fundamental question. But such differences are a product of philosophical, moral and religious differences which cannot be resolved by resort to scientific "truth" alone. Those who claim that the Court's decision in *Roe* v. *Wade* is refuted by scientific law or fact are merely expressing their own value judgments. *Amici* respectfully urge this Court to reject the assertion that *Roe* v. *Wade* should be overruled on the basis of alleged inconsistency with scientific "truth" and to reaffirm its decision in that case.

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AMICUS CURIAE

BRIEF

No. 88-605

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,
v.
REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The National Family Planning and Reproductive Health Association, Inc. ("NFPRHA"), is a nonprofit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over 85 percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970, 42 U.S.C. § 300 *et seq.*

This case raises a number of issues of constitutional dimension, including: whether the State may determine that human life begins at conception, whether the State may require that physicians perform medical examinations and tests to determine characteristics of fetal viability, and whether the State can make it unlawful for public employees, public facilities and public funding to be involved in the performance or assistance of elective abortions. Appellants have also specifically asked that the Court reconsider the trimester approach to determining the State interest in regulating abortion services, first enunciated in *Roe v. Wade*, 410 U.S. 113 (1973). It is, however, only the issues relating to the expenditure of public funds for counseling on abortion that will be addressed by NFPRHA in this brief.*

In the present case, the Court of Appeals declared unconstitutional portions of a Missouri statute prohibiting the use of public funds, employees, and facilities for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life. *See* Mo. Ann. Stat. §§ 188.205, .210, .215. In 1988, the United States Department of Health and Human Services ("HHS") promulgated regulations similar to the public funds provision of the Missouri statute, which *inter alia*, prohibited Title X funding recipients from mentioning abortion as an option in counseling patients with unintended pregnancies. *See* 53 Fed. Reg. 2922 (February 2, 1988) (to be codified at 42 C.F.R. § 59.8).

NFPRHA joined with Massachusetts in challenging HHS' Title X regulations and obtained a permanent injunction preventing their implementation. *See Massachusetts v. Bowen*, 679 F.Supp. 137 (D. Mass. 1988), *appeal pending*, No. 88-1279 (1st Cir.) These same Title

* This *Amicus Curiae* Brief is filed with the consent of all parties to this appeal and letters to this effect have been filed with the Clerk of the Court.

X regulations were also held unconstitutional and permanently enjoined in *Planned Parenthood Fed'n v. Bowen*, 680 F.Supp. 1465 (D. Colo. 1988), *appeal pending*, No. 88-2251 (10th Cir.), but were upheld in *New York v. Bowen*, 690 F.Supp. 1261 (S.D.N.Y. 1988), *appeal pending*, No. 88-6204 (2d Cir.).

In all three cases, plaintiffs argued that the HHS regulations: (1) were unauthorized and contrary to the intent of Congress in enacting and reenacting Title X; (2) violated a woman's First and Fifth Amendment rights to make an informed reproductive choice in consultation with her physician; and (3) violated a physician's First Amendment right to provide necessary medical information and counseling to his or her patient without government censorship or interference. All three cases have been appealed, briefed, and argued in their respective circuits and await decisions. This Court's ruling as to the relationship between the use of public funds and counseling on abortion may well affect the outcome of these pending challenges to the Title X regulations.

SUMMARY OF ARGUMENT

According to Article III of the Constitution, there must be an actual, ongoing controversy between the parties at all stages of litigation, including review before this Court. The Missouri statute at issue in this case prohibits the use of public funds, public employees, and public facilities in counseling a woman on abortion. The lower courts struck down all three provisions as unconstitutional.

The State's decision to appeal only the public funding component of the statute, along with certain representations made by the State during the pendency of this appeal, results in broad protection of most of the unidentified plaintiff class members and settlement of the controversy as between the identified litigants. Consequently, this case must now be remanded to the district court for reconsideration of the class definition, exclusion of those

whose claims are moot, and substitution of class representatives with live claims pertaining to the public funding question.

Even if the Court reaches the public funding prohibition, it must declare the Missouri statute unconstitutional. First, it directly interferes with the privacy right of a woman to make an informed decision between abortion and childbirth.

Second, it violates the protected First Amendment free speech rights of both the patient and the physician to both speak and receive information freely. As a result, patients are not left with the same range of choice as they would have had if the State had chosen not to fund family planning programs at all.

Finally, the Missouri statute openly discriminates on the basis of viewpoint. Viewpoint discrimination by the State cannot be excused or justified because it is accomplished through the manipulation of its public funds.

ARGUMENT

I. THERE IS NO ACTUAL, ONGOING CONTROVERSY BETWEEN THE LITIGANTS ON THE PUBLIC FUNDING QUESTION.

Under Article III of the Constitution, an essential prerequisite to the exercise of jurisdiction by this Court is the existence of an "actual, ongoing" controversy between the litigants. *Honig v. Doe*, 108 S.Ct. 592, 601 (1988); *Deakins v. Monaghan*, 108 S.Ct. 523, 528 (1988). In addition, this Court requires that:

> [t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937) (citations omitted). Finally, the controversy must

exist at all stages of litigation, including review before this Court. *See Kremens v. Bartley*, 431 U.S. 119 (1977); *Preiser v. Newkirk*, 422 U.S. 395, 401-04 (1975).

The Missouri statute prohibits the use of public funds (§ 188.205), public employees (§ 188.210), and public facilities (§ 188.215) in counseling a woman on abortion. These provisions were challenged in a class action brought by five publicly-employed health care professionals and two non-profit corporations.[1] Both the district court and the court of appeals struck down these three sections as violative of rights guaranteed under the First and Fourteenth Amendments to the Constitution. *See Reproductive Health Services v. Webster*, 851 F.2d 1071, 1077-80 (8th Cir. 1988); *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 423-28 (W.D. Mo. 1987).

Missouri neglected to appeal the court of appeals' holding that the statutory prohibition on the involvement of public employees and facilities in abortion counseling is unconstitutional. Consequently, those statutory provisions are not now properly before the Court. The State's appeal of only the public funding component of the statute is based on the assertion that it "does not implicate the First Amendment rights of any person. Section 188.205 merely directs officials not to expend public funds under their control . . . . The statute . . . does not forbid anyone from discussing the subject of abortion." J.S. at 24-25.

Indeed, the State maintains that § 188.205 "does not prohibit the use of public funds to provide information

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[1] The district court certified a plaintiff class consisting of (1) facilities, physicians and other health care professionals offering abortion counseling and services; and (2) pregnant women seeking abortion counseling and services in Missouri. *See Reproductive Health Services v. Webster*, 662 F. Supp. 407, 411 (W.D. Missouri 1987).

regarding abortion or to inform a woman of the options she may have . . ." J.S. at 25. Rather, the State contends that § 188.205 prohibits "the use of public funds for the purpose of *directly urging* a woman to have an abortion not necessary to save her life." Brief for Appellants at 38 (emphasis added).

The Court need not address the merits of the State's interpretation of § 188.205. Because of the State's currently-expressed reading of the funding restriction, pregnant women can receive counseling on all options, including abortion, notwithstanding the fact that public funds may be used to pay for that counseling. While it is, of course, true that the funding restriction still prohibits a physician from advocating in favor of abortion unless a life-threatening condition exists, the ability to counsel generally on the abortion option certainly relieves the tension originally associated with § 188.205.

And since Missouri has not appealed the Eighth Circuit's decision with respect to public employees or facilities, as it now stands, anyone in Missouri receiving or operating with public funds, including a public employee, is free to counsel pregnant women on the abortion option, and may do so even in a State-supported facility. The public employees and public facilities rulings of the court of appeals, coupled with the State's representations on public funding, result in a broad protection toward the vast majority of the members of the plaintiff class. As the Court concluded in *Kremens*, any remaining "disputes are so unfocused as to make informed resolution of them almost impossible." 431 U.S. at 134. Under the circumstances of this case, this Court should not exercise its judicial power under Article III to address Missouri's public funding restriction, and should instead remand that question to the district court "for

reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." *Kremens*, 431 U.S. at 134-135.

II. THE MISSOURI STATUTE IS UNCONSTITUTIONAL.

The public financing limitations raise a number of troubling constitutional questions, irrespective of any reconsideration of *Roe v. Wade*, for even if the Court overrules *Roe v. Wade*, it is still likely that many States will allow abortions under some circumstances. Regardless of the *Roe v. Wade* question, it will remain proper for physicians to counsel pregnant patients on the abortion option.

Notwithstanding Missouri's attempt to narrow and soften the meaning of § 188.205, the line between what Missouri will label mere counseling and what it will interpret as "directly urging" is seductive at best. Thus, for purposes of analysis of the underlying constitutionality of § 188.205, this Court should recognize that the normal physician-patient counseling which takes place when pregnancy is diagnosed will be at least somewhat impeded by § 188.205. For purposes of constitutional analysis, accordingly, the State's attempt to portray § 188.205 as being something other than an intrusion into the ordinary relationship between physician and patient must be disregarded.

The State's argument regarding § 188.205 is that it has no affirmative obligation to fund abortion counseling in the programs it supports. The State maintains that it may refuse to subsidize activities that may facilitate the abortion decision as a logical extension of the Court's rulings in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980).

In *Maher*, the Court held that Connecticut could refuse to pay for elective abortions from its Medicaid

funds. Although the Court explicitly reaffirmed its decision in *Roe v. Wade*, it upheld the government's right to make a value judgment in the public interest favoring childbirth over abortion and indicated that such a preference could be reflected in the allocation of public funds. 432 U.S. at 474.

The *Maher* Court explained that the privacy right recognized in *Roe v. Wade* was passive in nature—a right to choose between childbirth and abortion *without direct State interference*. It did not necessarily follow that the government had an affirmative duty to underwrite the actual *performance* of abortions in order to effectuate that choice.

In *Harris v. McRae*, the Court upheld the "Hyde Amendment," which prohibited federal Medicaid reimbursements for abortions except in the event of rape, incest, or threat to the life of the woman. In *McRae*, the Court emphasized that the government's refusal to pay for the abortion itself did not necessarily constitute an undue burden or create an obstacle to an indigent woman's right to choose one. She has "at least the same range of choice in deciding" as she would have had if the government had not funded family planning services at all. 448 U.S. at 317.

The same cannot be said of the statute at issue here. Section 188.205 directly and actively interferes with the woman's right to make an informed decision regarding abortion. The State attempts to harmonize the present case with *Maher v. Roe* and *Harris v. McRae* by characterizing the § 188.205 issue as "only concerned with the spending of public money." Brief of Appellants at 38. However, neither *Maher* nor *McRae* involved government intrusion into the highly personal nature of the medical decision-making process that must take place between physician and patient. In these cases, no government encroached upon a woman's deliberative process,

only upon her ability to use public money to *act* on a particular choice—abortion.

The Missouri statute in question here is far more insidious in that it conditions receipt of public funds upon the health professional's willingness to compromise medical, ethical, and possibly legal[2] judgment to accommodate the State's political view of the moment, in this case, antipathy to abortion. The fundamental question before this Court is whether the State may administer public funds in such a way as to manipulate an indigent woman's choice between abortion and childbirth by censoring certain medically necessary information that her physician would otherwise have given according to his or her best clinical judgment and professional standards of practice and ethics.

A. The Missouri Statute Directly Interferes With the Privacy Right of a Family Planning Patient to Make an Informed Choice Between Abortion and Childbirth.

In *Roe v. Wade*, this Court recognized that there exists a zone of personal privacy and autonomy that protects the woman's right to make informed decisions affecting her body, including under certain circumstances, the decision to terminate her pregnancy. 410 U.S. at 152-53, 165-66. Included in this zone of personal autonomy is the right to make important choices about one's own medical care in consultation with a qualified physician. *See Whalen v. Roe*, 429 U.S. 589, 603 (1977) (referring to patient's "right to decide independently, with the advice of his physician, to acquire and to use needed medication"); *see also Doe v. Bolton*, 410 U.S. 179, 219 (1973) (Douglas, J., concurring) ("The right of privacy

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[2] *See, e.g., Moore v. Preventive Medicine Medical Group, Inc.*, 178 Cal. App. 3d 428, 223 Cal. Rptr. 859 (Cal. App. 1986) (physician liable for failure to advise patient of risk).

has–no more conspicuous place than in the physician-patient relationship.").

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court reiterated that reproductive decisions are inherently and primarily medical in nature and stressed the central role of the physician in the deliberative process:

> It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances.

Id. at 443.

Akron is similar to the instant case in that it too involved direct government interference in the physician-patient relationship. In *Akron*, the Court struck down a requirement that physicians recite to each pregnant patient a list of so-called abortion 'facts,' specifically "designed to influence the woman's informed choice" between abortion and childbirth. *Id.* at 444-45 ("parade of horribles"). The Court warned "against placing the physician in . . . such an 'undesired and uncomfortable straightjacket.'" *Id.* at 445 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169 (1986), the Court again encountered a statute directing physicians to provide certain information in the process of obtaining the woman's consent to abortion, and again, it was invalidated:

> Even the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list.
>
> * * * *
>
> [T]he rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intrudes upon the discretion of the pregnant woman's physician and thereby imposes the 'undesired and uncomfortable straightjacket' with which the Court in *Danforth* was concerned.

Id. at 2179-80 (citations omitted).

In *Thornburgh*, the Court criticized the government's intrusion as "the antithesis of informed consent" and "an outright attempt to wedge [Pennsylvania's] message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.*

This Court has consistently and unequivocally rejected, on privacy grounds, government attempts to dictate what is permissible in the physician-patient dialogue.

B. The Missouri Statute Violates the First Amendment Free Speech Rights of Both Family Planning Patients and Their Physicians.

An equally-compelling argument can be made that the free speech guarantee of the First Amendment protects the necessary exchange of information between doctor and patient in this case. This argument transcends any reconsideration of the privacy interest enunciated in *Roe v. Wade*.

In *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), it was stated that:

> [for] at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for a

> number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

See also Maher, 432 U.S. at 474-75 n.8; *McRae*, 448 U.S. at 317 n.19; *see generally Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Planned Parenthood v. Arizona*, 718 F.2d 938, 944 (9th Cir.), *aff'd sub nom. Babbit v. Planned Parenthood*, 107 S.Ct. 391 (1986).

The First Amendment protects both the physician's right to counsel, and the patient's right to receive such counseling, regardless of whether the discussion includes the topic of abortion. *See Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion counseling protected speech); *see also Board of Education v. Pico*, 457 U.S. 853 (1982) (plurality opinion) (right to receive information protected); *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) (same). Although the State may deny persons the 'benefit' of public funding it may not do so on a basis that infringes their constitutionally protected right to speak and receive information freely.

In the context of the immediate case, this means that the State may choose not to pay for family planning programs at all, or it may simply refuse to subsidize certain procedures such as abortions. However, if the State decides to fund medical services, it may not pick and choose between persons to fund based solely upon what those persons may say or hear.

According to *Perry v. Sinderman*, the State, no matter how well-intentioned, simply cannot use its power to allocate public funds as a means of circumscribing free speech and managing the otherwise free flow of information. *See Frost & Frost Trucking Co. v. Railroad Comm'n of California*, 271 U.S. 583, 594 (1926) ("If the State

may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all"); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down ban of editorials on federally funded public broadcasting stations).

C. The Missouri Statute Does Not Leave Family Planning Patients With at Least the Same Range of Choice in Deciding Whether to Obtain an Abortion as They Would Have Had if the State Had Chosen Not to Fund Family Planning Programs at All.

In the present case, the State of Missouri is attempting to do through funding restrictions what it could never do directly—ban discussion of abortion as an alternative to childbirth. Unfortunately, the effects of the State's action inevitably hit those who are most vulnerable the hardest—poor and teenage women. It simply cannot be said that these women are left with "at least the same range of choice in deciding whether to obtain a[n] . . . abortion as [they] would have had" if the State had chosen not to fund family planning programs at all. *McRae*, 448 U.S. at 317.

State-supported programs, such as Missouri's, are typically designed to serve areas that, because of economics or demographics, do not receive adequate health care and family planning services. These programs have traditionally offered a wide range of comprehensive health services that these women could not obtain elsewhere. Poor and teenage women in these medically-underserved areas are often entirely dependent upon the free family planning counseling and services offered there.

Under the Missouri statute, these women would in fact be worse off than if there was no funded program at all. In practice, through public funding women are lured into their local family planning program by its offer of free, comprehensive reproductive health counseling and services. Such women grow to rely upon the

advice and skill of the attending physician as in any other doctor-patient relationship. But then, at the point of pregnancy, Missouri denies these women their constitutional right to receive what may well be medically necessary information [3] regarding their options.

Women patients clearly would not be left in the same position that they would have been in if there was no program at all. In fact, having reasonably relied on the expectation of comprehensive care, they will be worse off for it: uninformed, uncounseled, delayed, and subjected to the State's message that there is no option available but childbirth.[4] *See generally Planned Parenthood Ass'n v. Kempiners*, 531 F.Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *aff'd on remand*, 568 F.Supp. 1490 (N.D. Ill. 1983).

This same objection is a cornerstone in NFPRHA's argument now pending before the First Circuit in *Massachusetts v. Bowen*, *supra*. In that case, there are two additional compelling arguments: (1) that the regulations at issue impose unconstitutional limits on private, as well as public, funds; and (2) that the counseling and

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[3] Continued pregnancy may pose a serious threat to the health of women with certain conditions, such as heart disease, hypertenion, sickle cell anemia, diabetes, renal disease, and cancer. In some of these instances, a pregnancy may be life-threatening. Similarly, diseases such as AIDS and rubella may pose a severe threat to the fetus.

[4] In *Planned Parenthood League of Mass. v. Belotti*, 641 F.2d 1006, 1014 (1st Cir. 1981), the court of appeals struck down a 24-hour waiting period for an abortion as an unlawful "state-created obstacle" and "direct state interference." As in *Belotti*, Missouri's statute imposes substantial "burdens in terms of time, money, travel and work schedules; for many women, particularly the poor, the rural and those with pressing obligations. The burdens will be substantial." *Id.* at 1015 (citations omitted).

other activities, which the regulations outlaw, actually are mandated by the statute. Thus, while a decision in this case favorable to appellees may well decide the constitutionality of the regulations, if it is unfavorable, serious constitutional and statutory issues will remain.

D. The Missouri Statute Impermissibly Discriminates on the Basis of Viewpoint.

Regardless of the degree of State interest in protecting fetal life, it simply cannot act in such a way as to ban speech solely on the basis of the speaker's viewpoint. *See League of Women Voters*, 468 U.S. at 383; *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983); *see also Perry v. Sinderman*, 408 U.S. at 597. In *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985), this Court held that it would be unconstitutional for even a facially-neutral executive order to exclude an organization from participating in a federal employee charity drive, if it "is in fact based on the desire to suppress a particular view" with which the government disagrees.

In the present appeal, the State's prohibition goes beyond the discussion of a particular viewpoint, to ban discussion of an entire topic—abortion. This Court has stated elsewhere that:

> [the] First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'

Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980), citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Cox v. Louisiana*, 379 U.S. 536, 580-81 (1965) (opinion of Black, J.); *see also Boos v. Barry*, 108 S.Ct. 1157 (1988).

Section 188.205 creates a real and substantial obstacle to the typical family planning program patient. A line must be drawn somewhere—the State has simply gone too far in this case.

There is no support in the caselaw for the State's proposition that viewpoint discrimination is somehow acceptable in publicly-funded programs. Viewpoint discrimination by the State cannot be excused or justified because it is accomplished through manipulation of public funding. The Missouri statute plainly violates the First Amendment.

CONCLUSION

The Court should not address the public funding issue and instead should remand the issue to the district court for reconsideration of class definition, exclusion of moot claims, and substitution of class representatives.

Should the Court decide to reach the public funding of abortion counseling issue, it should affirm the court of appeals' ruling that § 188.205 is unconstitutional for the reasons set forth in argument II above.

Respectfully submitted,

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March 30, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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Supreme Court of the United States
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On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF 281 AMERICAN HISTORIANS AS AMICI CURIAE SUPPORTING APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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McCollum v. Board of Education, 333 U.S. 203 (1948) 3

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 2

McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) 24

Moore v. East Cleveland, 431 U.S. 494 (1977) 2

Orr v. Orr, 440 U.S. 268 (1979) 29

Poe v. Ullman, 367 U.S. 497 (1961) 2

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Stanton v. Stanton, 421 U.S. 7 (1975) 29

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 2

United States v. Foote, 25 Fed. Cas. 1140 (S.D.N.Y. 1876) 19

CONSTITUTION, STATUTES, AND REGULATIONS:

Comstock Act, Ch. 258,§ 1, 17 Stat. 598 (1873) 19

18 U.S.C. § 1461 (West 1984) 19

Pub. L. 91-662, 84 Stat. 1973 (1971) 19

The Public Statute Laws of the State of Connecticut 152-153 (1821) 12

N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21 (1828 to 1835) 12

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

AMA Editorial, *Abortion or Removal of Pregnant Uterus*, 96 J. Am. Med. Ass'n 1169, April 14, 1931 23
Antebellum American Culture (D. Davis ed. 1977) 14
Aries, P., *Centuries of Childhood: A Social History of Family Life* (R. Baldick trans. 1962) 7
Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, XXII Transactions of the American Medical Association 241 (1871) 18
Baxandall, R., L. Gordon & S. Reverby, eds., *America's Working Women: A Documentary History—1600 to the Present* (1976) 23
Beck, T., *Elements of Medical Jurisprudence* (1823) 10
Bender, "The Erosion of Public Culture: Cities, Discourses, and Professional Disciplines," in *The Authority of Experts: Studies in History and Theory* (T. Haskell ed. 1984) 14
Bledstein, B., *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1976) 14
Brodie, J., *Family Limitation in American Culture*, PhD Dissertation, University of Chicago, 1982 6
Chicago Tribune, Nov. 21, 1912, p. 1 23
Culpeper, N., *The English Physician* (1799) 6
Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. of Soc. Hist. 20 (1976) 7
Davis, D., *From Homicide to Slavery: Studies in American Culture* (1986) 20
D'Emilio, J. & E. Freedman, *Intimate Matters: A History of Sexuality in America* (1988) 6, 7
Degler, C., *At Odds: Women and the Family in America from the Revolution to the Present* (1980) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* (V. Tufte & B. Myerhoff eds. 1979) 9
Ehrenreich, B. & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979) 15
Faragher, *History from the Inside-Out: Writing the History of Women in Rural America*, 33 Am. Q. 536 (1981) 9
Flaherty, D., *Privacy in Colonial New England* (1972) 7
Flexner, E., *Century of Struggle: The Woman's Right's Movement in the United States* (rev. ed. 1975) 17
Foner, E., *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970) 20
Frederickson, G., *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (1965).. 20
Geison, G., ed., *Professions and Professional Ideologies in America* (1983) 14
Gordon, L., *Woman's Body, Woman's Right: A Social History of Birth Control in America* (1976) 10, 18, 19, 21
Gordon, M., *The American Family: Past, Present, and Future* (1978) 7
Grossberg, M., *Governing the Hearth* (1985)..6, 12, 19, 25
Haggard, *Abortion: Accidental, Essential, Criminal, Address Before the Nashville Academy of Medicine*, Aug. 4, 1898 8
Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899 4
Haskell, T., *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (1977) 14
Hawthorne, N., *The Scarlet Letter* (1850) 7
Higham, J., *Strangers in the Land: Patterns of American Nativism 1860-1925* (1963) 21

TABLE OF AUTHORITIES—Continued

Page

Hoff-Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution: Explorations in the History of American Radicalism* (A. Young ed. 1976) 7
Hofstadter, R., *Social Darwinism in American Thought* (1955) 20
Kennedy, D. *Birth Control in America: The Career of Margaret Sanger* (1971) 21
Kevles, D., *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (1985) 21
Lader, L., *Abortion* (1966) 23
Laslett, P., *The World We Have Lost* (1972) 7
LaSorte, *Nineteenth Century Family Planning Practices*, 14 J. of Psychohistory 163 (1976) 10
Leavitt, J., *Brought to Bed: Child-Bearing in America, 1750-1950* (1986) 14
Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230 (1987) 27, 28
Lipset, S. & E. Raab, *The Politics of Unreason: Right-Wing Extremism in America, 1790-1970* (1970) 20
Luker, K., *Abortion and the Politics of Motherhood* (1984) 22, 23, 24, 28
McLaren, A., *Reproductive Rituals* (1983) 5
Means, *The Phoenix of Abortional Freedom*, 17 N.Y. L. Forum 335 ..... 5, 12
Mohr, J., *Abortion in America: The Origins and Evolution of National Policy* (1978) ..... *passim*
Mohr, J., *Iowa's Abortion Battles of the Late 1960s and Early 1970s*, forthcoming in 1989 from the Center for the Study of the Recent History of the United States, Iowa City, Iowa 24
New York Times, Aug. 23, 1871 10
Norton, M., *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (1980) 8
Petchesky, R., *Abortion and Woman's Choice* (1986) 8, 9, 11

TABLE OF AUTHORITIES—Continued

Page

Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 Feminist Studies 263 (1987) 29
Proceedings of the Philadelphia County Medical Society 132 (1892) 27
Reed, J., *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (1978) 21
Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Georgetown L. Rev. 173 (1960-61) 12
Reagan, L., *When is Abortion Necessary to Save a Woman's Life?: The Political Dimension of Therapeutic Abortion During the Period of Criminalized Abortion in the United States, 1880-1973* (unpublished paper, Univ. of Wisconsin, Madison, June 20, 1987) 23
Rothman, B., *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (1986) 29
Rothstein, W., *American Physicians in the Nineteenth Century: From Sects to Science* (1972) 14
Ryan, M., *Womanhood in America: From Colonial Times to the Present* (1975) 23
Ryan, M., *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (1981) 17
Smith, "Family Limitation, Sexual Control, and Domestic Feminism in Victorian America," in *A Heritage of Her Own* (N. Cott. & E. Pleck eds. 1979) 8
Smith & Hindus, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, 5 J. Interdisciplinary Hist. 537 (1975) 7
Smith-Rosenberg, C., *Disorderly Conduct* (1985) ..... *passim*
Stanton, "Declaration of Sentiments 1848," reprinted in L. Kerber & J. Mathers, *Woman's America: Refocusing the Past* (1982) 17

TABLE OF AUTHORITIES—Continued

	Page
Starr, P., *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* (1982)	13, 14
Stix & Wiehl, *Abortion and Public Health*, 28 Am. J. Pub. Health 622 (1938)	22
Stix, *A Study of Pregnancy Wastage*, 13 Milbank Memorial Fund Q. 347 (1935)	22
Taussig, F. *Abortion, Spontaneous and Induced: Medical and Social Aspects* (1936)	22
Ulrich, "Martha Moore Ballard and the Medical Challenge to Midwifery," in *From Revolution to Statehood: Maine in the Early Republic, 1783 to 1820* (J. Leamon & C. Clark eds. 1988)	6
Veysey, "Intellectual History and the New Social History," in *New Directions in American Intellectual History* 3-26 (J. Higham & P. Conkin eds. 1979)	4
Wells, R., *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, 25 Population Studies 73 (1971)	8
Wertz, R. & D. Wertz, *Lying-In: A History of Childbirth in America* (1977)	14

BRIEF OF 281 AMERICAN HISTORIANS AS AMICI CURIAE SUPPORTING APPELLEES

INTEREST OF AMICI

Amici are two hundred and eighty-one American historians who, with the permission of the parties, here seek to provide a rich and accurate description of our national history and tradition in relation to women's liberty to choose whether to terminate a pregnancy. Never before have so many professional historians sought to address this Honorable Court in this way. Amici have widely diverse perspectives and knowledge, but are united in the conviction that *Roe v. Wade* is essential to women's liberty and equality and consistent with the most noble and enduring understanding of our history and traditions.

SUMMARY OF ARGUMENT

Established constitutional principles require examination of our history and tradition as a Nation to determine the existence and contours of fundamental constitutional rights. The United States asserts that our history unambiguously supports the constitutionality of laws restricting women's access to abortion.

This brief will demonstrate that for much of our nation's history abortion was not illegal; that for much of the nineteenth century abortion remained legal prior to quickening; and that, in most states, the statutes regulating abortion did not punish women. It discusses the prevalence and visibility of abortion in the nineteenth century. It shows that a variety of complex factors underlay the nineteenth-century laws restricting abortion: concern for women's health, the medical profession's desire to control the practice of medicine, openly discriminatory concepts of the appropriate role of women, opposition to non-procreative sexual activity and to the dissemination of information concerning birth control, and hostility to those who did not fit the white Anglo-Saxon Protestant model. Our brief shows that concern for the fetus has become a central argument for anti-

abortion laws only as these earlier justifications have become either anachronistic or constitutionally and culturally impermissible.

Restricting access to abortion imposes ponderous burdens on the liberty and equality of women. A state cannot constitutionally justify the imposition of such burdens by adopting one, highly contested, metaphysical concept of the value of fetal life. This Court should affirm *Roe v. Wade*.

ARGUMENT

I. OUR TRADITIONS AND HISTORY DEFINE THE CONTOURS OF THE CONSTITUTIONAL RIGHT TO PRIVACY.

Since John Marshall, no Justice of this Court has seriously disputed that the wise and intended meaning of our Constitution is determined by interpreting its words in light of our nation's history and traditions.[1] Our history and tradition shape the meaning of the relatively concrete provisions of the Constitution, such as the First Amendment.[2] History and tradition also give content to the

[1] *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-06 (1819) (Marshall, C.J.); *Poe v. Ullman*, 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting); *Roe v. Wade*, 410 U.S. 113 (1973); *Moore v. East Cleveland*, 431 U.S. 494, 503-05 (1977) (plurality opinion). Justice White has expressed this view eloquently:

> [T]his Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting).

[2] *See, e.g., Martin v. Struthers*, 319 U.S. 141, 145 (1943) (door-to-door distribution of literature protected by First Amendment because "in accordance with the best tradition of free discussion").

more open-textured provisions of our Constitution—the prohibition in the Fifth and Fourteenth Amendments of state actions that deprive citizens of life, liberty or property without due process of law; the Fourteenth Amendment's guarantee of equal treatment under the law; and the Ninth Amendment's command that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Justice Frankfurter, a staunch defender of judicial restraint, underscored the role of history and tradition, joining this Court's invalidation of "released-time" religious instruction in public schools:

> Accommodation of legislative freedom and constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before us.

McCollum v. Board of Education, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring). Justice Frankfurter frankly acknowledged that " 'released time' ha[d] attained substantial proportions," but recognized that that fact did not decide the case. *Id.* at 224. A more exhaustive examination of our traditions led Justice Frankfurter, and seven other Justices, to strike down Illinois's "released-time" program.

While there is little disagreement that history and tradition are important guides to decision in this area of the law, there is significant dispute about what our history actually demonstrates.[3] This Court's 1973 decision in

[3] The brief *amicus curiae* of the United States, in the instant case, seeks to show that our history does not support women's claim of right to terminate pregnancy. It relies upon only one historical work: James Mohr's *Abortion in America: The Origins and Evolution of National Policy* (1978). Brief *amicus curiae* of the United States at 13, 16-17. Among historians this book is

Roe v. Wade provided a rich and sound description of the history of abortion. Since 1973 much historical work has expanded and deepened this understanding. An important part of American historical inquiry has shifted from the study of wars, formal legal rules, economics and elections, to provide a fuller and far more rounded account of American social history through exploration of diaries, letters, and other artifacts of what "ordinary people" did and believed.

In searching our nation's history for evidence of our society's basic beliefs, practices, and understandings, statutes are neither the only sources nor the best ones. As legal historian Hendrik Hartog has pointed out, "[i]n defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretative stances other than those . . . which have the benefit of formal authoritativeness."[4] In any calculus of traditions and "fundamental" values, the moral beliefs and practices of ordinary people are entitled to consideration.[5]

II. AT THE TIME THE FEDERAL CONSTITUTION WAS ADOPTED, ABORTION WAS KNOWN AND NOT ILLEGAL.

As the Court demonstrated in *Roe v. Wade*, abortion was not illegal at common law.[6] Through the nineteenth century American common law decisions uniformly reaffirmed that women committed no offense in seeking

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widely regarded as accurate and comprehensive. Professor Mohr is among the historians on whose behalf our brief is submitted. Yet, as we shall demonstrate, the United States misapprehends both Mohr's work and the historical record.

[4] Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899, 934-35.

[5] *See* Veysey, "Intellectual History and the New Social History," in *New Directions in American Intellectual History* 3-26 (J. Higham & P. Conkin eds. 1979).

[6] *Roe v. Wade*, 410 U.S. 113, 132-36 & n.21 (1973). *See also* J. Mohr, *supra* note 3, at 3-19.

abortions.[7] Both common law and popular American understanding drew distinctions depending upon whether the fetus was "quick," *i.e.* whether the *woman* perceived signs of independent life.[8] There was some dispute whether a common law misdemeanor occurred when a third party destroyed a fetus, after quickening, without the woman's consent. But early recognition of this particular crime against pregnant women did not diminish the liberty of the woman herself to end a pregnancy in its early stages.[9]

Abortion was not uncommon in colonial America.[10]

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[7] For example, in 1845, Chief Judge Shaw of Massachusetts held that abortion, with the woman's consent, is not punishable at common law unless the fetus were quick. *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845). In 1892 the Massachusetts Supreme Judicial Court held that, despite statutory enactments regulating abortion, the woman having an abortion was not a principal or an accomplice. *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N.E. 471 (1892). In *Abrams v. Foshee*, 3 Iowa 274, 278, 66 Am. Dec. 77, 80 (1856), the Iowa Supreme Court held that abortion, prior to quickening, was no crime. *Hatfield v. Gano*, 15 Iowa 177 (1863), held that Iowa's statutory enactment did not apply to abortion produced by a woman herself. *See* C. Smith-Rosenberg, *Disorderly Conduct* 219-20 (1985).

[8] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 3, at 24-26. In ordinary language in the eighteenth century and much of the nineteenth century the term "abortion" meant the termination of pregnancy after the point of quickening. *Id.* at 3-5.

[9] *See Roe v. Wade*, 410 U.S. at 134-36; J. Mohr, *supra* note 3, at 24-26. Means, *The Phoenix of Abortional Freedom*, 17 N.Y. L. Forum 335, 336-53 (1971) demonstrates that commentators who asserted that a misdemeanor could be charged against third parties who destroy a fetus by assaulting a women late in pregnancy misread the common law precedents upon which they purported to rely. Even in cases involving brutal beatings of women in the late stages of pregnancy, common-law courts refused to recognize abortion as a crime, independent of assault upon the woman, or in one case "witchcraft." *See* A. McLaren, *Reproductive Rituals* 119-121 (1983).

[10] "[O]bservers in the seventeenth and eighteenth centuries made repeated references to employment of abortifacients by both the single and the married." A. McLaren, *supra* note 9, at 114 and generally at 113-44.

Herbal abortifacients were widely known,[11] and cookbooks and women's diaries of the era contained recipes for medicines.[12] Recent studies of the work of midwives in the 1700s report cases in which the midwives provided women abortifacient compounds. More significantly, these cases are described as routine and are unaccompanied by any particular disapproval.[13]

The absence of legal condemnation of abortion in colonial America is all the more remarkable because both families and society valued children and population growth in a rural economy, with vast unsettled lands, where diseases of infancy claimed many lives. For these reasons, single women more often sought abortions in the Colonial era.[14] The absence of legal condemnation is particularly striking in the New England culture of tight-knit, religiously homogeneous communities in which neighbor observed the private behavior of neighbor and did not hesitate to chastise those who violated pervasive moral norms of the community.[15] In an era characterized

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[11] The classic work was N. Culpeper, *The English Physician* (1799). *See* J. Brodie, *Family Limitations in American Culture*, PhD Dissertation, University of Chicago 1982, at 224-30.

[12] C. Smith-Rosenberg, *supra* note 7, at 228.

[13] For example, a midwife reported, "She is suffering from obstructions and I prescribed the use of particular herbs." Diary of Martha Moore Ballard, Sept. 27, 1789, Maine State Manuscript Library. For a general discussion, see Ulrich, "Martha Moore Ballard and the Medical Challenge to Midwifery," in *From Revolution to Statehood: Maine in the Early Republic, 1783 to 1820* (J. Leamon & C. Clark eds. 1988).

[14] M. Grossberg, *Governing the Hearth* 159 (1985). J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* (1988), report, "Cases of attempted abortion usually involved illicit lovers, not married couples. 'When a single woman,' Margaret Lakes later confessed, she 'used means to destroy the fruit of her body to conceal her sin and shame.' Elizabeth Robins of Maryland confessed that she had twice taken savin, an abortifacient; her husband suspected that she had an incestuous relationship with her brother." *Id.* at 26.

[15] Adultery, incest, insubordination by children, and even "living alone not subject to the governance of family life," were condemned

by extensive oral and written moral prescripts from community and religious leaders, birth control and abortion were rarely the subject for moralizing. Where abortion is noted, it is not the practice itself that is subject of comment, but rather the violation of other social/sexual norms that gave rise to the perceived need to attempt to abort.[16]

In the late eighteenth century, strictures on sexual behavior loosened considerably. The incidence of premarital pregnancy rose sharply; in the late eighteenth century, one third of all New England brides were pregnant at the time of marriage, compared to less than ten percent in the seventeenth century.[17] Falling birth rates in the 1780s suggest that, at the same time our founders drafted the Constitution, including the Ninth Amendment's guarantee that the enumeration of certain rights "shall not be construed to deny or disparage others re-

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by the criminal law, when abortion was not. *See* Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. of Soc. Hist. 20, 22-24, 33 (1976); P. Laslett, *The World We Have Lost* 37-38 (1973); D. Flaherty, *Privacy in Colonial New England* 42-43, 76 (1972); P. Aries, *Centuries of Childhood: A Social History of Family Life* 405-07 (R. Baldick trans. 1962). For a more popular, fictional treatment, see N. Hawthorne, *The Scarlet Letter* (1850).

[16] J. D'Emilio & E. Freedman, *supra* note 14, at 12, report the following case from the 1600s. "Captain William Mitchell, an influential Marylander who served on the governor's council, not only impregnated Mrs. Susan Warren and gave her a 'physic' to abort the child, but he also 'lived in fornication' with his pretended wife, Joan Toaste. Even so, the first charge filed against Mitchell by the Maryland attorney was that he professed himself to be an Atheist and openly mocked all Religion."

[17] M. Gordon, *The American Family: Past, Present, and Future* 173 (1978). For comprehensive discussions see D. Smith & M. Hindus, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, 5 J. Interdisciplinary Hist. 537, 553-57 (1975); Hoff-Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution: Explorations in the History of American Radicalism* 404 (A. Young ed. 1976).

tained by the people," the use of birth control and abortion increased.[18]

III. THROUGH THE NINETEENTH CENTURY, ABORTION BECAME EVEN MORE WIDELY ACCEPTED AND HIGHLY VISIBLE.

Through the nineteenth century and well into the twentieth, abortion remained a widely accepted popular practice, despite increasingly vigorous efforts to prohibit it after 1860.[19] Changing patterns of abortion practice and attitudes towards it can only be understood against a more general background of dramatic change in American economic and family life. During the period between ratification of the Constitution and adoption of the Civil War Amendments, Americans moved to cities and increasingly worked for wages.[20] In 1787, the average white American woman bore seven children; by the late 1870s, the average was down to fewer than 5; by 1900 it was 3.56.[21] Carl Degler calls this decline in fertility "the single most important fact about women and the family in American history." [22]

Economic reasons motivated urban couples to limit their family size. Working class married women, faced with the material difficulty of managing a family budget on a single male wage, resorted to abortion as the most effective available means of "conscious fertility control."[23]

But more than economic factors were at work in the restriction of fertility.[24] White middle-class Americans were, in particular, influenced by changing family conceptions and definitions of motherhood. As men's work patterns deviated farther from those of women, "wife" and "home" became powerful symbols of men's economic security and social standing.[25] Nineteenth-century women faced sharply conflicting demands. "The True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility, symbolize her husband's affluence, and do good within the world." [26]

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[18] Wells, *Family Size and Fertility Control in Eighteenth Century America: A Study of Quaker Families*, 25 Population Studies 73 (1971); M. Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* 232 (1980).

[19] C. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* 243-46 (1980). Several studies by physicians in various parts of the U.S. suggest that in the mid-nineteenth century one abortion was performed for every four live births. *See* J. Mohr, *supra* note 3, at 76-80. Reports from the late 1870s estimated even greater numbers. *Id.* at 81-82. The Michigan Board of Health estimated in 1898 that one-third of all pregnancies in that state ended in abortion. Haggard, *Abortion: Accidental, Essential, Criminal, Address Before the Nashville Academy of Medicine*, Aug. 4, 1898, at 10, discussed in C. Smith-Rosenberg, *supra* note 7, at 221.

[20] *See* C. Degler, *supra* note 19.

[21] Smith, "Family Limitation, Sexual Control, and Domestic Feminism in Victorian America," in *A Heritage of Her Own* 226 (N. Cott & E. Pleck eds. 1979). For discussion of continual decline in family size in the eighteenth and nineteenth centuries, see R. Petchesky, *Abortion and Woman's Choice* 73-74 (1986).

[22] C. Degler, *supra* note 19, at 191.

[23] *See* R. Petchesky, *supra* note 21, at 53.

[24] The size of rural families also declined sharply during the nineteenth century. Faragher, *History From the Inside-Out: Writing the History of Women in Rural America*, 33 Am. Q. 536, 549 (1981); R. Petchesky, *supra* note 21, at 74. James Mohr observes that by the 1860s abortion "seemed to thrive as well on the prairies as in large urban centers." J. Mohr, *supra* note 3, at 100.

[25] The home was conceived as "a bastion of peace, of repose, of orderliness, of unwavering devotion to people and principles beyond the self . . . safe from the grinding pressures and dark temptations of the world at large. . . . The husband-father undertook an exclusive responsibility for productive labor. . . . [F]amily life was wrenched apart from the world of work—a veritable sea-change in social history. . . . [T]he wife-mother . . . became the centerpiece in a developing cult of Home." Demos, "Images of The American Family, Then and Now," in *Changing Images of the Family* 51, 52 (V. Tufte and B. Myerhoff eds. 1979).

[26] C. Smith-Rosenberg, *supra* note 7, at 225.

To limit the number of children they bore, women adopted a range of strategies, including abortion.[27] Through the 1870s abortion was "common," a "matter of fact" and often "safe and successful." [28] The most common methods of abortion in the nineteenth century involved herbs and devices that women could purchase from pharmacists and use themselves.[29] Nonetheless, in 1871, New York City, with a population of less than one million, supported two hundred full-time abortionists, not including doctors who sometimes performed abortions.[30]

For most of the nineteenth century, abortion was highly visible. "Beginning in the early 1840s abortion became, for all intents and purposes, a business, a service openly traded in the free market. . . . [Pervasive advertising told Americans] not only that many practitioners would provide abortion services, but that some practitioners had made the abortion business their chief livelihood. Indeed, abortions became one of the first specialties in American medical history." [31]

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[27] One physician wrote that "abortion is not always associated with crime and disgrace; it may arise from causes perfectly natural and altogether beyond the control of the female." T. Beck, 1 *Elements of Medical Jurisprudence* 207 (1823), *quoted in* M. Grossberg, *supra* note 14, at 160.

[28] L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 51-52 (1976).

[29] *See* LaSorte, *Nineteenth Century Family Planning Practices*, 41 J. of Psychohistory 163, 166-70 (1976).

[30] *New York Times*, Aug. 23, 1871, at 6.

[31] J. Mohr, *supra* note 3, at 47. "[A] genuinely flourishing market in abortion services existed in the United States from the 1840s through the 1870s." *Id.* at 98. In the 1860s and 1870s both the popular press and medical journals were full of advice about abortion servicse. *Id.* at 67-68. *See also* C. Degler, *supra* note 19, at 230.

IV. NINETEENTH-CENTURY ABORTION RESTRICTIONS SOUGHT TO PROMOTE OBJECTIVES THAT ARE TODAY PLAINLY EITHER INAPPLICABLE OR CONSTITUTIONALLY IMPERMISSIBLE.

Between 1850 and 1880, the newly formed American Medical Association, through some of its vigorously active members, became the "*single most important factor in altering the legal policies toward abortion in this country.*" [32] Nineteenth-century "regular" physicians enlisted state power to limit access to abortion for reasons that are, in retrospect, parochial, and have long since been rejected by organized medicine.[33] The doctors found an audience for their effort to restrict abortion because they appealed to broader concerns: maternal health, consumer protection, a discriminatory idea of the natural subordination of women, nativist fears generated by the fact that elite Protestant women often sought abortions. Some of those seeking these diverse objectives also sought to attribute moral status to the fetus.

A. From 1820-1860, Abortion Regulation in the States Rejected Broader English Restrictions And Sought To Protect Women From Particularly Dangerous Forms Of Abortion.

In 1803, English law made all forms of abortion criminal.[34] Despite this model, for two decades, no American state restricted access to abortion. In 1821, when one state, Connecticut, acted, it prohibited only the administration of a "deadly poison, or other noxious and de-

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[32] J. Mohr, *supra* note 3, at 157 (emphasis supplied). *See also* R. Petchesky, *supra* note 21, at 79.

[33] *See* brief *amicus curiae* of the American Medical Association in the instant case.

[34] The law was passed as part of a comprehensive revision of the criminal code, urged by Lord Ellenborough, broadening the sweep of the criminal law and increasing penalties. J. Mohr, *supra* note 3, at 23; *Roe v. Wade*, 410 U.S. 113, 136-38 (1973).

structive substance."[35] Moreover, the act applied only after quickening, and punished only the person who administered the poison, not the woman who consumed it. In the late 1820s, three other states followed the Connecticut model, prohibiting the use of dangerous poisons *after* quickening.[36] Most American states did not see abortion as a problem demanding legislative attention.

In 1830, Connecticut became the first state to punish abortion after quickening.[37] In the same year, New York, also animated by a concern for patient safety, considered a law to prohibit *any* surgery, unless two physicians approved it as essential. Prior to scientific understanding of germ theory and antisepsis, any surgical intervention was likely to be fatal. The act finally adopted applied only to surgical abortion and included the first "therapeutic" exception, approving abortion where two physicians agreed that it was "necessary."[38] As the Court recognized in *Roe v. Wade*, until the twentieth century, abortion, particularly when done through surgical intervention, remained significantly more dangerous to the woman than childbirth.[39] Because nineteenth-century abortion laws were drafted and justified to protect women, they did not punish women as parties to an abortion.[40]

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[35] *The Public Statute Laws of the State of Connecticut* 152-53 (1821). *See* J. Mohr, *supra* note 3, at 22. *See also* Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Georgetown L. Rev. 395 (1960-61).

[36] Missouri adopted such a statute in 1825, Illinois in 1827, and New York in 1828. *See* J. Mohr, *supra* note 3, at 25-27.

[37] Conn. Stat. Tit. 22, § 14 at 152 (1821), reported by Quay, *supra* note 35, at 453.

[38] *See* N.Y. Rev. Stat., pt. IV, Ch. I, tit. VI § 21, at 578 (1828-1835), reported by Quay, *supra* note 35, at 499.

[39] *See Roe v. Wade*, 410 U.S. at 148-50; Means, *supra* note 9, at 353-54, 358-59, 382-96.

[40] *Roe v. Wade*, 410 U.S. at 151-52; M. Grossberg, *supra* note 14, at 163-64.

None of these early laws, restricting forms of abortion thought to be particularly unsafe, were enforced.[41] That absence itself speaks powerfully, particularly since abortion was prevalent. Despite legislative action and medical opposition, common, openly tolerated practice suggests that many Americans did not perceive abortion as morally wrong.[42]

B. From The Mid-Nineteenth Century, A Central Purpose Of Abortion Regulation Was To Define Who Should Be Allowed To Control Medical Practice.

Without exception, physicians were the principal nineteenth-century proponents of laws to restrict abortion. A core purpose of the nineteenth-century laws, and of doctors in supporting them, was to "control medical practice in the interest of public safety."[43] This is not to deny that some doctors had moral objections to abortion, as well as moral and social views about women and race. But the most significant explanation for the drive by medical doctors for statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization.

Medicine was not then the organized, highly regulated profession we know today. It was an occupation in which conventional and scientifically authoritative modes of practice still contended for stature and authority with more popular modes, such as botanic medicine, homeopathy, herbalists, midwives and abortionists. Allopathic physicians sought to establish and consolidate professional sovereignty.[44] This struggle was not easy, nor

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[41] J. Mohr, *supra* note 3, at 37.

[42] C. Degler, *supra* note 19, at 233-34, cites physicians who observe that women who are "otherwise quite intelligent and refined, with a keen sense of their moral and religious obligations to themselves and to others, deem it nothing amiss to destroy the embryo during the first few months of its growth."

[43] J. Mohr, *supra* note 3, at 31-32.

[44] *See* P. Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* (1982).

was its outcome certain. The professionalizing spirit, illustrated by pressures to require licensure for doctors, was contrary to the egalitarian spirit of public life in Jacksonian America.[45] It was only by mid-century, with the founding of the American Medical Association, that professional sovereignty was tentatively established for "scientific" medicine.[46]

Most nineteenth-century Americans did not seek the help of physicians in dealing with pregnancy, abortion and childbirth.[47] Childbirth remained an affair of family, friends, and midwives until well into the nineteenth century.[48] The process by which childbirth became asso-

[45] From the 1820s through the 1840s, the prevailing political ideology in the United States was strongly opposed to all forms of monopoly or elitism. Thus, exclusive political clubs or economic associations were regarded with suspicion. *See Antebellum American Culture* 187-95 (D. Davis ed. 1977).

[46] *See generally* P. Starr, *supra* note 44; W. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science* (1972). The phenomenon of professionalization in American culture has been much studied. *See, e.g.*, T. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (1977); G. Geison, ed., *Professions and Professional Ideologies in America* (1983); Bender, "The Erosion of Public Culture: Cities, Discourses, and Professional Disciplines," in *The Authority of Experts: Studies in History and Theory* 84-106 (T. Haskell ed. 1984); and B. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1976). Although some historians celebrate the effects of professionalization on our culture and others criticize them, all agree on two basic propositions: the professionalizing impulse is a response to needs pereceived by practioners regarding the establishment and maintenance of legitimate social authority, and the professionalizing of numerous disciplines has resulted in a less public and less egalitarian nature of those disciplines. The development of the medical profession in America is a vivid example of these larger developments.

[47] No group of physicians was more insecure than those specializing in problems of women's reproductive health. C. Smith-Rosenberg, *supra* note 7, at 231.

[48] *See* J. Leavitt, *Brought to Bed: Child-Bearing in America, 1750-1950* (1986); R. Wertz & D. Wertz, *Lying-In: A History of Childbirth in America* (1977); B. Ehrenreich & D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1979).

ciated with doctors and hospitals, and with a heightened degree of medical intervention, is a well-documented example of the medical profession's gradual consolidation of authority. This development was not necessarily coercive or conspiratorial. Women were eager for services and knowledge that might lessen the risks and pain of childbirth. But the physician's effort to move childbirth to the hospital involved more than clinical considerations. Similarly, the deep involvement of doctors in the early abortion statutes was intimately connected with professional struggles between proponents of "scientific medicine" and those who practiced less conventional modes of healing.

As we have seen, the first anti-abortion laws were "anti-poisoning" statutes rather than sweeping prohibitions on all abortions. Because certain abortifacients derived from herbs and purgatives could be fatal if taken in overly large quantities, it became a crime to "administer" such remedies.[49] These laws did not express an abhorrence of abortion any more than current laws banning the unauthorized practice of law represent an abhorrence of legal representation. Rather, they served the dual function of protecting the public and solidifying the bounds of professional authority.

More significant, the nineteenth century movement to regulate abortions was one chapter in a campaign by doctors that reflected a professional conflict between "regulars" (those who ultimately became the practitioners and proponents of scientific medicine) and "irregulars." As James Mohr explains:

> Practically, the regular physicians saw in abortion a medical procedure that not only gave the competition an edge but also undermined the solidarity of their own regular ranks. If a regular doctor re-

[49] J. Mohr, *supra* note 3, at 21-22.

fused to perform an abortion he knew the woman could go to one of several types of irregulars and probably receive one. . . . As more and more irregulars began to advertise abortion services openly, especially after 1840, regular physicians grew more and more nervous about losing their practices to healers who would provide a service that more and more American women after 1840 began to want. Yet, if a regular gave in to the temptation to perform an occasional discreet abortion, and physicians testified repeatedly that this frequently happened among the regulars, he would be compromising his own commitment to an American medical practice that would conform to Hippocratic standards of behavior. *The best way out of these dilemmas was to persuade state legislators to make abortion a criminal offense. Anti-abortion laws would weaken the appeal of the competition and take the pressure off the more marginal members of the regulars' own sect.*[50]

To be sure, some "regulars" were morally troubled by abortion, and not all "irregulars" were willing to perform them. A variety of reasons explain why "regular physicians became interested in abortion policy from an early date and repeatedly dragged it into their prolonged struggle to control the practice of medicine in the United States." [51] In the larger context, however, public consideration of abortion in antebellum America was more an issue of medical authority and professional sovereignty than of any particular social or moral attitude toward abortion. Without such an explanation centering on professional imperatives, it is difficult to account for the fact that the American Medical Association and its members became primary proponents of twentieth-century statutes legalizing abortion. *See* Section V, *infra*.

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[50] *Id.* at 37 (citation omitted, emphasis added).

[51] *Id.*

C. Enforcement Of Sharply Differentiated Concepts Of The Roles And Choices Of Men And Women Underlay Regulation Of Abortion And Contraception In The Nineteenth Century.

The American Medical Association's campaign to restrict access to abortion succeeded for many reasons. Concerns over the dangers of surgical abortion to women were well founded. Further, physicians persuaded male political leaders that "abortion constituted a threat to social order and to male authority." [52] Since the 1840s, a growing movement for women's suffrage and equality had generated popular fears that women were departing from their purely maternal role.[53] These fears were fueled by the fact that family size declined sharply in the nineteenth century.[54]

In 1871, the American Medical Association's Committee on Criminal Abortion described the woman who sought an abortion:

> She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity; and, destitute of all delicacy and refinements, resigns herself, body and soul, into the hands of unscrupulous and wicked men. Let not

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[52] C. Smith-Rosenberg, *supra* note 7, at 235.

[53] The moral fervor of the abolitionist cause drew Northern women more deeply into public life than ever before in our history. *See* E. Flexner, *Century of Struggle: The Woman's Rights Movement in the United States*, Ch. 13 (rev. ed. 1975). Some of the women who were active in the anti-slavery movement perceived parallels between the subjugation and disenfranchisement of black people and the oppression of women. In 1848, the first Women's Rights Convention, held in Seneca Falls, New York, issued a proclamation that closely tracked the original Declaration of Independence. Stanton, "Declaration of Sentiments 1848," reprinted in L. Kerber & J. Mathers, *Women's America: Refocusing the Past* 431-33 (1982).

[54] M. Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* 155-57 (1983).

> the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.[55]

The nineteenth-century American Medical Association's view of women is strikingly similar to that adopted by this Court in 1872, when women were denied the right to practice law because "divine ordinance," and "the nature of things," prescribed a "family institution [that] is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[56] This Court has, of course, now come to see this view as part of our "long and unfortunate history of sex discrimination," and as constitutionally illegitimate.[57]

The women's movement of the nineteenth century affirmed that women should always have the right to decide whether to bear a child and sought to enhance women's control of reproduction through "voluntary motherhood," ideally to be achieved through periodic abstinence.[58] Anxieties about changing family functions and gender

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[55] Atlee & O'Donnell, *Report of the Committee on Criminal Abortion*, 22 Transactions of the American Medical Association 241 (1871), *quoted in* C. Smith-Rosenberg, *supra* note 7, at 236-37. Smith-Rosenberg observes that, although middle-class husbands were undoubtedly active participants in their wives' decisions about abortion, the nineteenth-century "AMA linked doctor and husband as the equally wronged and innocent parties. The aborting wife, in contrast, was unnaturally selfish and ruthless." *Id.* at 236.

[56] *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

[57] *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

[58] *See* L. Gordon, *supra* note 28, at 109. During this period, much scientific and folk wisdom held a flatly inaccurate view of the cycle of female fertility. *Id.* at 101. This inaccurate belief, combined with hard data on declining birthrates, *see* notes 21-23 *supra*, underscore how common abortion must have been.

roles were critical factors motivating the all-male legislatures that adopted restrictions on abortion.[59]

In contrast to the feminist demand for control of reproduction, the federal government, in 1873, took the lead in banning access to information about both contraception and abortion. The Comstock law[60] restricted not only medical information on abortion and contraception, such as a medical text on physiology written by an eminent Harvard scientist, but also literary depictions, such as Leo Tolstoy's disapproving tale of infidelity, *The Kreutzer Sonata*, as well as moral literature, including a pamphlet urging total chastity.[61] An 1876 federal court decision rejected a claim that physicians should have the right to distribute contraceptive information.[62]

In the nineteenth century, opposition to abortion and contraception were closely linked, just as political and doctrinal support for this Court's decisions in *Griswold v. Connecticut* and *Roe v. Wade* are linked in this century. Michael Grossberg observes that "Anthony Comstock had labeled as abortionists everyone who advocated or dealt in family-limitation materials and services."[63]

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[59] C. Smith-Rosenberg, *supra* note 7, at 218.

[60] The act prohibits mailing, transporting or importing "obscene, lewd or lascivious" items, specifically including all devices and information pertaining to "preventing conception and producing abortion." *See* Comstock Act, Ch. 258, § 1, 17 Stat. 598 (1873). It was not until 1971 that an amendment was passed deleting the prohibition as to contraception. Pub. L. 91-662, 84 Stat. 1973 (1971). The ban as to information about abortion remains. *See* 18 U.S.C. § 1461 (1988) (current version of Act).

[61] *See* M. Grossberg, *supra* note 14, at 190.

[62] *United States v. Foote*, 25 Fed. Cas. 1140, 1141 (S.D.N.Y. 1876), discussed in M. Grossberg, *supra* note 14, at 191. Edward Bliss Foote, the defendant, was an advocate of free-thought, civil liberties, women's rights and birth control. After his arrest, Foote wrote, "It is my conscientious conviction that every married woman should have it within her power to decide for herself just when and just how often she will receive the germ of a new offspring." *See id.*; L. Gordon, *supra* note 28, at 168.

[63] M. Grossberg, *supra* note 14, at 193.

The core purposes of the Comstock Act were to enforce chastity on the young and unmarried and to preserve the subservient position of women within a "traditional" family structure. Nineteenth-century restrictions on abortion and contraception can only sensibly be understood as a reaction to the uncertainties generated by large shifts in family functions and anxieties generated by women's challenges to their historic roles of silence and subservience.

D. Nineteenth-Century Contraception And Abortion Regulation Also Reflected Ethnocentric Fears About The Relative Birthrates Of Immigrants And Yankee Protestants.

Nativism, notably anti-Catholicism, had been part of American politics and culture as early as the Jacksonian period.[64] The Civil War and Reconstruction Era dramatically raised consciousness about national identity and citizenship. Social conservatives in the 1850s articulated an "organicist" ideal in which social unity would predominate over diversity.[65] By the 1870s social thought was turning the insights of Charles Darwin toward racist ends.[66] The political ideology of "free labor," forged in the nascent Republican Party in the years preceding the Civil War,[67] was severely challenged by an influx of foreign labor in the latter part of the nineteenth century. The discriminatory immigration policies and nativist fears of the late nineteenth and early twentieth centuries had their roots in a far earlier period, when

[64] D. Davis, *From Homicide to Slavery: Studies in American Culture* 137-54 (1986); S. Lipset & E. Raab, *The Politics of Unreason: Right-Wing Extremism in America, 1790-1970* (1970).

[65] *See* G. Frederickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (1965).

[66] *See* R. Hofstadter, *Social Darwinism in American Thought* (1955).

[67] E. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970).

Americans first became concerned about the creation of an urban population of wage workers.[68]

Beginning in the 1890s, and continuing through the first decades of the twentieth century, these nativist fears coalesced into a drive against what was then called "race suicide."[69] The "race suicide" alarmists worried that women of "good stock"—prosperous, white, and Protestant—were not having enough children to maintain the political and social supremacy of their group.[70] Anxiety over the falling birth rates of Protestant whites in comparison with other groups helped shape policy governing both birth control and abortion.[71] As James Mohr points out, "The doctors both used and were influenced by blatant nativism. . . . There can be little doubt that Protestants' fears about not keeping up with the reproductive rates of Catholic immigrants played a greater role in the drive for anti-abortion laws in nineteenth-century America than Catholic opposition to abortion did."[72]

[68] The classic work on this issue is J. Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925* (1988).

[69] *See* L. Gordon, *supra* note 28, at 136-58.

[70] *See* C. Degler, *supra* note 19, at 229-30, on the concern of physicians that women of "good stock" were particularly likely to obtain abortions. In Buffalo in 1855, the fertility ratio of Irish women of ages 30-34 was over twice that of native white women. *Id.* at 134.

[71] J. Reed, *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (1978); D. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (1985); D. Kennedy, *Birth Control in America: The Career of Margaret Sanger* (1971).

[72] *See* J. Mohr, *supra* note 3, at 167. Horatio Robinson Storer, who spearheaded the American Medical Association's mid-nineteenth century anti-abortion campaign, frequently referred to racial themes. *See id.* at 180-90. One doctor lamented in 1874 that, owing to the prevalence of abortion among Protestant women, "the Puritanic blood of '76 will be but sparingly represented in the approaching centenary." *Id.* at 167. Carl Degler also documents that physicians of the 1850s and 1860s expressed particular concern

V. ENFORCEMENT OF ABORTION RESTRICTIONS IN THE FIRST HALF OF THE TWENTIETH CENTURY FOLLOWED HISTORIC ETHNIC AND CLASS DIFFERENTIATIONS, AFFIRMED HISTORIC CONCERNS ABOUT ENFORCING GENDER ROLES, AND IMPOSED ENORMOUS COSTS UPON WOMEN, THEIR FAMILIES AND PHYSICIANS.

Statutory restrictions on abortion remained virtually unchanged until the 1960s. Physicians were allowed to perform abortions only "to preserve the mother's life." Nonetheless, the incidence of abortion remained high, ranging from one pregnancy in seven at the turn of the century, to one in three in 1936.[73] Most abortions were performed illegally.[74] Legal restrictions did not stop abortion, but made it furtive, humiliating, and dangerous.[75]

In the first half of the twentieth century, a two-tiered abortion system emerged in which services depended on the class, race, age and residence of the woman. Poor and rural women obtained illegal abortions, performed by people, physicians and others, who were willing to defy the law out of sympathy for the woman or for the fee. More privileged women steadily pressed physicians for legal abortions and many obtained them. Some doctors could be persuaded that deliveries would endanger women's health; the dilation and curetage procedure was indicated for numerous other gynecological health problems.

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that abortion was increasingly sought by married women of "high repute." C. Degler, *supra* note 19, at 229.

[73] *See* F. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 338, and Appendix A, 453-75 (1936). *See also* Stix, *A Study of Pregnancy Wastage*, 13 Milbank Memorial Fund Q. 347 (1935); Stix & Wiehl, *Abortion and Public Health*, 28 Am. J. Pub. Health 622, Table I (1938).

[74] *See* K. Luker, *Abortion and the Politics of Motherhood* 48-54 (1984).

[75] *See* brief *amicus curiae* of the National Abortion Rights Action League in the instant case.

Shifts in the definition of "therapeutic" abortion responded to larger social forces.[76] Early in the century, "race suicide" fears fueled efforts to suppress both abortion and birth control.[77] During the Depression, abortions increased as the medical profession recognized impoverishment as an indication for therapeutic abortion.[78] In the 1940s and 1950s the definition of therapeutic abortion expanded to include psychiatric indications.[79] Physicians were caught in a double bind: abortion was criminal, but the reasons women sought them were so multiple and compelling that they were difficult to resist.

In the 1950s, more restrictive attitudes toward both legal and illegal abortions[80] were part of a conservative response to growing female labor-force participation and independence.[81] The 1960s movement to legalize abortion arose in response to this, rather brief, wave of anti-abor-

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[76] L. Reagan, *When is Abortion Necessary to Save a Woman's Life?: The Political Dimension of Therapeutic Abortion During the Period of Criminalized Abortion in the United States, 1880-1973* (unpublished paper, Univ. of Wisconsin, Madison, June 20, 1987).

[77] On November 20, 1912, 390 federal postal inspectors arrested 173 people for using the mails to disseminate information about abortion and contraception in violation of the Comstock Act. The campaign was called the "federal war on race suicide." "Take Chicagoans in Federal War on Race Suicide," *Chicago Tribune*, Nov. 21, 1912, p. 1.

[78] In 1931 an American Medical Association editorial noted that "poverty . . . does not constitute an indication for abortion, [but] there is no doubt that in the United States many abortions are performed for borderline cases in which there is a strong ethical indication plus a more or less minor medical ailment." *Abortion or Removal of Pregnant Uterus*, 95 J. Am. Med. Ass'n 1169 (1931).

[79] K. Luker, *supra* note 74, at 45-47, 54-57.

[80] L. Lader, *Abortion* 42-51 (1966).

[81] M. Ryan, *Womanhood in America: From Colonial Times to the Present* 198-215 (1975); *America's Working Women: A Documentary History—1600 to the Present* 299-308 (R. Baxandall, L. Gordon & S. Reverly eds. 1976).

tion enforcement. Physicians, particularly those who worked in public hospitals and clinics, saw women who needlessly suffered and died as a consequence of illegal abortions.[82] Others were disturbed that most of those women were poor and black.[83] Many were distressed by the class bias inherent in the psychiatric indications for therapeutic abortions.[84] In the late 1960s, concerned physicians were joined by women who had come to understand that control of reproductive capacity is the *sine qua non* of women's self-governance and moral personhood.[85]

As a number of states acted to legalize abortion, additional concerns heightened pressure for recognition of constitutional protection for the basic right of abortion choice. Debate over abortion, now revolving around insoluble metaphysical disputes about the moral status of the fetus, preoccupied state legislatures and often prevented them from addressing other vital issues.[86] Class and regional differentiations were accentuated as it became possible for women with resources to travel to states where abortion was legal. In *Roe v. Wade*, this Court responded to all of these forces in holding that constitutional rights of liberty and privacy protect the right of the woman and her physician to choose abortion.

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[82] *See* brief *amicus curiae* of the American Public Health Association and brief *amicus curiae* of the Attorneys General in Support of Appellees.

[83] *See* brief *amicus curiae* of Organizations of Women of Color.

[84] *See McRae v. Califano*, 491 F. Supp. 630, 668-76 (E.D.N.Y. 1980).

[85] K. Luker, *supra* note 74, at 92-125.

[86] *See* J. Mohr, *Iowa's Abortion Battles of the Late 1960s and Early 1970s*, forthcoming in 1989 from the Center for the Study of the Recent History of the United States, Iowa City, Iowa; K. Luker, *supra* note 74, at 66-91.

VI. THE MORAL VALUE ATTACHED TO THE FETUS BECAME A CENTRAL ISSUE IN AMERICAN CULTURE AND LAW ONLY IN THE LATE TWENTIETH CENTURY, WHEN TRADITIONAL JUSTIFICATIONS FOR RESTRICTING ACCESS TO ABORTION BECAME CULTURALLY ANACHRONISTIC OR CONSTITUTIONALLY IMPERMISSIBLE.

Some of those seeking to enlist the power of the state to deny women's liberty to choose abortion have long articulated a concern for the fetus.[87] Yet until the late twentieth century, this concern was always subsidiary to more mundane social visions and anxieties. The mid-nineteenth century physicians' campaign sought to prohibit the practice of botanic medicine and chiropractic, as well as abortion. Protection of fetal life is plainly not the driving concern of such a movement. Those who opposed abortion and birth control to stanch "race suicide," sought to protect the privilege of elite white Anglo-Saxon Protestants, not to protect fetuses.

Religious support for the physicians' campaign to bar abortion was practically non-existent.[88] Physicians vigorously sought to enlist moral authority and organized

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[87] *See* J. Mohr, *supra* note 3, at 165-66.

[88] The extensive religious press of the United States, both Catholic and Protestant, "maintained a total blackout on the issue of abortion from the beginning of the nineteenth century through the end of the Civil War." J. Mohr, *supra* note 3, at 183. It was not until 1869 that a papal declaration condemned abortion as a violation of the fetus prior to "ensoulment," held to be 40 days gestational age for a male fetus and 80 days for a female. Before that time, Catholic theology condemned early abortion on precisely the same terms as it had condemned masturbation and contraception, *i.e.* a distrust of sexuality and an interference with natural processes. In Catholic doctrine late abortions were always held to be a form of homicide. No American diocesan newspaper reported the Pope's 1869 statement. *Id.* at 187. In that same year, the Bishop of Baltimore issued the only formal nineteenth-century Catholic condemnation of abortion in America, *id.* at 186, and the Old School Presbyterians became the only major Protestant denomination to condemn abortion. *Id.* at 192. No other religious denominations or leaders followed.

religion in their campaign to restrict abortion, and "were openly disgusted when the established voices of moral authority refused to speak on their behalf. . . . Medical journals accused the religious journals of valuing abortifacient advertising revenue too highly to risk criticizing the practice." [89]

Further, the small support that physicians found among Protestant religious leaders appeared to be "more worried about falling birth-rates among their adherents than about the morality of abortion itself." [90] The conspicuous absence of religious support for the physicians' anti-abortion crusade is particularly striking compared to extensive religious involvement in other nineteenth-century movements for changing social morality, such as temperance.[91]

Nineteenth-century laws restricting access to abortion were not based on a belief that the fetus is a human being. To the contrary, New Jersey Chief Justice Green expressed the prevailing judicial opinion in 1849 when he asserted that although it was "true, for certain purposes, [that] the law regards an infant as *in being* from the time of conception, yet it seems nowhere to regard it as *in life*, or to have respect to its preservation as a living being." [92] Michael Grossberg summarizes the nineteenth-century cases, saying, "[A] fetus enjoyed rights only in property law and then only if successfully born. It had no standing in criminal law until quickening, and none at all in tort. The law highly prized children, not fetuses." [93]

Judith Walzer Leavitt's analysis of medical decisions about the procedure of craniotomy (a surgical mutila-

[89] J. Mohr, *supra* note 3, at 184.

[90] *Id.* at 195.

[91] *Id.* at 182-96.

[92] *Cooper v. State*, 22 N.J. L. (2 Zab.) 52, 56-57 (1849) (emphasis in the original), discussed in M. Grossberg, *supra* note 14, at 165.

[93] M. Grossberg, *supra* note 14, at 165.

tion of the live fetal head to permit vaginal extraction) provides one complex window on the moral status of the fetus, during the period from 1880 to 1920. At this time, most women gave birth at home. When a woman's pelvis was too small to permit delivery, two alternatives were possible.[94] A Caesarean section would ordinarily save the fetus, but posed high risks to the woman's life. A craniotomy killed the fully formed fetus, but with significantly less risk to the woman.

Most physicians thought craniotomy, which could save the life of the woman, the more appropriate choice in this difficult situation.[95] Others based their assessment on their judgment of the social and moral worth of the woman.[96] But the core issue for physicians was the principle that "the obstetrician alone must be the judge of what is to be done." [97] Roman Catholic writers widely condemned craniotomy in popular medical journals, informing obstetricians in 1917 that it was "[b]etter that a million mothers die than that one innocent creature be

[94] In some cases, physicians could attempt to avoid this dilemma by stretching or breaking the woman's pelvis. *See* Leavitt, *The Growth of Medical Authority: Technology and Morals in Turn-of-the-Century Obstetrics*, 1 Med. Anthropology Q. 230, 233-35 (1987).

[95] Craniotomy was, of course, a brutal and distasteful procedure. Nonetheless, one medical leader, speaking to a medical society audience, in 1892 explained:

> I should much prefer Caesarean section in these cases, but I scarcely expect in the near future that a larger number will consent to it. The husband, *if told the truth* [about the dangers to the woman of cesarean section], will demand craniotomy, and I think moreover that every one of us would do the same under similar circumstances. I know I should, and I feel confident that every gentleman here to-night would too, if his own wife were in question.

T. Barker, *When is Emryotomy Justifiable? Proceedings of the Philadelphia County Medical Society* 132-39 (1892), *quoted in* Leavitt, *supra* note 94, at 240.

[96] Leavitt, *supra* note 94, at 246.

[97] *Id.* at 244.

killed." [98] But continued medical practice and dialogue demonstrate that neither patients nor physicians attached such high, absolute value to the fetus, even when it was plainly viable.

As this Court observed in *Roe v. Wade*, the pattern of American abortion laws does not support the view that they were designed principally to incorporate a view of the fetus as a person. Both the lesser punishment for abortion than for homicide, and the various exceptions allowing the physician to determine that abortion is justified, rebut the assumption that laws against abortion reflect that belief.[99]

Further, increasing "scientific" understanding does not support attributing enhanced moral value to the fetus. That pregnancy is a biologically continuous process has long been recognized by Americans even when the common law recognized a woman's right to choose abortion. For example, a popular home medical book published in 1817 and dedicated to the *Wives of the Ministers of the Gospel of the United States*, stated: "[T]he contents of the pregnant womb, formed in miniature at conception, are the child, the waters, the membranes holding them, the navel cord, and afterbirth." [100] The book goes on to describe in detail embryonic and fetal development. Historically, claims that startling advances in medical knowledge about pregnancy and fetal development should alter attitudes toward abortion have consistently been highly exaggerated.[101]

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[98] *Id.* at 239-40.

[99] *See Roe v. Wade*, 410 U.S. 113, 132-50 (1973).

[100] *Quoted in* K. Luker, *supra* note 74, at 23.

[101] *See* K. Luker, *supra* note 74, at 23-25. Other parties before this Court are better able than historians to address current claims of technical advances. *See* brief *amicus curiae* of the American Medical Association, refuting the claim that it is now possible to maintain fetal life outside the womb at ever earlier stages of gestation. *See also* brief *amicus curiae* of American Law Professors in Support of Appellees.

One technological development that has spurred the effect to attach moral value to the fetus is the technology that allows the imaging of the fetus in utero. B. Katz Rothman observes that "the fetus in utero has become a metaphor for 'man' in space, floating free, attached only by the umbilical cord to the spaceship. But where is the mother in that metaphor? She has become empty space." B. Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* 114 (1986). Rosalind Petchesky observes, "[I]mages by themselves lack 'objective' meanings; meanings come from the interlocking fields of context, communication, application and reception. . . ." Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 Feminist Studies 263, 286 (1987).

VII. A PRESUMED INTEREST IN PROTECTING FETAL LIFE DOES NOT JUSTIFY DENYING WOMEN THEIR HISTORIC LIBERTY TO CHOOSE ABORTION.

A culture can, of course, allow growing humanistic impulses to attach greater moral value to fetuses or to potential human life, even if these moral judgments are not triggered by new scientific understanding. But, for two core reasons, this Court should reject state efforts to invoke the protection of fetal life to justify restrictions upon women's access to abortion.

First, as this brief has demonstrated, the complex historic grounds for restricting access to abortion are now either socially irrelevant or recognized as constitutionally illegitimate. Both culturally and legally, it is today impossible to defend abortion restrictions as a means of enforcing an absolutist religious belief, grounded in natural law, that intimate relations must always remain open to the possibility of procreation.[102] Similarly, abortion restrictions cannot be justified by desires to keep women in traditional roles.[103] Likewise, our social con-

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[102] *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[103] *See Stanton v. Stanton*, 421 U.S. 7 (1975); *Orr v. Orr*, 440 U.S. 268 (1979).

sensus, embodied in principles of legal equality, would not permit the Court to defend restrictions on abortion as a means of encouraging the propagation of white Yankee stock or of punishing racial or religious minorities. But any sophisticated understanding of American history and traditions must recognize that such motivations do not disappear simply because they are no longer culturally or constitutionally legitimate. In this context, we must therefore question whether protection of unborn life has become a surrogate for other social objectives that are no longer tolerated.

Second, and decisively, this Court must affirm *Roe v. Wade*, and reject asserted state interests in protecting prenatal life, because the costs of denying constitutional protection to abortion choice are simply too enormous. Our experience from the 1890s until 1973 amply demonstrates that if women are denied access to legal abortions, many will turn in desperation to self-abortion, folk remedies, or illegal practitioners. Many will die. Others will suffer permanent damage to their reproductive capacity. Still others will bear children for whom they cannot provide adequate care. Apart from these devastating consequences to the lives and health of women, restricting access to abortion will again deny the fundamental legitimacy of women as moral decision-makers.

CONCLUSION

The judgment of the Court of Appeals and this Court's decision in *Roe v. Wade* should be affirmed.

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AMICUS CURIAE

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Supreme Court, U.S.
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MAR 30 1989
JOSEPH F. SPANIOL, JR.
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(82)

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,
v.
REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Eighth Circuit

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Texas Monthly, Inc. v. *Bullock*, 57 U.S.L.W. 4168 (U.S. Feb. 21, 1989) 24
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Wallace v. *Jaffree*, 472 U.S. 38 (1985) ..... *passim*

CONSTITUTIONAL AND STATUTORY AUTHORITIES:
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Mo. Rev. Stat. § 1.205.1(2) 5, 17, 25
Mo. Rev. Stat. § 188.010 ..... 5, 17

OTHER AUTHORITIES:
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *ET AL.*,
APPELLEES.

On Appeal From The Unites States Court Of Appeals For The Eighth Circuit

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLES

STATEMENT OF INTEREST

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has some 50,000 individual members of various religious beliefs and some of no religious belief, plus 4,000 cooperating religious organizations, in all states of the

United States, including the State of Missouri. Both the governing board of Americans United and its National Advisory Council (which elects the organization's Board of Trustees) include clergy and laypersons who have varying views on the question of abortion with many of them personally opposed to abortion on philosophical, moral, or religious grounds.

In this brief, Americans United takes no position on the questions of whether public funds or facilities should be utilized to provide abortions or the regulation of abortions. Our concern, rather, is directed to what we believe to be theologically-derived legislative findings by the Missouri legislature that personhood begins at the moment of conception. Such an inherently theological, but controversial, determination violates a core purpose of the Establishment Clause of the First Amendment—that is, the absolute prohibition against government preference of one religious sect or denomination over another and the placing of the state's imprimatur on a particular religious dogma.

The membership and governing board of Americans United believe that this specific legislation does not present the appropriate vehicle to resolve the other non-Establishment Clause concerns which this Court will at some later date address. Americans United further believes that any judicial determination ignoring the Establishment Clause question which is unique to this legislation will only generate additional political divisiveness along religious lines.

This *amicus* brief will only address the specific question of whether the Missouri statute here in question violates the Establishment Clause of the First Amendment to the United States Constitution. Americans United understands that no other *amicus* brief will specifically address Establishment Clause concerns of the law's stated legislative findings and its impact.

SUMMARY OF ARGUMENTS

This brief narrowly focuses on the question of whether the Missouri anti-abortion statute violates the Establishment

Clause of the First Amendment. The statute, co-authored by the Missouri Catholic Conference, is based upon inherently theologically-derived legislative findings over which there has been a long and continuing history of deep division within the Judeo-Christian community.

Although civil government is not a competent arbiter of Scripture, the Missouri legislature, in the written text of the statute, determined that human life or personhood is conferred at the time of conception. Such an idea is not subject to scientific or medical confirmation and always has been viewed as theological in character.

Although Americans United readily acknowledges that religious organizations have the constitutional right to speak to moral and ethical issues and to influence public policy, that does not exempt legislation from the proscriptions of the Establishment Clause. It has also become a part of our Establishment Clause jurisprudence that legislation may parallel sectarian teachings and belief without resulting in a violation of the Establishment Clause. Americans United, however, contends that the text of the Missouri statute reveals a legislative purpose of endorsing a sectarian belief. The program has a perceived and actual effect of advancing the religious aims of certain religions. The message conveyed, therefore, is one of endorsement of a particular religious belief to the detriment of those who do not share it. As such, the statute cannot withstand the Establishment Clause. Appellants contend that the legislative finding that personhood is conferred at the moment of conception is neither a necessary nor operative provision. If appellants are correct, there can be no valid claim that the legislative declaration merely parallels a religious belief. Rather, it must be concluded that the legislature has adopted, endorsed, and encouraged a specific and divisive sectarian belief as the stated purpose for the remainder of the statute.

In fact, the theologically-derived finding as to personhood is operative since the statute itself requires all laws in Missouri, presumably both existing and future, to be interpreted and

construed so as to acknowledge on behalf of the unborn fetus at every stage of development all the rights, privileges, and immunities available to all other persons. The endorsement of a sectarian belief with the requirement that the theological view embraced by the legislation will be used to interpret all other related laws in the state clearly creates the potential for political divisiveness. As such, it provides a warning signal suggesting that the legislative act is perceived as an endorsement of religion. Legislation enacted under the guise of securing secular values cannot be promoted in theological terms by religious figures without those values taking on an inherently sectarian character.

This Court has recognized that the common law and, until the mid-nineteenth century, a large majority of jurisdictions in this nation recognized that an abortion performed before quickening was not an indictable offense. Arguments have been raised suggesting that somehow the theological concept that personhood is conferred at the time of conception has been engrafted as part of the Fourteenth Amendment's reference to persons. Those arguments focus on what is perceived to have been the prevailing mood of the nation and the existing laws relative to abortion at the time of its adoption. This contention, however, ignores the fact that the language of the Fourteenth Amendment tracks with the language of the Fifth Amendment. It is only logical that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

This legislation, suffused with the use of theological terms and concepts, should be disposed of on Establishment Clause grounds for the same reasons considered by this Court in reviewing the Alabama moment of silence legislation in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), and the Louisiana creation-science legislation reviewed by this Court in *Edwards* v. *Aguillard*, 107 S.Ct. 2573 (1987). The motivating and perceived legislative purpose for the enactment of this statute was

sectarian in nature and thus unlike *Harris* v. *McRae*, 448 U.S. 297 (1980), it does not set forth a legislative will that merely corresponds with certain sectarian beliefs. Here, the imprimatur of the State of Missouri has been placed on sectarian views that have historically generated, and are currently the subject of, divisive theological debate which by its very nature can never be resolved by legislative findings derived from a consensus of the scientific and medical communities.

ARGUMENTS

I. THE LEGISLATIVE FINDINGS AND THE STATED PURPOSE OF THIS STATUTE TAKEN TOGETHER WITH ITS AUTHORSHIP CLEARLY DEMONSTRATE THE INHERENTLY RELIGIOUS BASIS OF THE STATUTE IN QUESTION.

The specific language of the Missouri statute here under review, which we believe raises serious Establishment Clause problems and demonstrates that the statute is predicated upon theologically-derived legislative findings, includes the statement that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child at *every stage of development*, all the rights, privileges, and immunities available to all other persns . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) (emphasis supplied).

In enacting the statute, the legislature stated its purpose as follows: "It is the intention of the General Assembly of the State of Missouri to grant the right of life to *all humans, born and unborn* . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

Thus the Missouri statute is based upon what Americans United believes to be theologically-derived legislative findings and purpose which, read collectively, have the effect of declaring that personhood is conferred at the moment of conception

and that all existing and future legislation of the state must be interpreted from that sectarian viewpoint.

Such an interpretation of the legislative findings does not appear to be the product of a crabbed interpretation of the statutory language. In fact, key parts of the statute are quoted by major organizations in their *amicus* briefs to this Court demonstrating that those organizations had the same understanding from the reading of the text as did Americans United. The "Brief for 127 Members of the Missouri General Assembly as *Amicus Curiae* Supporting Appellants," at 10, states: "In the 1986 Act, the Missouri General Assembly expressed its continuing concern with the protection of human life by finding that '[t]he life of each human being begins at conception' and that '[u]nborn children have protectable interests in life, health, and well-being.'"

That same brief, *id.* at 12, later states: "The Missouri legislature has defined personhood to include all human beings—and not to exclude any."

The "Brief of *Amicus Curiae* Missouri Catholic Conference in Support of Appellants," at 1-2, explains in its Statement of Interest:

> The interest of the Missouri Catholic Conference in this case arises from the position of the Catholic Church as expressed by the National Council of Catholic Bishops, which includes all of the Catholic Bishops of Missouri, that "human life is a precious gift from God; that each person who receives this gift has responsibilities toward God, toward self, and toward others and that society through its laws and social institutions, must protect and sustain human life at every stage of existence. These convictions grow out of [the] Church's constant witness that life must be protected with the utmost care from the moment of conception." *Pastoral Plan for Pro-Life Activities: A Reaffirmation*, Nov. 14, 1985. Based on these principles, the Missouri Catholic Conference supported, through testimony before committees of the Missouri General Assembly, the legislation which is the subject of this lawsuit.

> *The Missouri Catholic Conference believes that the Missouri legislature should be permitted to express the wishes of the majority of the residents of the State, including the Catholics of Missouri, regarding when an unborn child is deemed to be a human being,* and regarding the use of public facilities or public employees to perform or assist in an abortion as provided in the challenged statute. [Emphasis supplied.]

The Missouri Catholic Conference was one of two organizations that *prepared* the language of the statute in question, according to its publication, the MCC Messenger, May 30, 1986, at 1, under the headline "State Paid Abortions—Not Here" (a copy of which appears as Appendix B to this brief at 42a):

> The most significant package of pro-life legislation since 1979 was enacted into law by the General Assembly this year. H. B. 1596 was approved by a vote of 119-36 in the House of Representatives and 23-5 in the Senate.
>
> The final bill is a combination of a bill *prepared* by the Missouri Catholic Conference, prohibiting the use of public funds, facilities and employees for the performance or promotion of abortions, in an omnibus pro-life bill *prepared* by Missouri Citizens for Life. [Emphasis supplied.]

The "Brief of the Lutheran Church-Missouri Synod, the Christian Life Commission of the Southern Baptist Convention, and the National Association of Evangelicals as Amici Curiae in Support of Appellants," at 4, states:

> This case squarely presents this Court with the question of whether, under the United States Constitution, a state legislatively may determine when its protectable interest in human life begins, and, predicated upon that interest in human life, thereafter regulate abortion. *Missouri, in prefacing its abortion law with a statement of the will of its people that human life begins at conception,* reveals its intent to enact a statute . . . to protect the interest of the state in human life before birth, as distinguished from a statute predicated principally upon protection of the health and welfare of the mother. [Emphasis supplied.]

The Lutheran Church-Missouri Synod, Christian Life Commission of the Southern Baptist Convention, and National Association of Evangelicals apparently recognized that the legislative finding was not, and could not, be based upon scientific evidence because their brief, *id.* at 6-7, further states:

> The Missouri legislature acted within the scope of its police power in enacting a statute stating that life begins at conception. Nothing in the Constitution prohibits the state from reaching the factual conclusion that life begins at conception and codifying it. The Supreme Court generally does not require legislatures to prove *their assumptions* or that the means which the legislature chooses will achieve only the ends which the legislature hopes to obtain. Reviewing courts "do not demand of legislatures 'scientifically certain criteria of legislation.'" *Ginsberg* v. *New York*, 390 U.S. 629, 642-43 (1968) (*citing Noble State Bank v. Haskel*, 219 U.S. 104, 110 (1911)). *Legislatures properly may rely on scientifically unprovable assumptions when protecting the broad social interest in order and morality. Paris Adult Theater I v. Slaton*, 413 U.S. at 60. [Emphasis supplied.]

In the same *amicus* brief, *id.* at 20, arguing that state laws prohibiting abortions are not unconstitutional establishments of religion, the organizations commented:

> The sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod, The Southern Baptist Convention, and of the other forty-seven church denominations represented in this brief. The Lutheran Church-Missouri Synod has, throughout its history, opposed abortion and has adopted official positions in its convention since 1971 condemning willful abortion as contrary to the will of God. Its convention resolution "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception;" that "as persons, the unborn stand under the full protection of God's own prohibition against murder;" and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother.

Likewise, the briefs Statement of Interest, *id.* at 2, states the beliefs of the National Association of Evangelicals: "The National Association of Evangelicals' profound interest in this case stems from its position that, based upon Scripture, human life begins at conception and deserves protection against destruction from its earliest stage."

Although the Roman Catholics, Missouri Synod Lutherans, Southern Baptists, and Evangelicals in Missouri may have a uniform theological view about when human life or personhood commences, other denominations and religious traditions reject the theological concept that human life or personhood begins at the time of conception.

For example, Rabbis Raymond Zwerin and Richard I. Shapiro write that "according to Jewish law, a fetus is not considered a full human being and has no juridical personality of its own . . . . The Talmud contains the expression *Ubar yereah imo*—the fetus is as the thigh of its mother, i.e., the fetus is deemed to be part and parcel of the pregnant's woman's body." Zwerin and Shapiro, *Judaism & Abortion* 1-2 (1987). Another prominent Jewish leader, Rabbi Henry Siegman, Executive Director of the American Jewish Congress, testified before Congress that "the fetus is not a person, in Jewish tradition, until the moment of birth. . . ." *Human Life Bill: Hearing Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 97th Cong., 1st Session 48-49 (1981).

Professor Paul D. Simmons, Professor of Christian Ethics at the Southern Baptist Theological Seminary, notes:

> Perhaps the major issue in the abortion debate centers on the question of the personhood of the fetus. Those who are working for a constitutional "human life" amendment to ban abortion in America argue that the Bible teaches (1) that the fetus is a human being and (2) that abortion is murder and thus should be legally prohibited.

Simmons, *Birth and Death: Bioethical Decision Making* 78 (1985). Adding that some traditional religious communities do

not agree with the proposition that human life or personhood begins at the moment of conception, Professor Simmons explains:

> Not all scholars are convinced the Bible teaches that abortion is murder or that the fetus is a person. John Stott, for instance, rejects the notion that a fetus is a human being; he believes that, at best, it may be regarded as potentially a person.
>
> Several things might be noted about these statements. First, many writers use the terms "human," "human life," "life," "person," and "human being" as if they were synonymous and thus interchangeable. Second, each statement reveals certain assumptions about what it means to be a human being or person. Third, each writer brings the teaching of the Bible as that writer understands it to buttress the argument. Finally, there is apparently no single teaching or definition in the Bible regarding personhood, or there would presumably be universal agreement among biblical scholars on this question. To understand the question of the personhood of the fetus and relate the teaching of the Bible more clearly to the question, it may prove helpful to deal with some of the assumptions involved.

Id. at 79. After reviewing the Biblical view of personhood, id. at 87-88, Simmons concludes:

> The biblical portrait of person, therefore, is that of a complex, many-sided creature with the godlike ability and responsibility of making choices. The fetus—certainly in the early stages of gestation—hardly meets those characteristics. At best, it begins to attain those biological basics which are necessary to show such capacities no earlier than the latter part of gestation. The "burden of proof" argument used by those who would equate fetus with person needs to be turned around. Brown argued, for instance, that the burden of proof is on those who say that the fetus is not a human person. "We must be able to say we are sure it is *not* human . . . . How can we be sure it is not a human being?" No one can disagree with him that the fetus is human. That is a simple statement that acknowledges the species to which the fetus belongs. Human is an adjective. The fetus is not bovine (cow), or feline (cat), but

> a *human* conceptus. The problem is asserting that the fetus is a person or human being. The terms are not synonymous. "Human being" is a noun and designates or names a living entity with the qualities of personality and life that distinguish *Homo sapiens* from all other creatures. Plainly the presence of life or animation is not a sufficient distinction, since all animals have life in that sense. The uniqueness of being person is reflecting the qualities of the image of God.

Annexed as Appendix A at 1a to 39a to this brief is a research paper of the Congressional Research Service of the Library of Congress entitled "Catholic Teaching on Abortion: Its Origin and Later Development," which traces the teaching of the Roman Catholic Church on the question of abortion including the theological question of personhood. This research shows that until relatively recent times there were conflicting but acceptable theological views within the Roman Catholic Church as to the beginning of human life or personhood.

Reviewing historic Roman Catholic writings on the subject, the research paper states (Appendix at 17a):

> For St. Thomas, "seed and what is not seed is determined by sensation of movement." What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of animated fetus only.

C. Whittier, *Catholic Teaching on Abortion: Its Origin and Later Development* 18 (1981).

The research paper, *id.* at 20 (Appendix at 18a-19a), further notes:

> In 1869 in his Apostolic Constitution *Apostolicae Sedis*, Pope Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility. In 1917, with the promulgation

of the new Code of Canon Law by Benedict XV (1854-1922), the 40 to 80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of *Effraenatam* and the Council of Elvira has become the officially sanctioned position of the Church.

The research paper, *id.* at 34-35 (Appendix at 29a-30a), concluded:

> The official teaching of the Catholic Church at present was stated in 1970 by the United States Catholic Bishops: "from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life"; in brief, "the child in the womb is human." This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care." Thus, in 1964, Pope Paul VI cited the words of Pius XII thirteen years before: "Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct deliberate attacks . . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."
>
> In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the *conceptus*. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropriate penalties.

In a similar vein, ecumenical dialogue sponsored by the Catholic Bishops' Committee for Ecumenical and Inter-

religious Affairs of the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational) issued a statement on Ethics and Christian Unity, A Statement on Abortion that noted substantial agreement on certain basic principles concerning abortion but indicated substantial differences on "the moment and meaning of personhood," "the rights of the unborn in situations where rights are in conflict," "the role of civil law in matters pertaining to abortion," and "the interrelation of individual versus communal factors in decision making." C. Whittier, Catholic Teaching on Abortion, *id.* at 39 (Appendix at 34a-35a).

II. RELIGIOUS ORGANIZATIONS HAVE THE RIGHT TO SPEAK OUT ON MATTERS OF MORAL AND ETHICAL CONCERN.

Nothing stated in this *amicus* brief should be construed as criticizing the right of religious organizations to speak out on important issues of moral and ethical concern. As Justice Brennan wrote in *McDaniel* v. *Paty*:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 670 (1970).

435 U.S. 618, 640-41 (1978) (Brennan, J., concurring).

Justice Brennan in his same concurrence added that "[t]he Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . . It may not

be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 641. However, the fact that religious organizations and their clergy have First Amendment rights to speak out on public issues and to seek to influence the political process in no way detracts from the Establishment Clause proscription against government adopting a sectarian belief on issues that are essentially religious. As Justice Brennan concluded in *McDaniel* v. *Paty*:

> Our decisions under the Establishment Clause *prevent government* from supporting or involving itself in religion or *from becoming drawn into ecclesiastical disputes*. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. *Beyond enforcing these prohibitions, however, government may not go*. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, *and, with judicial enforcement of the Establishment Clause*, any measure of success they achieve must be short-lived, at best. (Emphasis supplied)

Id. at 642.

In fact, Americans United firmly believes that religious organizations, like secular bodies and private citizens, have a constitutional right to speak to public questions. Members of the clergy and their religious organizations certainly have the right to speak out on matters of moral and ethical concern and have done so throughout this nation's history. This is why Americans United committed its resources to assisting the church plaintiffs in *Bemis Pentecostal Church* v. *State of Tennessee*, 731 S.W.2d 897 (Tenn. 1987), *appeal denied*, 108 S.Ct. 1102 (1988), in which thirteen churches in Jackson, Tennessee, publicly opposed a liquor-by-the-drink referendum, and challenged the constitutionality of Tennessee's Campaign Disclosure Act.

Thus, although religious organizations have the constitutional right to speak out on public questions, the ultimate protection remains within the political process *and with the courts* to enforce the guarantee against establishment of religion.

III. GOVERNMENT MAY PROPERLY TAKE ACTION AGAINST CONDUCT OR ACTIVITIES EVEN WHEN IT MAY PARALLEL SECTARIAN TEACHINGS AND BELIEFS WITHOUT VIOLATING THE PROSCRIPTION OF THE ESTABLISHMENT CLAUSE.

The developing Establishment Clause jurisprudence clearly accepts the proposition that mere parallelism between religious dogma and legislative action does not in and of itself result in an Establishment Clause violation. In fact, Judeo-Christian religious teachings may properly be the fountainhead from which community morals may spring. Americans United, however, believes that disputed sectarian dogma may not receive the imprimatur of the state as the stated purpose or predicate for governmental legislative action.

In *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980), this Court stated:

> It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education* v. *Regan*, 444 U.S. 646, 653. Applying this standard, the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson* v. *Board of Education*, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442. . . . The Hyde Amendment, as the District Court noted, is as much a

> reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. . . . In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, *without more*, contravene the Establishment Clause. [Emphasis supplied.]

Justice Stewart based part of his *Harris* v. *McRae* analysis on this Court's decision in *McGowan* v. *Maryland*. In that case, this Court specifically stated that a law may violate the Establishment Clause "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *McGowan* v. *Maryland*, 366 U.S. 420, 453 (1961).

IV. THE MISSOURI LEGISLATURE, IN ADOPTING ITS ANTI-ABORTION STATUTE, DEMONSTRATED A RELIGIOUS PURPOSE AND ENTERED THE THEOLOGICAL THICKET FROM WHICH IT IS BARRED BY THE ESTABLISHMENT CLAUSE.

In *Harris* v. *McRae*, 448 U.S. at 319-20, this Court, although finding that a secular legislative purpose may properly parallel a sectarian interest, implied that a legislative body may nevertheless transgress the Establishment Clause when enacting anti-abortion legislation. In *Harris* the Court merely acknowledged that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church and would not, "without more," violate the Establishment Clause.

Americans United, however, believes that in the Missouri case the legislation does not merely coincide with a sectarian teaching. Rather, the text of the statute itself results in a breach of the wall between church and state erected by the Establishment Clause of the First Amendment because the statute is predicated upon a theologically-derived legislative finding that "[t]he life of each human being begins at conception" (Mo. Rev. Stat. § 1.205.1(1) (1986)) and a requirement

that "laws of . . . [the State of Missouri] shall be interpreted and construed to acknowledge on behalf of the unborn child *at every stage of development*, all the rights, privileges, and immunities available to *all other persons* . . . ." (Mo. Rev. Stat. § 1.205.1(2) (1986)) (emphasis supplied).

The legislature, in enacting the statute, said its legislative purpose was "to grant the right of life *to all humans, born and unborn* . . . ." (Mo. Rev. Stat. § 188.010 (1986)) (emphasis supplied).

This legislative findings and statement of purpose go beyond a statement of "traditionalist values" represented by the Hyde Amendment and embrace theological dogma and are an attempt to place the imprimatur of the state on one side of the theological argument as to the "personhood" of a fetus.

In *McRae* the district court carefully observed that the consensus of the legislative opinion that gave rise to the passage of the Hyde Amendment prohibiting the use of federal funds for abortion "did not in truth turn on whether an embryo or fetus or, indeed, a zygote or blastocyst is a 'human being.'" *McRae* v. *Califano*, 491 F.Supp. 630, 715 (E.D. N.Y. 1980). The Missouri legislature, however, clearly predicated its legislation on a purely theological finding—a finding which has not been validated by a consensus within the medical or scientific communities.

Appellants and their supporting *amici* argue that the legislative finding is not an operative portion of the statute but merely contributes to a general understanding of the statute. We do not agree, but, whatever merit that argument may have, the legislative declaration nevertheless does clearly demonstrate that the legislative purpose was religiously based. Even though the purpose prong of the *Lemon* test usually looks to the subjective intent of the legislature, intent may be deduced from the face of the statute. *Edwards* v. *Aguillard*, 107 S.Ct. 2573, 2585 (1987). Therefore, if the legislative finding concerning when life begins is unnecessary to further the state's legitimate interests, as claimed by appellants, *amicus* believes

an improper intent may be inferred. It may be concluded that if the legislative declaration is unnecessary for the regulation of abortion, then Missouri is not "paralleling" a religious belief, but adopting and encouraging one.

Appellants argue that the state has a legitimate secular interest in regulating all trimesters of a pregnancy. If this is so, there is no reason for a legislative body to take the extra step and declare that life has in fact begun at the moment of conception, particularly when this issue has not been decided by the medical or scientific communities and is the subject of continuing theological debate. Such a legislative finding, therefore, serves no secular purpose but does demonstrate that the legislative purpose is religiously based.

This Court, over the years, has used a three-part test to analyze Establishment Clause challenges: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

More recently Justice O'Connor has suggested additional refinements to the traditional *Lemon* test which we believe are helpful in the analysis of the Establishment Clause issue present in this case. In *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984), Justice O'Connor, concurring, suggested that the purpose prong goes to the issue of what government intended to communicate by its action (the "objective" meaning of the statement in the community), while the effects prong relates to what message governmental action actually conveyed whether intended or not (the "subjective" meaning of the statement). Justice O'Connor analyzed the issue as follows:

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent

> by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is thereby necessary to determine whether the action carries a forbidden meaning.
>
> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. See also Estate of Thornton v. *Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

Justice O'Connor further suggested in *Lynch* v. *Donnelly* that in reviewing the question of whether the action of government "was understood to place its imprimatur on the religious content" and thereby "communicates endorsement of religion is not a question of simple historical fact." Rather, the question, "like the question whether racial or sex-based classifications communicate an invidious message," is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Id.* at 693-94. Further, Justice O'Connor suggested that, in making such an analysis, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded.

Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Id.* at 694.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 73-74 (1985), Justice O'Connor, in applying her modified *Lemon* test analysis to an issue substantially the same as the question addressed here—that is, whether the purpose of the so-called moment of silence legislation enacted by the Alabama legislature had the purpose of advancing religion—stated:

> The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

In *Wallace* Justice O'Connor also suggested that any inquiry into the legislative purpose to determine Establishment Clause violations "should be deferential and limited" without attempting "to psychoanalyze the legislators." *Id.* at 74. In this case, however, Americans United believes that that portion of the text of the statute setting forth the aforementioned legislative findings and purpose of the legislation is inherently religious in character. This, coupled with the acknowledgement that the legislation actually was co-drafted by the Missouri Catholic Conference, should relieve this Court of any need for an intensive investigation of legislative motive.

The Establishment Clause is violated by the advancement of a particular religious belief. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980); *Edwards* v. *Aguillard*, 107 S.Ct. at 2578. Also, this Court in *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968), stated that a law should not "be tailored to the principles or prohibitions of any religious sect or dogma." Nevertheless, this is exactly what the Missouri legislature has done.

In *Wallace* v. *Jaffree*, 472 U.S. 38, 75 (1985), Justice O'Connor in her concurrence stated:

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or religious practice.

It seems clear, as demonstrated earlier in this brief, that a historic and contemporaneous link exists between the teachings of certain religious groups and the human "life begins at the time of conception" finding of the Missouri legislature. In *Edwards* v. *Aguillard*, 107 S.Ct. at 2582, this Court stated: "Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."

This Court also stated in *Edwards* v. *Aguillard*, 107 S.Ct. at 2583, that "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." *See also Wallace* v. *Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring); *Richards* v. *United States*, 369 U.S. 1, 9 (1962); *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956).

Justice Blackmun concluded in his dissent in *Bowen* v. *Kendrick*, 108 S.Ct. 2562, 2590 (1988), that secular values may be properly promoted by legislation: "Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that *when promoted in theological terms by religious figures, those values take on a religious nature.*" (Emphasis supplied.)

V. THE MISSOURI STATUTE HAS THE PERCEIVED EFFECT OF ENDORSING A CONTESTED THEOLOGICAL POSITION CONTRARY TO THE PROHIBITION OF THE ESTABLISHMENT CLAUSE.

In *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), this Court stated that "[t]he clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another."

In *Wallace* v. *Jaffree*, 472 U.S. 38, 69-70, Justice O'Connor reviewed her suggested modifications of the *Lemon* test and stated:

> Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." . . . Under this view, *Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

Justice O'Connor continued:

> A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the state could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

Id. at 69-70. Justice O'Connor further stated:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes religious liberty of the non-adherents for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Id. at 70. Here the power and direct coercive pressure of the state are exercised on behalf of a sectarian teaching about "personhood."

Under Justice O'Connor's endorsement test, courts must examine whether a statute under review "in fact conveys a message of endorsement," irrespective of the state's actual intent. *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984). As Justice O'Connor added in her concurrence in *Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2874 (1987), "To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer acquainted with the text, legislative history, and implementation of the statute."

Not only were Missouri Catholics informed through their own church newspaper, the MCC Messenger (Appendix B herein at 40a), that the Missouri Catholic Conference had co-authored, not merely promoted, the anti-abortion bill enacted into law, but also the general public was informed by the secular press that the executive director of the Missouri Catholic Conference and the state legislative chairman of Missouri Citizens for Life had "ghost written" the legislation. The Kansas City Times noted that the role played by the Missouri Catholic Conference was no secret and quoted the executive director to the effect that "some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation." Sentell, *Abortion Law was Work of Ghostwriters*, The Kansas City Times, Jan. 23, 1989. A copy of this article is annexed hereto as Appendix C at 43 a.

Also, if an objective observer reading the text of the Missouri statute considers the declaration of personhood contained in the legislative findings as being unnecessary to achieve a valid state interest, then the effect of the statement would be to convey a message that the particular theological theory of life is "favored or preferred." *Wallace* v. *Jaffree*, 472 U.S. at 70. In essence, if the legislative finding does not further the state's

interest, and is in fact an encroachment into a religious area, then both the actual purpose and effect must be to endorse a particular religious viewpoint.

At the very least, the legislative finding made by the Missouri legislature sets forth a legislative preference for a specific theological idea. As Justice Blackmun stated recently, "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. *Texas Monthly, Inc.* v. *Bullock*, 57 U.S.L.W. 4168, 4175 (U.S. Feb. 21, 1989) (Blackmun, J., concurring).

In *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981), this Court reasserted the principle that "[c]ourts are not arbiters of scriptural interpretation." If this is beyond the competence of the Judicial Branch, it is equally outside the domain of the Legislative Branch.

Although noting in *Wallace* v. *Jaffree* that it is possible that a legislature will enunciate a sham secular purpose for a statute, nevertheless Justice O'Connor had "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an express secular purpose is in doubt." 105 S.Ct. at 75. Arguments that the legislative purpose was based upon secular concerns are belied by the sectarian foundation of the legislative action. According to Justice O'Connor, "While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." *Id.* at 75-76.

VI. IF THIS COURT SHOULD VALIDATE A LEGISLATIVE ACT PREDICATED ON A THEOLOGICALLY-DERIVED LEGISLATIVE FINDING INTENDED TO BE USED IN THE INTERPRETATION OF ALL EXISTING AND PROSPECTIVE LEGISLATION TOUCHING ON THE STATUS OF "THE UNBORN CHILD AT EVERY STAGE OF DEVELOPMENT," SUCH LEGISLATION CREATES THE POTENTIAL FOR EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE.

The Missouri legislature specifically stated that its findings that "the life of each human being begins at conception" are to be utilized in interpreting and construing the laws of the state. Thus, the suggestion that the findings and purpose portion of the statute is not operative is pure fiction. Apparently such a mandated interpretation would apply to both existing and prospective legislation. The legislature specifically stated that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and construction of this state." (Mo. Rev. Stat. § 1.205.1(2) (1986)).

It is clear that the legislature in this case went beyond restricting the use of public funds or facilities in abortions. It attempted to place a theological interpretation on all existing and future legislation touching on "the unborn child at every stage of development." Such a statutory requirement portends a myriad of unpredictable ways for wreaking havoc in the future.

In *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), this Court indicated that the "potential for political divisiveness" was relevant in determining whether legislation created excessive entanglement

between church and state. In *Nyquist* this Court noted that "while the prospects for such divisiveness may not alone warrant the invalidation of state laws . . ., it is certainly a 'warning signal' not to be ignored." 413 U.S. at 797-98.

In *Lynch* v. *Donnelly*, Justice O'Connor in her concurring opinion stated that "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." 465 U.S. at 689.

VII. THERE IS NO LOGICAL BASIS FOR IMPLANTING ONE THEOLOGICAL VIEW OF PERSONHOOD INTO THE FOURTEENTH AMENDMENT.

In *Roe* v. *Wade*, 410 U.S. 113, 132-133 (1973), this Court recognized that "abortion performed *before* quickening' was not an indictable offense at common law and that "[t]he absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins."

This Court in *Roe* v. *Wade* also acknowledged that "the law in effect until mid-nineteenth century was the pre-existing English common law" and that by the end of the 1950's a large majority of jurisdictions banned abortion "unless done to save or preserve the life of the mother." *Id.* at 138, 139. This Court also noted that "at the time of the adoption of our Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes" in effect at the time of the *Roe* v. *Wade* decision. *Id.* at 140.

A number of *amicus* briefs filed in this case in support of appellants have argued that the Fourteenth Amendment to the United States Constitution somehow changed the common law and somehow included a fetus as a "person" who could neither be deprived of "life, liberty, or property without due process of law" nor be denied the "equal protection of the law." For

instance, the brief of a number of religious pro-life groups addresses "the personhood, under the Fourteenth Amendment, of human beings conceived but not yet born." *Amicus* Brief of Catholics United for Life at 4. That brief argues that the "absence or dearth of case support for unborn personhood is irrelevant" and takes a gigantic leap in logic by citing Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) tying such a concept to the proposition that the framers of the Fourteenth Amendment intended that "in the eyes of the Constitution, every *human being* within its sphere . . . from the President to the slave, is a person." *Id.* at 7, 14.

Similarly, the *amicus* brief of the Knights of Columbus argues that "viability is an invalid benchmark for construing the meaning of 'person' in the Fourteenth Amendment because it has nothing to do with attributes of personhood, or a particularized state of being, but only the state of medical technology." Brief of the Knights of Columbus at 2. In effect, the Knights of Columbus would have this Court substitute Roman Catholic theology for "medical technology," the sectarian for the secular.

Even the Knights of Columbus brief admits, however, that "the legislative history of the [Fourteenth] Amendment makes no explicit reference to the unborn or to abortion." *Id.* at 18. Whether the term "human being" includes all unborn children to the time of their conception also is not demonstrated in any Fourteenth Amendment generated case law, and, therefore, would rest solely on church dogma or teaching.

The *amicus* briefs of Catholics United for Life and Knights of Columbus focus on what they perceive to have been the prevailing mood of the nation and the existing abortion laws at the time the Fourteenth Amendment was adopted. Then, *ipse dixit*, they engraft on the Fourteenth Amendment the concept that its protection of "persons" includes a fetus. This argument ignores the fact that the common law and the prevailing view at the time of the adoption of our Constitution and the Bill of Rights fails to support any such notion.

The Fifth Amendment contains the same type of language and restraint as does the Fourteenth Amendment. Both provide that a "person" shall not be deprived of "life, liberty, or property, without the due process of law." The only difference is that the Fifth Amendment proscribes actions by the federal government, and the Fourteenth prevents similar action by state governments. How ironic it would be if the same language within the Constitution could produce distinctly different results according to whether the action is federal or state. It is more logical to believe that the authors of the Fourteenth Amendment, in using the word "persons," had in mind the same definition of persons as used by the drafters of the Bill of Rights.

CONCLUSION

The legislative findings and stated legislative purpose establishing the Missouri statute in question on a theological teaching about which there are deep divisions within the religious community require a constitutional determination by this Court that both the purpose and effect of the statute violate the Establishment Clause of the First Amendment because they place the imprimatur of the state upon a particular sectarian belief. For this reason, this Court should affirm the decision of the Court of Appeals.

Dated: March 30, 1989

Respectfully submitted,

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APPENDIX

APPENDIX A

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CATHOLIC TEACHING ON ABORTION:
ITS ORIGIN AND LATER DEVELOPMENT

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May 15, 1981

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ABSTRACT

This report examines the origins and later development of Catholic teaching regarding abortion. It seeks to present that teaching in relation to changing beliefs on the nature of fetal life and the infusion of the human soul. It provides a context for clarifying continuities and discontinuities in the development of a complex tradition and notes areas for possible dialogue in the search for understanding and consensus.

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CATHOLIC TEACHING ON ABORTION: ITS ORIGIN AND LATER DEVELOPMENT

INTRODUCTION

Few issues have proved to be more controversial and difficult of resolution than the status of abortion. Whatever the law may permit or forbid at any given period of history, it is evident that widely divergent convictions are held today regarding the moral and ethical principles involved. A carefully nuanced awareness of tradition, its sources and development through history, can strengthen better understanding of differences among men and women of good will, an important condition for the rational dialogue essential to a free and increasingly pluralist society.

Historically, the Judaeo-Christian tradition has been the single most important factor shaping the moral consensus of Western civilization toward the status and character of abortion in religion, medicine, and law. Within that mainstream tradition, Catholic, Orthodox, and traditional Protestant have shared fundamental presuppositions regarding the nature of life in the womb in contradistinction to the culture and law of the pagan world, particularly the Roman Empire.[1]

Within that Judaeo-Christian context, the fetus has been accorded what John Noonan has called an "almost absolute" value[2]—that is to say, an intrinsic (because God-given) worth

[1] See Nardi, Enzo. Procurato Aborto Nel Mondo Graeco Romano. Milan, Dott. A. Giuffre Editore, 1971. Though not yet translated, it is reviewed by Prof. John Scarborough in the American Historical Review, vol. 78, February 1973, p. 77. The practice of abortion (like infanticide), though often condemned, appears to have been widespread in the Graeco-Roman world, reflecting popular indifference to fetal life. No distinction was made between abortion and contraception.

[2] Noonan, John T., ed. The Morality of Abortion. Harvard University Press, 1970. p. 1.

and rightful claim upon life.

While there has been general agreement on the presence of human life or its unique potentiality in the fetus from its conception, certain crucial distinctions have been made by moral theologians at various times in history regarding the so-called "therapeutic exception" (direct or indirect abortion in order to save the life of the mother) and the criteria for its sanction. Further distinctions were recognized from the earliest period—distinctions explicitly considered by the 5th century—regarding the infusion of the soul into the fetus in relation to the understanding of embryonic development prevalent in the early centuries of the Christian era and into modern times. As a result of these distinctions in the hominization[3] and ensoulment of the fetus, there was some variation in the analysis of abortion as a sin and as a *delict*[4] and, consequently, in the canonical penalties prescribed.

The most fully developed theology of abortion occurred within the Roman Catholic Church, which, adhering to the common Christian consensus in respect to abortion, gave rise to a long tradition of casuistry—that is, the application of moral principles to the exigencies of particular situations, with distinctions in penalty (the private penance or *poena*, punishment) appropriate to the case. During the great formative period of Western canon law in the Middle Ages, the apostolic and patristic tradition was incorporated into the law of the Latin Church and the distinctions of embryonic ensoulment

[3] The process of becoming fully human.

[4] That is, a crime, a morally imputable violation involving objective, subjective, and juridic elements. The *delict* of abortion (which requires both malicious intent and use of deliberate means) always presupposes a mortal sin, but not every sin of abortion is a *delict*. Abortion is punished by excommunication. It constitutes an irregularity for those (males) seeking Orders, and clerics are liable to deposition. The canons on abortion are analyzed in detail in Huser, Roger J., O.F.M. The Crime of Abortion in Canon Law. Washington, Catholic University Press, 1942. p. 79-121.

further refined in a process which may be said to have continued to the present day, as "an ever-growing appreciation of insights possessed from the beginning."[5]

This development in the history of theology and casuistry, which has profoundly affected beliefs, attitudes, and feelings in the moral and ethical consciousness of Western civilization, and which is significant not only to religious believers but to the larger community, can further understanding of the complex process by which moral judgment is shaped in history through the conflict of values. In addition, widely-popularized misunderstandings associated with the ensoulment controversy,[6] supposed changes in the Church's teaching, and related matters, are clarified and corrected by careful examination of the historical context.

SCRIPTURE AND APOSTOLIC TEACHING: THE EARLIEST TRADITION

Abortion—that is, deliberate detachment and expulsion of a previable fetus, incapable of extra-uterine existence—was

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[5] Kerns, Joseph. Relevant Currents in the History of Sexuality. The Problem of Population—Moral and Theological Considerations. Edited by Donald Barrett. Notre Dame, Indiana, University of Notre Dame Press, 1964. p. 39.

[6] Thus, the Supreme Court in 1973 (*Roe* v. *Wade*, 410 U.S. 113, p. 45) declared "mediate animation" to have been "official Roman Catholic dogma until the 19th century," though it never was, before or since the 19th century. Further, the Court spoke of the "existence of life from the moment of conception" as "now, of course, the official belief of the Catholic Church," whereas the Church has always taught that human life is present incipiently, even if the soul is not infused at conception, and has therefore always condemned abortion at every stage. (See the text of the 1974 Declaration on Abortion by the Sacred Congregation for the Doctrine of the Faith, Appendix A, p. 35). The Court also refers to "agreement" among canonists and theologians that destruction of the pre-formed fetus was "not a homicide"; no mention is made of traditional teaching regarding feticide or destruction of the embryo as anticipatory homicide.

associated with infanticide by early Christians and condemned as a grave sin, a form of homicide. The Bible does not deal specifically with abortion, though some argue that the sanctity of fetal life is clearly implied by passages which speak of the pregnancies of Mary and Elizabeth: Matthew 1:18, and Luke 1:41 and 42, especially the former where the "babe" (*brephos*) is said to have "leaped in [Elizabeth's] womb," for joy at the greeting of Mary. The Pauline condemnation of the "desires of the flesh" in Galatians 5:17-21 includes *pharmakeia*, usually translated as "sorcery" or "witchcraft" but actually meaning medicine in the sense of drugs with magical or occult power, used as abortifacients. Similarly, the practitioners of such magic, the *pharmakai*, are condemned in Revelation 21:8 and 22:15, where they are associated with homicides, fornicators, and the like. Deliberate abortion was linked in the Christian view with lust and violence. This association is made in the authoritative *Didache*,[7] the *Teaching of the Twelve Apostles*, a first century treatise on morals and discipline emanating from the Syrian Christian community: "You shall not practice medicine (*pharmakeia*). You shall not slay the child by abortions. You shall not kill what is generated" (*Didache* 2:2). They are said to be "killers of the child who abort the mold (*plasma*) of God," which may be a reference to the distinction between "unformed" and "formed" fetuses. If so, it is a thoroughgoing prohibition of abortion at any stage of fetal life.

Other writings of the Apostolic Church repeat this condemnation: the Epistle of Barnabas, composed between 70-100 AD at Alexandria, which associates abortion with sinning against one's neighbor; the second century Apocalypse of Peter, the most important and popular of the apocryphal apocalypses[8]; and the Apocalypse of Paul (fourth century).

Much controversy has surrounded the seemingly explicit reference in Scripture to abortion—if, indeed, it is a reference

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[7] The Didache was discovered in 1875 and first published in 1883.

[8] Books, outside the official cannon of Scripture, claiming to reveal "hidden" truths concerning the Last Days.

to abortion: Exodus 21:22-25, which prescribes penalties for injuries to a pregnant woman resulting in the premature birth of a dead child. Rabbinic law generally did not regard the fetus as a human being until birth, though some scholars have held that the ancient law prescribed the death penalty for abortion of a "completed" or "formed" fetus. In any event, the Greek Septuagint[9] translation of the Hebrew Bible, popular among Christians, expanded the Hebrew text in Exodus 21:22 so that "life shall pay for life" (the *lex talionis* or law of retaliation) for the accidental killing of a "formed" fetus. Thus, the Septuagint reading, reflecting the understanding of fetal development in the Graeco-Roman world, influenced Christian thinking as we shall see, regarding the difference between the "formed" and "unformed" fetus.

THE FATHERS OF THE CHURCH, AND THE HOMINIZATION OF THE FETUS

The Fathers of the Church, both before and after the 4th century, reflected and continued earlier teaching on abortion.[10] Clement of Alexandria (d. c. 215 AD) in his *Paedagogus*, the "Schoolmaster,"[11] dealing with Christian life and manners, condemns destruction of the embryo with abortifacient drugs. Similarly, Athenagoras of Athens, a 2nd century apologist, in his letter to the Emperor Marcus Aurelius and his son Commodus, denounces abortion: "the fetus in the womb is not an animal, and it is God's providence that he exist" (the *Apology* or *Supplication*, the "Embassy for the Christians," dated c. 177

[9] From the tradition of its having been translated by 72 scholars in Alexandria for Greek-speaking Jews. It became the early Christians' Bible. The great Hellenistic Jewish philosopher and Scriptural exegete, Philo (d., c. 50 AD) of Alexandria, interpreted Exodus 2:22-25 in the Septuagint reading as condemning both accidental and intentional killing of the formed fetus.

[10] Patristic writings and early Conciliar legislation are discussed in: Huser, The Crime of Abortion, p. 1229.

[11] Paedagogus 2.10.86.1.

AD).[12] Minucius Felix, an African Christian lawyer (d. c. 200 AD), in his *Octavius*, writes of the pagans: "By drinks of drugs they extinguish in their viscera the beginning of a man-to-be and before they bear, they commit parricide," an interesting use of a term drawn from Roman law, *parricidium*, the killing of a near relation, to include abortion.[13]

Tertullian (d. c. 220 AD), also an African and a lawyer, perhaps the greatest theologian of the African Church before Augustine, angrily repudiates the accusation of infanticide and replies: "For us, indeed . . . it is not lawful to destroy what is conceived in the womb while the blood is still being formed into a man . . . . He who is man-to-be is man, as all fruit is now in the seed."[14] It is sometimes argued that Tertullian, in the *De Anima*, "On the soul" (25.4), accepts the possibility of therapeutic abortion of the "unformed" or pre-formed fetus—that is, embryotomy to prevent matricide. It seems clear that he did hold to the belief that a full human being (*homo*) is present in the womb only after a certain stage of development and formation. The evidence that he allowed for therapeutic abortion is still debated.[15]

[12] Embassy for the Christians, c. 35, given in Patrologiae Cursus Completus, . . . Series Graeca, 6.191 (the Greek Fathers).

[13] Octavius 2.43 in the Corpus Scriptorum Ecclesiasticorum Latinorum (the Latin Fathers).

[14] Apologeticum ad nationes 1.15. Tertullian is not always consistent as to the character of the soul which some believed present at conception: see Section IV, p. 13. His belief in some form of mediate animation from the moment of conception is said to have influenced Albert the Great.

[15] The passage in question is translated by Noonan in his Morality of Abortion, p. 13 (based on the Latin edition of H.J. Waszink, Amsterdam, 1947). He argues that it would be inconsistent with Tertullian's general position regarding abortion. George Williams, however, believes that Tertullian "was constrained to make one sad exception" in his condemnation of abortion, i.e., the "therapeutic exception" to save the mother's life. Williams, George. Religious

Gradually a "consensus Patrum" or authoritative patristic tradition emerged on abortion, finding its legislative expression in the acts of the Council of Ancyra in 314 and the Council of Elvira around 306. The former, representing Bishops in Syria and Asia Minor, reduced the penance for abortion from excommunication for life to ten years. Since the Council retained the life penance for all other forms of voluntary homicide, its action may be viewed as a recognition of mitigating circumstances, at least in the Eastern Church. By contrast, in the West, the Council of Elvira in Spain extended lifetime excommunication to women whose abortion was the result of adultery and, in an extraordinarily severe ruling, precluded even death-bed reconciliation. The differing approaches by Ancyra and Elvira indicate that already by the 4th century, though abortion was universally condemned, distinctions in gravity and thus in penalty were evident, probably in response to the special pastoral problems of various regions.[16] The canons of Ancyra later acquired immense authority in both East and West by their ratification at the Fourth Ecumenical Council held at Chalcedon in 451. Eventually the milder penalty for abortion received the force of the law in the West under Charlemagne in the 8th century.

Though neither Ancyra nor Elvira touch upon the formed-unformed distinction, the 4th century is also the period in which that problem is first dealt with explicitly and, in terms of future policy, authoritatively by several of the greatest and most influential among the Church Fathers—Augustine and Jerome. Following the hylomorphism of Aristotle—the belief that the actuality of every entity is determined by its material form—both Augustine and Jerome distinguish the "unformed"

Residues and Presuppositions in the American Debate on Abortion. Theological Studies, Vol. 31, No. 1, March 1970. p. 25-26.

[16] The canons of Elvira and Ancyra, canon 53 and canon 21 respectively, are given in Mansi, J.D., Sacrorum Conciliorum Nova et Amplissima Collectio 2.5-19 and 2.16.

from the "formed" fetus, influenced again by the Aristotelian teaching, generally accepted in the ancient world (as well as by the Septuagint reading of Exodus 21:22), that there are developmental stages in the emergence of uterine life. For Aristotle, full hominization does not occur until approximately 40 days after conception in the case of males and 90 days in the case of females.[17] Some scholars hold that this belief is probably reflected in Leviticus 12:1-5, where the ritual purification for women after childbirth is prescribed at 40 days for a male and 80 days for a female.[18] In any event, it was widely believed that the fetus became a human being at the moment of "formation," prior to which Aristotle distinguished stages of "unformed" fetal development. This teaching of gradual hominization, inevitably bound up with Christian doctrine regarding the infusion of the soul by God (dealt with in greater detail in Section IV on ensoulment), is evident in the fact that both Augustine and Jerome, sharing a cautious agnosticism on (the time of) ensoulment, accepted the unformed-formed distinction.

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[17] Aristotle, History of Animals 7.3.583. The belief in progressive ensoulment from vegetable to animal to rational or human stages in fetal life appears in many other writers—for example, the Stoic philosopher, Poseidonius of Apamaea (fl. Syria, c. 51 BC), who held that the rational soul, infused at birth, was distinct from the corporeal spirit that conferred sentient and appetitive life.

[18] See Connery, John R., S.J. Abortion: The Development of the Roman Catholic Perspective. Chicago, Loyola University Press, 1977. p. 18, 108, 326-327. The eighty-day Levitical computation was generally accepted by later writers for female formation, including St. Albert the Great (d. 1280), who attributed the difference between male and female formation to the greater heat believed to be generated by the male. The Levitical computation appears as late as the 15th century in the *Summa* of St. Antoninus of Florence (d. 1459). It may derive from the *De natura puerorum* of Hippocrates in the 4th century B.C., which is probably reflected in Aristotle and in Leviticus alike. Hippocrates is cited for the time of animation as late as the 17th century—by de Lugo (d. 1660), one of the greatest theologians of his age.

In his commentary on Exodus,[19] Augustine notes that abortion before formation, for him equivalent to "animation" or ensoulment, does not constitute homicide "for there cannot yet be said to be a live soul in a body that lacks sensation when it is not formed in flesh and so not yet endowed with sense." Similarly, Jerome writes that "seeds are gradually formed in the uterus, and it [abortion] is not reputed homicide until the scattered elements receive their appearance and members."[20] Whether the non-formed or unformed fetus has life, is "vivified," is left unresolved—Augustine, for example, is uncertain in the matter.

However, the abortion of the unformed *conceptus*, though not classified as murder, is still severely condemned.[21] Indeed, Augustine in his *Marriage and Concupiscence* provided what would become a classic text against abortion of the *un*formed fetus, a text later incorporated into the authoritative collections of canon law by Gratian and Peter Lombard in the 12th century. In the famous section beginning *Aliquando* ("sometimes") Augustine describes abortion of the "pre-vivified" fetus as "lustful cruelty or cruel lust" in which "the wife (becomes) the harlot of her husband, or he is [as] an adulterer with his own wife."[22]

Alongside this Augustinian view of fetal development, a more rigorist position continued to exist, which ignored (if it did not reject) the unformed-formed argument. Thus, St. Basil the Great (d. c. 379), Bishop of Caesarea in Cappadocia, in his letter to Amphilocius, writes: "the hair-splitting difference between formed and unformed makes no difference to us . . .

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[19] On Exodus 21:80.

[20] Epistola ad Algasiam, 121.4.

[21] Epistola ad Eustochium 22.13. Philo, similarly, condemns intercourse for any purpose other than procreation (Joseph 9:43), reflecting Rabbinic, Stoic, and later Christian views.

[22] De nuptiis et concupiscentia 1.15.17. The text is discussed in: Noonan, John T. Contraception. Cambridge, Mass., Harvard University Press, 1954. p. 171-173.

Whoever deliberately commit abortion are subject to the penalty for homicide."[23] Nevertheless, he retains the more lenient penance imposed by Ancyra—ten years rather than life. These views acquired canonical status in the East and may be said to have influenced those in the West who favored a stricter position regarding early abortion.

ENSOULMENT

The disagreement over the status of the unformed as against the formed fetus was crucial for Christian teaching on the soul. It was widely held that the soul was not present until the formation of the fetus 40 or 80 days after conception, for males and females respectively. Thus, abortion of the "unformed" or "inanimate" fetus (from *anima*, soul) was something less than true homicide, rather a form of anticipatory or quasi-homicide. This view received its definitive treatment in St. Thomas Aquinas and became for a time the dominant interpretation in the Latin Church.[24]

However, the contrary view—that the human soul is infused at the moment of conception—has always been maintained within the Church, both East and West. It is found in Gregory of Nyssa (d. c. 395),[25] the younger brother of Basil the Great, where, however, it is associated with what is called traducionism, the belief that the soul is transmitted by parents to their offspring.[26] In a spiritualized form traducionism has been

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[23] Epistola ad Amphilochium 188. There is a translation into English of the "Basilian canon," in part, in: Huser, The Crime of Abortion, p. 22.

[24] See Reany, William. The Creation of the Human Soul. New York, Benziger Brothers, 1932. p. 173-180.

[25] Ibid., p. 182 (citing St. Gregory's De anima et resurrectione, "On the soul and the resurrection").

[26] For an extended discussion of traducionism, see The New Catholic Encyclopedia. Vol. 14. New York, McGraw-Hill, 1967. p. 230. It was condemned in 498 by Pope Anastasius II in a letter to the Gallican bishops, noting that the soul is said to be infused four weeks after conception.

taught by many, and was revived in the last century by Rosmini-Serbati (d. 1855) and others. The teaching of Tertullian—"he is a human being [in essence] who will be one"—influenced Augustine and, later, Luther and the Reformers generally toward what is often said to be traducionism or "generationism," signifying the creative power of the soul given by God to generate and transmit another soul. In fact, however, the Church Fathers are often difficult to interpret when dealing with the origin of the soul. Traducionism, though formally condemned, has survived in differing forms as the attempt to explain and reconcile the spiritual and biological aspects of human life in its inception.

There is then no unanimous and authoritative teaching in Catholic tradition regarding every aspect of the nature of the soul in relation to the body[27] (except for the character of the soul as simple, immaterial, created, immortal, and infused), and the Church has never defined the manner of the origin of the soul or the time of its infusion—"immediate" (at conception) and "mediate" (delayed) animation alike have been held at various times both in the past and today.

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[27] Ibid., Vol. 13, p. 462 and 470-471. See also Connery, Abortion, p. 212: "Distinctions the Church makes, or does not make, in regard to penalties do not constitute church teaching. So while it is true that the Church today penalizes abortion at any stage, it would be wrong to conclude from this that it teaches immediate animation or infusion of a rational soul in the fetus. This it has never done." Fr. Connery further notes (p. 308), "The only opinion the Church has ever condemned was that which identified animation with the time of birth. It has never taught immediate animation. Even the fathers of Vatican II resisted efforts to elicit such a teaching statement in connection with its condemnation of abortion. And the most recent declaration (1974) on abortion from the Scared Congregation for the Doctrine of the Faith made a similar bypass of the question." See Appendix A, p. 41, the Declaration on Abortion by the Sacred Congregation.

THE CANONISTS IN THE MIDDLE AGES: "SI ALIQUIS . . . AND "SICUT EX. . ."

The decretals *Si Aliquis* and *Sicut Ex* are the two most important rulings affecting the treatment of abortion by the canonists in the Middle Ages.

In contradistinction to the Augustinian view of mediate animation, based upon the unformed-formed distinction, the more rigorist view, treating abortion at any stage as homicide, found classic expression in the famous anonymous 10th century decretal *Si Aliquis* ("If anyone . . ."),[28]. Significantly, *Si Aliquis* was omitted in 1096 from the *Panormia* of Ivo of Chartres (d. 1116), the most influential canonical collection before Gratian in the 12th century. The *Panormia* included three canons citing patristic authority (Augustine and Jerome) in support of the distinctions between the unformed and formed fetus and differentiated penalties. This, the less rigorous view, was given definitive status in Gratian's *Decretum* of c. 1140: "he is not a murderer who brings about abortion before the soul is in the body."[29] He cites Ivo of Chartres, Augustine, Jerome, and a spurious text attributed to Augustine (Pseudo-Augustine) which states explicitly that there is "no soul before the form." The distinction in penalty between homicide and quasi-homicide is made by the commentators on Gratian, notably Rufinus (1157-59) and the *Glossa Ordinaria* (1215-1245).

In his famous letter of 1211 to the Carthusians (concerning a monk who has accidentally caused his mistress to abort), Pope Innocent III (1160-1216) held that homicide could occur only after the fetus was "vivified" or ensouled (i.e., formed, animated). As the canon *Sicut ex*,[30] this letter was included in the

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[28] There is a discussion of *Si aliquis* in John T. Noonan's Contraception, p. 208-210. The decretal, erroneously attributed by Burchard of Worms (d. 1012) to a Council held at Worms in 830, is associated with Regino of Prum (c. 900-915).

[29] Gratian, Decretum 2.32.2.8-10.

[30] The full text of *Sicut ex* (Inasmuch as . . .) is given in Huser's The Crime of Abortion in Canon Law, p. 50.

definitive *Decretales*[31] of Gregory IX (1148-1241) by the compiler, Raymond of Pennafort (d. 1275), and promulgated in 1234 in the Bull "Rex Pacificus." This was the last authentic collection of canon law for the Roman Church until 1917 and the first legislation applicable to the whole Church which incorporated the theory of delayed or mediate animation. *Si Aliquis* was also included in the *Decretales*, and was reconciled with *Sicut ex* by use of the "quasi-homicide" category for abortion of the unformed fetus, an act subject to lesser penalties than abortion as homicide (i.e., of the formed fetus). No official judgment was rendered then—or at any later time—as to the moment of animation, though most canonists accepted some variant of the Aristotelian theory reflected in the Septuagint Exodus and in Leviticus. The distinction in penalties on this basis was taught by the greatest canonists of the Middle Ages, including Bernard of Parma or de Bottone (d. 1264), Hostiensis[32] (Henry of Suso or Segusio, d. 1271), Joannes Andreae (d. 1348), and Panormitanus (Nicolaus de Tudeschis, d. 1445). The last two explicitly cite the 40-80 day norm for formation and animation or ensoulment.

ST. THOMAS AQUINAS ON MEDIATE ANIMATION

The theory of mediate animation, incorporated in canon law, was taught by the most authoritative theologians of the Middle Ages. It appears in the *Sentences* of Peter Lombard (d. 1160),[33] and in the commentary of Albert the Great (d. 1280)[34] upon the *Sentences*. Abortion of the unformed fetus is treated not as homicide but as a sin against marriage, the natural law, and the

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[31] Gregory IX, Decretales 5.12.20.

[32] Hostiensis is perhaps the first to speak of aborting the unformed fetus as "interpretative" homicide or homicidium conditionaliter: Summa aurea 5.1 (written c. 1253).

[33] Libri IV Sententiarum 4.31. (See, however, the Appendix B for Albert on the soul's infusion.)

[34] In libros IV sententiarum in Opera, vol. 30, 4.31.18.

rightful use of the reproductive organs. The teaching of Albert was further developed in his greatest pupil, St. Thomas (d. 1274).

For St. Thomas, as for mediaeval Christendom generally, there is a lapse of time—approximately 40 to 80 days—after conception and before the soul's infusion. Until that action by God, there is a primitive embryonic organization associated with a vegetative and later a sensitive "soul" or vital principle, related potentially to but distinct from the fully human or rational soul and deriving from the "formative virtue" in the semen—an attempt to reconcile the materialist metaphysics of Aristotle's hylomorphism[35] with the supernatural understanding of the origin of life and of the soul in Christian teaching. The vegetative and sensitive souls are by definition corruptible, unlike the rational or intellectual soul, which is incorruptible, simple, immaterial, yet all three constitute the unity of the soul as the form of the body, a union destined by God. St. Thomas ascribed this successive or delayed animation, in part, to the principle of proportionality in terms of the rudimentary character, as was generally supposed, of embryonic activity and organization in the period after conception.

For St. Thomas, "seed and what is not seed is determined by sensation and movement."[36] What is destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of an animated fetus only.

LATER LEGISLATION: CHANGING TEACHING ON ENSOULMENT

The rigorist tradition reappeared, however, in the Counter-Reformation. In 1588 Pope Sixtus V (1521-1590), in the course

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[35] The belief that the soul is the form of the body.

[36] St. Thomas, In octo libros politicorum 7.12.

of a vigorous campaign against prostitution in Rome, issued the Bull *Effraenatam*, imposing severe penalties for abortion at any stage. In effect, the Bull abolished the formed-unformed distinction, reverting to the position of the Council of Elvira. Abortion at any stage was defined as homicide, entailing the full penalties of secular and canon law alike. Since this position was in conflict with canonists and theologians as well as with the Sacred Penitentiary, the body charged with administering penances, it encountered considerable opposition.[37]

In 1591, Sixtus' successor, Gregory XIV (1590-91), acted to repeal all the penalties of *Effraenatam* except those applying to an ensouled fetus. His Apostolic Constitution *Sedes Apostolica* of 1591 represented a return to the mainstream of mediaeval tradition, reserving absolution and penance for abortion of the unformed fetus to the local Bishop. This, the so-called Sixtine-Gregorian law, remained in effect until the mid-19th century—indeed, until the revision of canon law in 1917.

In 1869 in his Apostolic Constitution *Apostolicae Sedis*, Pope Pius IX broke with the older tradition by omitting all distinctions in canonical penalties between the unformed and the formed fetus. The effect was implicitly to accept the theory of immediate ensoulment or, at least, to provide for it as a likely possibility.[38] In 1917, with the promulgation of the new Code of Canon Law by Benedict XV (1854-1922), the 40 to 80 day animation determination, still in effect for dealing with irregularities, was completely eliminated. The definition of abortion as the ejection of an immature or non-viable fetus by deliberate

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[37] The contrasting policies of Sixtus and his successor, Gregory, are discussed in: Grisez, Germain G. Abortion. New York, Corpus Books, 1966. p. 167-168. Pertinent texts from the Sixtine-Gregorian law are cited in Huser, The Crime of Abortion in Canon Law, p. 62-80.

[38] See Callahan, Daniel. Abortion: Law, Choice, and Morality. London, Collier-Macmillan, 1970. p. 413. See also Granfield, David. The Abortion Decision. Garden City, New York, Doubleday Image Books, 1970. p. 62-63.

intent and efficacious means derives from Sixtus V. By fetus is meant the human organization in the womb after conception and before birth. In effect, the teaching of *Effraenatam* and the Council of Elvira has become the officially sanctioned position of the Church. This shift was, in large measure, the result of changing opinion regarding ensoulment at conception and growing knowledge of fetal development.[39] It also reflected the increased moral authority of the Holy See and the consequent tendency of canonists and theologians to follow papal leadership in contrast with earlier periods.

Other factors helped shape Catholic thought in this area, including the fact that belief in the doctrine of the Immaculate Conception had become general in the course of the 16th century, though it would not be defined as dogma until 1854 by Pius IX. However, as early as 1701 it was declared a feast of universal obligation by Clement XI, and its liturgical observance heightened popular consciousness concerning the sanctity of fetal life from its conception.

In 1620 Thomas Fienus, a physician at Louvain, argued that the rational soul was infused three days after conception. In 1621 a more influential work appeared, a treatise on medical-legal questions by Paolo Zacchia, a physician of Rome. Wholly rejecting the Aristotelian—Thomistic theories, he argued that the rational soul "must be infused in the first moment of conception." H views were to be widely debated, but in 1644 he received a signal mark of Papal approbation, being named

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[39] Increasing scrutiny of aborted embryos and the discovery of spermatozoa by Leeuwenhoek in 1677 seemed to s pport a preformationist theory of life as fully present in seminal fo m and unfolding in gestation, popularly understood as the homuculus in the ovum, ensouled at or three days after conception. A similar view appears to have been held by the philosopher Leibniz (d. 1716). The older view of epigenesis, life manifest in successive stages, the "metamorphosis of souls" in the embryo, was increasingly challenged as lacking substantiation.

"General Proto-Physician of the Whole Roman Ecclesiastical State" by Innocent X.

The changing climate of opinion[40] in the Holy See was evident when in 1679 the Holy Office under Innocent XI condemned sixty-five propositions as "at least scandalous and in practice dangerous." The censure concerned itself with their prudence rather than their truth; nevertheless it marks the influence of conservative theologians at Louvain and Rome against "laxism," the tendency to relax the obligations of natural and positive law in difficult cases of conscience.[41] Specifically, it rejected the views of Tomas Sanchez (d. 1610) and Caramuel y Lobkowicz (d. 1682). Caramuel was associated with the belief that the rational soul is infused at birth, and Sanchez with the argument that "a girl, detected as pregnant" could licitly abort (before ensoulment) to save herself from harm at the hands of relatives.[42]

It should be noted that the official position in canon law and in moral theology still held to the unformed-formed, inanimate-animate distinction. Thus, the greatest and most influential Catholic moral theologian of the 18th century, Alphonsus Liguori (1696-1787), in his *Theologia* (1753-1755), held it to be "certain" that there is no immediate ensoulment, though (he noted) "some say badly"[43] to the contrary. Already, however, as

[40] Fuller background for this change is given in: Grisez, Abortion, p. 170-177.

[41] For laxism, see Cross, F. L., ed. Oxford Dictionary of the Christian Church. London, Oxford University Press, 1958. p. 791-792.[3]

[42] De matrimonia 9, disp. 20, N. 11. Sanchez' arguments are examined in Noonan's Contraception, p. 442-444. See also Connery, John. Grisez on Abortion in Theological Studies, Vol. 31, No. 1, March, 1970. p. 173-74. Sanchez provides other instances in which he justifies therapeutic abortion (before ensoulment): the endangered survival of the mother, and rape. In both cases the fetus is an innocent aggressor against whom the mother may act in self defense.

[43] Liguori, Theologia Moralis 6.394.

early as 1736, there had been a theological analysis of abortion by Constantino Roncaglia arguing the "most probable" view for ensoulment at conception or "at least from the third or seventh day." Roncaglia's *Universale Moralis Theologia* was published at Lucca in 1834. Even Liguori, who did not accept this position, acknowledged that "there flourishes the opinion, received not without approbation from experts, that the fetus from the beginning of conception, or at least after several days, is informed by a soul."[44] Since at least 1658 and the *Baptisms of Doubtful Men* of Geronimo Florentinio, significantly enough a member of the same order as Roncaglia (the Congregation of the Mother of God),[45] it had been held that a fetus should be baptized even if taken from its mother's womb before 40 days after conception, given the possibility (which eventually came to be seen as the probability) of the soul's having been already infused.

Thus, within about two or three centuries—from the mid or latter 17th to the mid-19th—the Church's official teaching "developed to an almost absolute prohibition"[46] of abortion at any stage, a "substantial return" to the earliest tradition associated with the Church Fathers.

THE THERAPEUTIC EXCEPTION

The so-called "therapeutic exception," abortion to save the life of the mother, has never been officially sanctioned by the

[44] Ibid., 6.121.

[45] Founded at Lucca in 1573 by St. John Leonardi—hence the popular name Leonardini—the Clerks Regular or Religious of the Mother of God, conceived in the spirit of Counter-Reformation piety, were instrumental in fostering devotion to the Immaculate Conception.

[46] Noonan, The Morality of Abortion, p. 36. It should be noted that the human ovum was not discovered until 1827 by Karl Ernest Baer (1792-1876), and not till nearly half a century later was the union of ovum and sperm at conception determined.

Church. Nevertheless, some form of therapeutic abortion has been defended as licit by a number of eminent theologians since the 14th century.[47] The Dominican John of Naples (fl. 1310-36) argued that a physician "ought to give (such) medicine [abortifacient]" in order "to preserve a pregnant woman" if the fetus were not ensouled. Antoninus of Florence (1389-1459) cites this opinion as probable, though he himself rejected it as dangerous if there is any doubt. The same view is cited with caution by Sylvester da Prieras (d. 1523). The leading canonists of the 16th century, Azpilcueta (d. 1586), held that if the physician "believed with probability" that the fetus was not ensouled,[48] he was not guilty of homicide in prescribing abortifacients. He cites this as the common opinion.[49] These opinions coincided with and may be seen as the reflection of the rise of probabilism, the teaching that in any doubtfully licit action; a solidly probable opinion favoring liberty or leniency is permitted even though the opposing opinion, favoring the law, may be more probable.[50] (Eventually, under the influence of Liguori, a more nuanced form of probabilism became generally accepted throughout the Church.)

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[47] The theological history of the "therapeutic exception" is considered in Noonan, The Morality of Abortion, p. 26-32; in Grisez, Abortion, p. 166-184; and in Connery, Abortion, p. 173-313.

[48] For Azpilcueta, as for most canonists in his day, this meant 50 days after conception.

[49] The argument of the Franciscan Antonius de Corduba (d. 1578) in support of *acceleratio partus* (hastening the delivery) by means directed to saving the mother's life was widely accepted by many authorities, including the noted Jesuit theologians Theophile Raynaud (d. 1663), Edmund Voit (d. 1780), de Lugo, and Antonius Diana (d. 1663), all of whom permit indirect and "accidental" abortion of an unanimated fetus where the mother's life is endangered. Such views were rejected by Cardenas (d. 1684) and others because of the possibility that the fetus might be animated by a rational soul.

[50] For Probabilism, Probabiliorism, and Equiprobabilism see: The New Catholic Encyclopedia, vol. 11, p. 814-815, and vol. 5, p. 502-503.

It remained for Sanchez (1550-1610), generally regarded as the greatest Catholic moral theologian of his time, to provide a fuller theoretical defense of therapeutic abortion.[51] He noted exceptions to the prohibition on abortion: when the mother's life is endangered and the fetus not ensouled, abortion "more probably" is lawful. Sanchez invokes the "double-effect" argument from St. Thomas on self-defense (as well as "just war" theory, calling to mind the rabbinic tradition which regarded the fetus in such cases as an "innocent pursuer" or "unjust aggressor" against whom the mother may act in self-defense). That is, he argues that while direct abortion is, of course, always illicit, the mother is not bound to sacrifice her life for an unensouled embryo. Hence, "indirect" means are licit to induce abortion. The Jesuit theologian, Leonard Lessius (1554-1623), himself a pupil of Suarez, carried this argument further, justifying therapeutic abortion broadly, provided there be no "direct intention" to kill the fetus.[52]

Liguori himself followed this line of reasoning, holding Sanchez' opinion to be probable. He cites Bernard Busenbaum (d. 1668) for the view that for the mother whose life is threatened by an unensouled fetus, "it is lawful to take (an abortifacient), and according to some she is bound to take it, intending

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[51] For a different perspective from that of Noonan see Means, Cyril. A Historian's View. In Hall, Robert, ed. Abortion in a Changing World. New York, Columbia University Press, 1970. p. 16-24. Citing ten authorities from John of Naples to Paul Laymann (d. 1635) in favor of therapeutic abortion, Means holds further that St. Thomas "seems to have condoned "Tertullian's alleged approval of embryotomy *sub silentio*, an argument "from silence" and hence subject to widely varying interpretations. The argument "from silence" also appears in articles by Pietro Avanzini (d. 1874), sometime editor of the official journal of The Holy See, in favor of craniotomy.

[52] Lessius, De justitia et jure (1635) 2.9.2.58. Many who defended the "therapeutic exception" cited St. Thomas in the Summa Theologiea II-II, p. 64, a.7.

directly only hēr own health, although indirectly and consequently the fetus is destroyed."[53]

In 1872 the Sacred Penitentiary, consulted regarding embryotomy (craniotomy), replied: "Consult approved authors, old and new, and act prudently."[54] Such counsel reflected the prevailing practice. However, from 1884 to 1902 a series of Holy Office responses, reflecting doubtless the changing sentiment on ensoulment, ruled against embryotomy regardless of intention.[55] In 1902 even the ectopic (extra-uterine) exception was eliminated in a ruling that permitted the operation only if both lives—mother and fetus—would be protected "by ordinary results." This position was reaffirmed by Pius XII in 1951 and by Paul VI in 1968.

Many theologians now hold that fetal death not due to purpose or intent by mother or physician, but rather as the side-effect of seriously needed therapy or surgery, may be justified according to "double effect"—that is, if a threatened abortion is so acute as to appear medically "inevitable," the physician may act to save the mother's life so long as he neither seeks nor intends the death of the fetus and so long as his procedures do not materially accelerate that death. Only two instances have been cited by theologians as licit, using these criteria: removal of a pathological tube in the case of an ectopic pregnancy,

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[53] Liguori, Theologia Moralis 3.394.

[54] Response of November 28, 1872 to a question directed to the Penitentiary on September 2, 1869, cited by: Bouscaren, T. Lincoln. Ethics of Ectopic Operations. 2nd ed. Milwaukee, Bruce Publishing Co., 1944. p. 13. Means notes that a number of authorities taught the licitness of therapeutic abortion: he cites Guiseppe Pennacchi and Augustin Lemkuhl (d. 1917) among them; Pennacchi in his De abortu et embryotomia, published in 1884, appears to have accepted Tertullian's alleged precedent. Lemkuhl is the author of the 1872 ruling, given in his Theologia Moralis, 10th edition, vol. I, p. 505, no. 804 (1902).

[55] The questions and responses are given in full in Bouscaren's Ethics of Ectopic Operations, p. 183-186.

defended by Huser as "in most cases . . . justifiable," and removal of a cancerous uterus.[56]

PRESENT TEACHING AND ITS STATUS

The spread of abortion in modern times and the gradual erosion of the Aristotelian-Thomistic analysis of gestation have led to condemnation of abortion at every stage, "erasing the distinction between a formed (ensouled) and unformed fetus." Thus, the 1911 edition of Slater's *Manual of Moral Theology* notes that "following the common opinion, we may put aside as antiquated the hypothesis of a living fetus not yet informed by a human soul. The human soul is infused into the fetus at the moment of conception, according to the common opinion." In Volume I of the 1918 edition, it is said that the soul is infused at conception "as is commonly held by theologians."[57] In fact, however, this does not appear to have been the "common opinion" until a later time. Thus, McHugh and Callan's *Moral Theology* (Volume II, 1930) speak more cautiously of abortion as always homicidal "if done after animation, which according to many today is simultaneous with conception."[58] In his *A Manual of Neo-Scholastic Philosophy*, published in 1923, Charles Barschab, writing of St. Thomas and the infusion of the soul, observes that "today this opinion is not shared gener-

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[56] See: Huser, The Crime of Abortion, p. 137; and Noonan, Contraception, p. 46-50, on the debate between Agostino Gemelli (d. 1959) and Arthur Vermeersch (d. 1936) in 1933. See also: Connery, Abortion, p. 295-303: "Theologians generally accepted the conclusion of Bouscaren . . . that the tube might be removed as a pathological organ when necessary to save the life of the mother."

[57] Slater, Thomas. Manual of Moral Theology. Vol. II. New York, Benziger Brothers, 1918. p. 312.

[58] McHugh, John A. and Charles Callan. Moral Theology. Vol. II, Sect. 1848. New York, Joseph F. Wagner, 1930, p. 115. The authors emphasize that "the mother is not obliged to prefer the temporal life of the child to her own life" (i.e., if the latter is endangered by pregnancy).

ally (i.e., delayed animation). However, to us its ground appears solid and we have nothing better to put in its place."[59] Similarly and with far greater authority, Cardinal Mercier (1851-1926), in his *A Manual of Modern Scholastic Philosophy,* describes the traditional teaching of St. Thomas (that "the soul is created during embryonic life") as "much more probable" than immediate ensoulment at conception. He adds: "As to what precise moment the embryo reaches the degree of organization required for its being informed by the rational soul, it is, of course, quite impossible to determine."[60] The evidence of history would seem to support Fr. William Reany's careful conclusion in his *The Creation of the Human Soul* that "although there is no decision in the Catholic Church in this matter, it may be said without exaggeration that there is no doubt ecclesiastical authority has always favored the opinion that there is a lapse of time between conception and the infusion of the human soul into the body." He cites the opinion of St. Thomas and "several enactments emanating from the highest authority" presupposing that opinion (Innocent III, Gregory XIV, and Clement VIII), the Catechism of the Council of Trent, and the 15th Thomistic thesis as approved by the Scared Congregation of Studies and confirmed by Benedict XV in 1911. Abortion before the infusion of the soul he calls "an anticipated homicide," the killing of that intrauterine life which is a *preparatio* for rational ensoulment. When done with malicious intent, it constitutes abortion but not homicide.[61]

"Anticipatory homicide" is the term used by Cardinal Lepicier (d. 1936) in 1910:[62] "abortion is always homicide, although the fetus is supposed not yet to have a rational soul: for it (the fetus) is ordered to men's formation; therefore, every case of

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[59] Barshab, Charles. A Manual of Neo-Scholastic Philosophy. New York, Herder, 1923. p. 199.

[60] Reany, The Creation of the Human Soul, p. 189.

[61] Ibid., p. 195-197.

[62] Ibid., p. 196.

abortion should be called an anticipatory homicide; accordingly, the withdrawal of the clause *post animatum foetum* (in the revision of canon law) does not prove that the mind of the Church is that the fetus is always a man in the strict sense of the word, but rather indicates that no one is now excused from the censure (of abortion) on the pretext that the fetus has no soul. . ."

Opinions differ as to whether the direction of the present trend among theologians is toward delayed or immediate animation. Fr. Hyacinthe Hering in 1951 is cited by Fr. Joseph Donceel[63] as a representative advocate of the older view of successive or mediate animation. Medical research in the area of human reproduction does not appear to have undermined the possibility of some form of the traditional belief regarding ensoulment. Any one of four crucial "moments" in the development of the fetus may be plausibly defended as the moment when human life begins and, hence, of full ensoulment: 1, the moment of conception, when the ovum is fertilized; 2, after the moment of possible segmentation (at which the ferilized ovum could subdivide or recombine); 3, implantation of the embryo in the womb (blastocyst); 4, the beginning of the development of the cerebral cortex (between the 15th and 40th days of pregnancy). Nothing that recent embryology has discovered has affected the Church's teaching on abortion. "At most," writes Fr. Arthur McNally, "it may somewhat diminish the malice of early abortion."[64] There would appear to be room for the

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[63] Donceel, Joseph. Why is Abortion Wrong? Commonweal, August 16, 1975. p. 65-67; and Abortion: Mediate vs. Immediate Animation. Continuum 5, Spring 1967. p. 167-171. See also: Wassmer, Thomas. Questions About Questions. Commonweal, June 30, 1967. p. 418. Donceel himself argues vigorously for a revival of the "delayed animation" theory, holding that the soul can exist only in a highly organized human body: see Immediate Animation and Delayed Hominization. Theological Studies, Vol. 3, No. 3, September 1970. p. 76-105.

[64] McNally, Arthur, Life in the Womb. The Sign. April 1975. p. 35-36. See also: Hellegers, Andre. Fetal Development. Theological Studies, Vol. 31, No. 1, March 1970. p. 3-9.

"intermediate" opinion mentioned by Fr. Reany that the infusion of the fully human or rational soul is preceded by only one (sensitive or vegetative or nutritive) "soul." The moment of that infusion is left open.[65]

The present view is authoritatively stated by Fr. Bernard Haring, described by Noonan as "the most persuasive of [Catholic] moral theologians in postwar Europe." In his magisterial *Das Gesetz Christi*, Fr. Haring writes: "At best, however, one can grant only a slight probability to the ancient view of Aristotle . . . to me, it seems wholly untenable . . .; assuming this (to be so), every abortion is to be regarded as morally equivalent to murder."[66] On the other hand, he recognizes that "the theory of successive animation . . . is gaining ground once more." He adds that "at least after the twentieth day there is an *individuum;* and there is an inborn dynamism, a principle of life in this *individuum* . . . The uncertainty about the status of person does not at all justify an arbitrary destruction of such a living being on the way to ever greater development of humanity."[67]

Since 1869 the Catholic Church no longer distinguishes between a fetus with a soul and a living embryo or even a zygote, though neither forbidding free scientific and theological discussion nor precluding responsible investigation of the

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[65] See, for example: Nogar, Raymond J. Evolution, Human Philosophical Aspects. New Catholic Encyclopedia. Vol. 5. p. 684. Nogar believes that animation occurs "probably not before the end of the third month."

[66] Haring, Bernard. Das Gesetz Christi. Vol. 3. Munich, Wewel, 1966. p. 220. The translation given in Noonan, The Morality of Abortion, p. 39, as "every abortion is murder" is taken from Edward Kaiser's rendering from the German and does not accurately convey Haring's carefully nuanced statement—"ist bei jeder Abtreibung sittlich der Tatbestand des Mordes zu statuiren."

[67] Haring, A Theological Evaluation in The Morality of Abortion, p. 131.

whole question. Should it be determined that ensoulment occurs sometime after conception (successive animation), as was taught from Augustine to Liguori—approximately 1300 years—the deliberate, voluntary destruction of an unanimated embryo and of a fetus animated with a soul would be sins specifically distinct. However, even where there is today a probable opinion that the soul is infused several weeks after conception, the abortion of a live fetus at any stage is presently regarded as homicide since this is a case in which probabilism is not permitted. Rather, the weight of probability rests with the possibility of life being present from conception. Only if it were conclusively proven that the rational soul is not yet present in the early stages of fetal life would abortion be a sin less grave than homicide. Therefore, while the criteria for identifying human life *in utero* are still medically unclear, the position of the Catholic Church regarding abortion of that life is clearly defined. "After a certain stage of intrauterine development it is perfectly evident that fetal life is fully human. Although some might speculate as to when that stage is reached, there is no way of arriving at this knowledge by any human criterion, and as long as it is probable that embryonic life is human from the first moment of its existence, the purposeful termination of any pregnancy (involves) moral malice."[68]

The official teaching of the Catholic Church at present was stated in 1970 by the Untied States Catholic Bishops: "from the moment of conception the child is a complex and rapidly-growing being endowed with the characteristics of human life"; in brief, "the child in the womb is human."[69] This simply reasserts the judgment of Vatican Council II: "From the moment of its conception, life must be guarded with the greatest of care."[70]

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[68] Abortion II—Moral Aspect. New Catholic Encyclopedia. p. 29.

[69] Statement by National Conference of Catholic Bishops, November 18, 1970.

[70] Pastoral Constitution "De ecclesia in mundu huius temporis," Section 51.

Thus, in 1964, Pope Paul VI cited the words of Pius XII thirteen years before: "Innocent human life, in whatever condition it is found, is to be secure from the very first moment of its existence from any direct deliberate attacks . . . Whatever foundation there may be for the distinction between these various phases of the development of life that is born or still unborn, in profane or ecclesiastical law, and as regards certain civil and penal consequences, all these cases involve a grave and unlawful attack upon the inviolability of human life."[71]

In conclusion, the pastoral and penitential practice of the Catholic Church regarding abortion today is to act as if the soul were present from conception, assuming the possibility, if not the probability, of fully human life or at least its unique potentiality in the *conceptus*. This represents a significant change from the dominant tradition in the past, which distinguished the unformed from the formed fetus in terms of canonical definition of abortion and of appropriate penalties. The present teaching, like that in the past, is authoritative rather than strictly infallible. Hence, there is the possibility of some modification, particularly if theologians and scientists should agree on developmental criteria for the humanization of the fetus, perhaps by returning to the distinction between unformed and formed, translated into contemporary language, or by distinguishing in some carefully defined way the stages of previable fetal development *in utero* so as to delineate the presence of human life in the fetus from the zygote, thus defining the point of ensoulment. The permissible norms for therapeutic abortion may possibly be somewhat broadened in accord with the "double effect" tradition.[72]

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[71] Cited in the first statement condemning abortion to be promulgated by a general council (on December 5, 1965). The words of Pius XII, first spoken in 1951 to the Catholic Society of Midwives, were quoted by Paul VI in an address to the new England Obstetrical and Gynecological Society on October 3, 1964.

[72] The history and development of the "double effect" tradition in Catholic moral theology, with particular reference to "indirect" therapeutic abortion, is traced in Granfield's The Abortion Decision. Garden City, New York, 1971. p. 126-138. Deriving originally from St. Thomas (Summa I-II, 64, 7), it was further refined by Cajetan (d. 1534) in his commentary, and made a general theological principle by Domingo de Santa Teresa (d. 1654) of the Salamancan school in 1647, Spanish Carmelites of the Discalced Reform (introduced by St. Teresa of Avila, d. 1582), who between 1600 and 1725 produced a gigantic commentary on St. Thomas. The modern formulation dates from Jean Gury (d. 1866) and his 1850 compendium of moral theology, heavily influenced by Liguori. Gury's argument was annotated and upheld by Antonio Ballerini (d. 1881) in the 17th edition of the *Compendium* (published in 1866).

However, it is inconceivable, given the moral unanimity or consensus of the Catholic Church regarding abortion throughout its history, that direct, deliberate abortion will ever be less than a very grave sin.[73] The change in the Church's present teaching does not represent something new, but rather the fruit of reflection upon the significance of scripture, tradi-

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[73] Susan T. Nicholson, in Abortion and the Roman Catholic Church (University of Tennessee, Knoxville, Tennessee, 1978) argues that Catholic teaching has not always condemned abortion as a form of homicide but only as a "sin of sex" (i.e., lust); she cites the ensoulment controversy as evidence that it is a "recent development . . . to consider the fetus a human being from conception" (p. 14). She contends that Augustine's equation of abortion with contraception is reflected in later history, citing the 1930 Encyclical of Pius XI, "Casti Connubi" (sic). Christian moralists, however, were greatly influenced in these matters by the 2nd century Greek physician Soranus, whose Gynecology, in treating abortifacients and contraceptives together, cites potions which "not only impede conception but also destroy what is already conceived" (Gynecology 1.19.60.63). Noonan in Contraception emphasizes the esteem in which Tertullian and Augustine, for example, held Soranus. Christian use of terms such as homicide and parricide for users of abortifacients reflects "neither biological nor legal but moral" norms in which "protection of life at the fetal stage" was later extended to the "life-giving process," in opposition to the teaching and practice of the Manichaeans, for whom procreative sex was intrinsically evil.

tion, doctrine, and scientific discoveries regarding embryonic life. It is not so much an innovation, despite an element of departure from long-established practice, as it is a considered return to the earliest tradition of the Church, a tradition never wholly lost.[74]

At the same time, that patristic tradition, in its utilization of scripture, Greek philosophy, and embryology, presents "no clear and unified view of fetal life."[75] There is support in the Catholic tradition for various theories of delayed hominization, and there is some theological precedent for certain limited forms of the "therapeutic exception" where the mother's life is endangered—if the latter has received no explicit endorsement by the Church, neither has it been explicitly condemned.[76] In the matter of delayed hominization, "the Catholic community enfolds a philosophic-theological pluralism,"[77] whose exploration may stimulate renewed dialogue and mutual understanding among persons who, differing greatly in belief, yet share a concern for the common good.

SUMMARY

Throughout its history from the earliest days, the Catholic Church has consistently condemned abortion. For much of that history, a distinction was recognized in the development of fetal life and in its ensoulment or hominization. The Fathers themselves were divided as to when the soul and therefore specifically human life appears. The dominant tradition favored mediate or delayed animation; a minority view upheld immediate animation at conception. Penalties for abortion were dis-

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[74] See Appendix B on the soul's infusion according to Albert the Great.

[75] Springer, Robert H. Abortion in Current Theology. Theological Studies, Vol. 31, No. 3, September 1970. p. 492-507.

[76] Connery, John R. Grisez on Abortion. Theological Studies, Vol. 31, No. 1, March 1970. p. 173.

[77] Springer, Abortion in Current Theology, p. 501.

tinguished accordingly. Similarly, while the dominant tradition opposed abortion for any reason, a minority tradition, arguing from the double-effect theory, defended the "therapeutic exception" where the mother's life was endangered.

Conflict cases involving the distinction between direct and indirect abortion would appear to be the only possible area for further development consonant with the reaffirmation of traditional Catholic teaching. Of the three areas of exception to that teaching proposed for consideration among theologians by George H. Williams, two—abortion to save the life of the mother, and abortion in instances of felonious intercourse (rape and incest)—can claim some precedent in the history of Catholic tradition. This might provide a basis for renewed theological exploration of "the doctrine of indirect effect,"[78] the double-effect principle, taking into account the rights of both fetus and mother as well as the interests of the larger community—the state and the medical, legal, socio-psychiatric, and religio-ethical professions. Such a co-sovereignty of progenitors and the state over fetal life might facilitate some ethical accommodation among diverse traditions in a pluralistic democracy.

Rethinking of the "double-effect" principle among Catholic theologians is discussed by Fr. Richard McCormick[79], who cites the German theologian Franz Scholz on conflicting goods. Fr. McCormick notes that "the ontological status of human life at this stage [i.e., before blastocyst] may be different than after this period," given the biological events which converge "during the earliest days," of conception.[80] Such a position would permit interception to prevent implantation in the 7-day period after conception in such extreme situations as rape. He advances this argument "with extreme caution," noting the

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[78] Williams, George H. The Sacred Condominium. In Noonan, The Morality of Abortion, p. 146-171.

[79] McCormick, Richard. Notes on Moral Theology. Theological Studies. Vol. 39, No. 1, March 1978. p. 104-116 and 122-128.

[80] Ibid., p. 127-128.

concern of those who emphasize the presence in the fertilized ovum of that genetic code present from the beginning and uniquely human.

Ecumenical dialogue has also begun.[81] Perhaps the most constructive statement to date is that on Ethics and Christian Unity, A Statement on Abortion, adopted by the Roman Catholic—Presbyterian and Reformed Consultation, sponsored by the Catholic Bishops' Committee for Ecumenical and Interreligious Affairs of the National Conference of Catholic Bishops and the Caribbean and North American Area Council of the World Alliance of Reformed Churches (Presbyterian and Congregational), conducted in 1976-79 at Washington and Princeton. The Report seeks to define basic principles held in common as well as areas of "substantial difference."[82]

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[81] Ibid., p. 104-116.

[82] Ethics and the Search for Christian Unity, Two Statements by the Roman Catholic-Presbyterian Reformed Consultation, I. A Statement on Abortion. Washington-Princeton, 1980 (not published). Seeking to define basic principles held in common as well as areas of "substantial difference," the Report declares:

> Some of the basic principles on which the Consultation was able to reach agreement include the following:
>
> 1. the transcendent basis for respect for human life is the image and likeness of God in which human beings are created;
> 2. the ultimate responsibility for moral decision—making rests with the individual conscience guided by reason and grace;
> 3. authentic moral decisions can never be exclusively subjective or individualistic but must take account of the insights and concerns of the broader religious, social, and familial community;
> 4. judicial and legislative standards are not always coterminous with moral demands, and therefore the legalization of abortion does not of itself absolve the Christian conscience from moral responsibility;
> 5. religious groups have the right to use licit means to influence civil policy regarding abortion.

Some of the areas in which substantial differences were discovered and which call for further dialogue between our two traditions

It remains an open question as to whether and to what extent traditional teaching on the nature and time of fetal animation, revised and restated in the light of modern embryology, may prove to be relevant for present-day consideration of abortion.

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include the following:

1. the moment and meaning of personhood;
2. the rights of the unborn in situations where rights are in conflict;
3. the role of civil law in matters pertaining to abortion;
4. the interrelation of individual versus communal factors in decision making.

In light of our common Christian heritage and in recognition of our real differences, our ministry, with regard to abortion, will be characterized by the following: We will attempt to clarify the basic principles pertinent to decision making in this area. We will always respect the personal dignity of those involved in making decisions about abortion. Regardless of the ultimate decision reached, we will offer pastoral support insofar as our personal conscience and moral convictions allow. We will not resort to stereotypes and abusive language. We will work to transform societal arrangements which press people into untenable moral dilemmas.

The Report concludes:

> In spite of these differences there is one important agreement among the members that offered hope, namely, that our Churches must continue the dialogue on these painful questions with mutual respect, total honesty, fidelity to our respective traditions and the kind of charity and perseverance that will ultimately provide the resolution of these differences and create the desired societal ethos that is abortion-free.

APPENDIX A

ANIMATION AND THE DECLARATION ON ABORTION (1974)

In a footnote to the Declaration, the Sacred Congregation for the Doctrine of the Faith observes:

> The present Declaration deliberately leaves untouched the question of the moment when the spiritual soul is infused. The tradition is not unanimous in its answer and authors hold different views: some think animation occurs in the first moment of life, others that it occurs only after the implantation. But science really cannot decide the question, since the very existence of an immortal soul is not a subject for scientific inquiry; the question is a philosophical one. For two reasons the moral position taken here on abortion does not depend on the answer to that question: 1) even if it is assumed that animation comes at a later point, the life of the fetus is nonetheless incipiently *human* (as the biological sciences make clear); it prepares the way for and requires the infusion of the soul, which will complete the nature received from the parents; 2) if the infusion of the soul at the very first moment is at least *probable* (and the contrary will in fact never be established with certainty), then to take the life of the fetus is at least to run the risk of killing a human being who is not merely awaiting but is already in possession of a human soul.

The Declaration thus reiterates the position enunciated by the drafting committee in preparing Vatican Council II's statement in 1965: "the time of animation is not touched on." (The full text of the Declaration is given in translation in The Pope speaks, vol. 19, no. 13, 1975; p. 150-262.) The Congregation cites numerous authorities against abortion, including canonical enactments by the first Council of Mainz (847) and by Popes Gregory III (d. 741) and Stephen V (d. 891).

APPENDIX B

ALBERT THE GREAT AND IMMEDIATE ENSOULMENT

Recently, many writers on abortion, associating St. Albert the Great with belief in ensoulment at conception, contrary to the theory of successive animation taught by St. Thomas, have asserted that theologians since that time have tended to agree with Albert. This is stated authoritatively by Fr. Bernard Haring who speaks of successive or delayed ensoulment as "the more common opinion before St. Albert the Great."[84]

While these authorities do note the differing theories of the soul held by St. Thomas and Albert, it is far from accurate to say that after Albert's time theologians tended toward his opinion as against Thomas. The historical reality has been far more complex. Nor can belief in immediate animation be ascribed unconditionally to Albert.

Mitterer does emphasize that St. Thomas' belief in successive animation—"the spiritual soul replaces all preceding souls"—was rejected by Albert as "unreasonable," "wholly contrary to Albert's opinion." Albert's supposition, influenced by Tertullian's view of ensoulment at conception, is said by Ruff to have replaced the Thomistic distinctions (between unensouled embryo and ensouled fetus) in the 19th century.

A careful scrutiny of Albert's teaching renders this assertion doubtful, whereas what Ruff calls the "Aristotelian-Thomist" position clearly dominated in both theology and canon law during the succeeding centuries.

The teachings of Albert on the soul illustrate the judgment of Dom David Knowles that "he was neither a consistent Aristo-

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[84] He cites studies by Fr. Wilfried Ruff in *Stimmen der Zeit* and by Rudolph J. Gerber in *Laval Theologique et Philosophique*, which appear, in turn, to be influenced by Albert Mitterer's *Die Zeugung der Organismen, Inbesondere des Menschen* (Vienna, Herder, 1947) ("The Generation of Organisms, Especially of Mankind").

telian nor a perfectly consistent thinker."[85] As Albert himself wrote: "if we consider the soul in itself, we follow Plato; if we consider it as the animating principle of the body, we agree with Aristotle." Moreover, it should be noted that he retained the traditional distinction in canonical penalties for abortion of the unformed and the formed fetus. While he could write that "the body is prior to the soul, which is not infused into it till it is organized," he held to the unity of that rational or intellectual soul, regarding the vegetative and sensitive souls as immanently present potentialities (though in some sense extrinsic); hence, his opinion in favor of ensoulment at conception. For Albert, the soul is essentially a substance using a body, the neo-Platonic view held by Avicenna (Ibn Sina, d. 1037), an *actus* or activity (rather than a *forma* or form) which informs the body but is distinct from it. The contradictory aspects of his teaching were unresolved.

For St. Thomas, in contrast, the soul is essentially the form of the body (Aristotle). A new *forma substantialis* or soul replaces the preceding forms (vegetative, sensitive) as each substantial stage of development, the body regarded as the appropriate *materia disposita*[86] for the unfolding ensoulment through a process of generation and corruption in which imperfect forms are discarded for the more perfect. As with Albert, the spiritual soul has within it the powers of the vegetal and sentient souls, but for St. Thomas it is not in itself present from the beginning of conception. For Albert, it is not reasonable to hold that the soul as spiritual substance can undergo this process of generation, corruption, and change. The vegetive and sentient powers immanent in the intellectual soul may be explained by Albert's teaching of seminal reasons (derived from Gregory of Nyssa and Augustine) or invisible principles, potential and causal, in all creation and perhaps inherent in the

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[85] Knowles, David. The Evolution of Mediaeval Thought. Baltimore, Helicon Press, 1962. p. 253.

[86] Matter suitably prepared and naturally disposed to receive each stage of ensoulment.

soul. Whether this be so or not, it has been argued that the Church itself in the Council of Vienne (1311-12) implicitly supported St. Thomas (and delayed animation) by condemning the teaching of the Spiritual Franciscan Petrus Olivi (d. 1298) on the manner of the soul's union with the body. The decrees of Vienne, the so-called Clementine decretals or Liber Septimus of Pope Clement V, were promulgated as canonical by John XXII in 1317. The opinions of Olivi (who was not condemned by name) clearly suggest the influence of Albert in the view of the soul as active and dynamic, essentially consubstantial with (rather than the form of) the body, and containing vegetive, sensitive, and intellective powers. In Albert these powers, also called "qualities," are said to emanate from the soul's constitutent substance, thus associating a neo-Platonic manner of thinking with Aristotelian teaching on the soul's powers.

It is clear that the opinion of immediate ensoulment as taught by Albert did not commend itself to Catholic thought after his time nor can it be shown to have affected mainstream theology in any later period. To the extend that theologians have returned to an earlier belief in animation at conception, that belief is based upon other grounds than those held by Albert or, for that matter, by Gregory of Nyssa.

APPENDIX B

MCC MESSENGER, MAY 30, 1986

"STATE-PAID ABORTIONS NOT HERE"

The most significant package of pro-life legislation since 1979 was enacted by the General Assembly this year. HB 1596 was approved by a vote of 119-6 in the House of Representatives and 23-5 in the Senate.

The final bill is a combination of a bill prepared by the Missouri Catholic Conference, prohibiting the use of public funds, facilities and employees for the performance or promotion of abortion and an omnibus pro-life bill prepared by Missouri Citizens for Life.

The bills were sponsored in the Senate by Senators John Schneider (D-Florissant) and Fred Dyer (R-St. Charles) and in the House by Rep. James Barnes (D-Baytown). The Governor is expected to sign the bill.

The bill gives our state a clear public policy favoring birth over abortion, a policy which, although it cannot outlaw abortion, clearly states that Missouri will not use public funds, facilities or employees to perform or promote the killing of unborn children.

Although, like any major controversial issue, a court challenge is expected, the basic provisions of this bill are supported by the United States Supreme Court decision in *Poelker* v. *Doe*, 97 S.Ct. 2391 (1977) and other cases.

In the attempt to defeat the bill, opponents and newspapers with pro-abortion editorial policies have made a number of false and exaggerated statements as to the contents of the bill. In the following summary the contents of HB 1596 are listed. If you would like to read the full bill as enacted by the Legislature, write MCC or the House Bill Room, State Capitol Building, Jefferson City, MO 65101, and request a copy of HB 1596.

1. HB 1596 recognizes legal rights of unborn at all stages of development except as taken away by the United States Supreme Court's abortion decision.

Although that Court ruled an unborn child has no protection against its own mother's desire to have an abortion, the court did not declare an "open hunting season" on the unborn by persons other than the mother. For example, a criminal has no right to assault or kill an unborn child or to embezzle a trust fund for the unborn's education or support. HB 1596 gives express recognition to the rights of the unborn against others. This section will not be effective until 1988 in case adjustments need to be made in the Probate Code or other statutes.

2. Abortions at 16 weeks or later must be performed in a hospital. Abortions after 16 weeks are 24 times more dangerous to the mother's life than earlier abortions, according statistics.

3. After 20 weeks of gestation a physician must determine if an unborn child is viable. If the child is viable, existing law requires that the abortion be necessary to preserve the life or health of the mother, that the physician utilize the available techniques of abortion most likely to preserve the life of the child, and that there be a second attending physician to provide immediate medical care to the child.

4. Employers, public and private, cannot compel employers to "participate in abortion" or discriminate against them for their refusal to do so. "Participate in abortion" is defined to mean, "to perform, assist in, refer for, promote, procure, or counsel a woman to have an abortion not necessary to save the life of the mother or to undergo an abortion."

Also medical, nursing school and other students are protected if they refuse to participate in abortions. Students may also refuse to pay any part of student fees that are used to pay for abortions.

5. So-called "wrongful life" suits are prohibited. For example, a handicapped child or his parent cannot sue a doctor for failing to have the child aborted.

6. HB 1596 clearly states that tax money and other public resources shall not be used to subsidize abortions (not necessary to save the life of the mother). No public funds or facilities may be used to perform or assist an abortion or to encourage a woman to have an abortion.

No public employee, acting within the scope of his employment may perform or assist an abortion. Public doctors, nurses, social workers and counselors, etc. may not encourage a woman to have an abortion. The bill does not prohibit providing full medical information to patients.

Public funds and employees include not only the state but local counties, cities, school district, etc.

Although a state may not prohibit abortion, due to rulings of the U.S. Supreme Court, that court has also said that the state does not have to pay for them and may prefer childbirth over abortion in the allocation of public funds.

Taxpayes have the right under HB 1596 to stop unlawful actions by going to court.

7. The bill also makes corrective changes in Missouri's existing abortion regulation laws required by past court decision.

APPENDIX C

THE KANSAS CITY TIMES, JAN. 23, 1989

"ABORTION LAW WAS WORK OF GHOSTWRITERS"

Two little-known Missouri legislative advocates could become footnotes in history.

The U.S. Supreme Court has decided to review a 1986 Missouri abortion law. Some predict that the case could make large changes or even reverse the high court's historic 1973 decision that legalized abortions.

What's hardly known outside the Capitol in Jefferson City is that the law under review was written primarily by two abortion critics, neither of whom is a legislator.

They are Samuel Lee, state legislative chairman of Missouri Citizens for Life, and Louis DeFeo, general counsel and executive director of the Missouri Catholic Conference.

Three years ago DeFeo was pushing a bill that, among other things, would ban the use of public facilities for abortions. Lee was trying to win support for a second bill that included a highly controversial provision that said life began at conception.

During the legislative process the two bills were combined, won approval by the General Assembly and started off on a course that has reached the U.S. Supreme Court.

DeFeo's role in helping write the legislation was no secret. Indeed, DeFeo said some critics of the proposal at the time noted his involvement and charged that religious beliefs were being advanced in the form of state legislation.

Lee said anti-abortion forces hoped in 1986 that the issue would reach the country's high court. What they did not know was that the law would reach the court after changes in the membership that could make the ruling on the Missouri law a historic one.

—Will Sentell

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,
APPELLANTS,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,
APPELLEES.

On Appeal From the United States Court of Appeals For the Eighth Circuit

BRIEF AMICI CURIAE IN SUPPORT OF APPELLEES BY Center for Population Options, The Society For Adolescent Medicine, The Juvenile Law Center, and The Judicial Consent For Minors Referral Panel

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Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

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Belloti v. *Baird*, 443 U.S. 622 ..... 4, 15
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Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 14, 20
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Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 20, 21
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Marsh v. *Chambers*, 463 U.S. 783 (1983) 17
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 14, 18
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Plessy v. *Ferguson*, 163 U.S. 537 (1896) 19
Reproductive Health Servs. v. *Webster*, 662 F.Supp. 407 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 851 F.2d 1071 (8th Cir. 1988) 22
Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*
Scott v. *Sandford*, 60 U.S. 393 (1857) 20
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 14, 18, 21
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 19, 23
United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 20
United States v. *Maine*, 420 U.S. 515 (1975) 19

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Watson v. *City of Memphis*, 373 U.S. 526 (1963) 16
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 14

Statutes:

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Other Authorities

Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986) 9
Adolescent Pregnancy and Childbearing—Rates, Trends and Research Findings From the CPR, NICHD (1988) 10, 11
Alan Guttmacher Institute, *Data on Teenage Pregnancies, Births and Abortions for the Years 1972-1983* (revised Mar. 1987) 2, 3, 6, 12
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem that Hasn't Gone Away* (1981) .. 2, 3, 5, 6, 8, 12
American Psychological Association, Interdivisional Comm. on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987) 9, 22
Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34 (1980) 10
Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163 (1982) 15
Bracken & Kasal, *Delay in Seeking Induced Abortion: A Review & Theoretical Analysis*, 121 Am. J. of Obstetrics & Gynecology 1008 (1975) 11

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Burt, *Estimates of Public Costs for Teenage Childbearing* (1986) 11
Cartoff & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 5, 6
Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18 (1980) 7, 9, 12
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Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New England J. of Medicine 621 (1983) 7
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CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* (1988) 3, 11
CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987) 4
David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives* (Mar. 1989) 11
Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5 (1987) 3, 17
Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II. (Hofferth & Hayes eds. 1988) 6
Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990's* (Cohen & Taub eds. 1989) 7, 8, 22

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Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* (Brown ed. 1988) 8, 15

Institute of Medicine, *Preventing Low Birth Weight* (1985) 8, 9

Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* (1986) 2, 5

Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987) 9

Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132 (1985) 7, 8

Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological & Legal Issues* 96 (Melton ed. 1986) 9, 10

Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 240 (1987) 10

Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Amer. Psychologist 79 (1987) 13

National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality* (1988) .. 7

National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 37:3 (1988) 8

Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 59 (1983) 3, 7, 17

Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing, Vol. I (Hayes ed. (1986)) 7, 10, 11, 12

Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40 (Melton ed. 1986) 12, 13

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Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* 107 (Stuart & Wells, eds. 1982) 7

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Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129 (Schoolar ed. 1973) 9

Tietze & Henshaw, *Induced Abortion: A World Review 1986* (1986) 7

Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506 (1988) 2, 3, 17

Zabin and Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983) 5

Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230 (1980) 5, 20

Interest of *Amici*

The Center for Population Options (CPO) is a national, nonprofit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and access to family planning services. The Society for Adolescent Medicine is a national, non-profit, multi-disciplinary organization dedicated to promoting the development, synthesis, and dissemination of scientific and scholarly knowledge unique to the development and health care needs of adolescents. The Juvenile Law Center is a public interest law firm that has provided free legal services to children in Pennsylvania since 1975, represented hundreds of abused and neglected children in Philadelphia Family Court, and been involved in numerous federal and state cases aimed at vindicating the rights of children who are served by government. Many JLC clients have been teenage parents. The Judicial Consent for Minors Referral Panel is a volunteer association of over two hundred Massachusetts lawyers who for the last eight years have represented more than 6,000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws, chap. 112, §12S.

Based on their experience and expertise with teenage girls, *amici* wish to bring to the Court's attention facts concerning the medical risks and societal cost of teenage pregnancy and childbearing, and to urge that the Court uphold the fundamental right to choose abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973).[1]

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[1] This brief is filed with the consent of the parties.

Summary of Argument

This brief focuses on pregnant teenage girls, on the individual and societal importance of preserving their right to choose between abortion and childbirth, and on the devastating harm that removing or restricting that right would cause to teenage girls in particular.

Whatever we might wish, sexual activity and unintended pregnancies have become a difficult reality of teenage girls' lives. Because most teenage pregnancies are unintended, and because unwanted childbirth and motherhood are so exceptionally burdensome for a teenage girl, a pregnant teenager's right to determine her future must include the right to choose abortion instead of childbirth. Teenage girls depend on this right more than women of any other age.

The life-shaping importance to teenage girls of their existing right to choose abortion is illustrated in these striking facts:

- Over 1 million teenagers become pregnant each year.[2]
- 84% of all teenage pregnancies (married and unmarried) are unintended.[3]
- 92% of premarital teenage pregnancies are unintended.[4]

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[2] Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506, 508, Table 2 (1988) (data for 1976, 1980, 1982, and 1983; 1983 is latest year for which detailed statistics on abortion are available); Alan Guttmacher Institute [AGI], *Data on Teenage Pregnancies, Births and Abortions for the Years 1972-1983* (revised Mar. 1987) [AGI, *Data on Teenage Pregnancies*]; AGI, *Teenage Pregnancy: The Problem that Hasn't Gone Away*, at 17 (1981) [AGI, *Teenage Pregnancy*].

[3] Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986) [Jones, *et al.*]. Calculations by CPO from cited data.

[4] *Id.*

- 42% of pregnant teenage girls choose abortion each year.[5]
- 29,000 girls become pregnant each year at age 14 or younger (an age when childbearing poses especially grave risks).[6]
- Pregnancy rates continue to rise for girls age 14 and younger.[7]
- Teenage girls are more than twenty-four times more likely to die from childbirth than from first-trimester legal abortion.[8]
- One in four teenage mothers drops out of high school, and only one in fifty finishes college.[9]
- In 1987, families begun with a teenage birth cost the federal government $19.27 billion in welfare payments.[10]
- Only 4% of unmarried teenage mothers surrender their infants for adoption.[11]

As this Court (including Chief Justice Rehnquist) observed in its leading case concerning minors and abortion:

> [T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition,

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[5] Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, 19 Fam. Plan. Persp. 5 (1987).

[6] Ventura, Taffel & Mosher, *supra* n. 2, at 508, Table 2; AGI, *Teenage Pregnancy*, *supra* n. 2, at 20.

[7] Ventura, Taffel & Mosher, *supra* n. 2, at 508, Table 2; AGI, *Data on Teenage Pregnancies*, *supra* n. 2.

[8] Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 59 (1983). Calculations by CPO from cited data.

[9] CPO, *The Facts: Teenage Childbearing, Education, and Employment*, (1987).

[10] CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* at 2 (1988) [CPO, *1988 Report*] (calculating payments under Food Stamps, Medicaid and Aid to Families with Dependent Children (AFDC) programs). The $19.27 billion represents more than half of all payments under these three programs.

[11] AGI, *Teenage Pregnancy*, *supra*, n. 2, at 27.

the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.[12]

Part I of this brief, thus, will describe the unintended and unanticipated nature of most teenage pregnancy; the heightened physical and psychological risks to teenage girls of pregnancy and childbearing, which greatly exceed the risks of abortion at any stage of pregnancy; the overwhelming costs to teenage girls and to society of teenage pregnancy and too-early childbearing; and the harm that even delayed access to abortion would cause to teenage girls. Part II will describe how the right for a teenage girl to choose abortion is properly seen as both "deeply rooted" in constitutional notions of liberty and "essential to [her] orderly pursuit of happiness."[13]

Argument

I. A Decision by This Court To Take Away or Constrain the Fundamental Right To Choose Would Devastate Teenage Girls

This Court would devastate the lives of teenage girls by taking away or constraining their right to choose between abortion and childbirth. Teenage sexual activity and unintended pregnancies are concrete realities of American life today.[14]

[12] *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) [*Bellotti II*] (plurality opinion). The statement quoted in text surely commanded the support of eight members of the Court. *See id.* at 652 (concurring opinion of Justices Stevens, Brennan, Marshall, and Blackmun).

[13] *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) ("orderly pursuit of happiness").

[14] In the United States today, seven out of ten teenage girls and eight out of ten teenage boys have sexual intercourse by the time they reach age twenty. CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987). As to unintended pregnancies, *see* notes 2-7 and statistics in the accompanying text.

Removing or impairing the right to choose abortion will not reduce teenage sexual activity or unintended teenage pregnancy.[15] What it will do, however, is dramatically increase unwanted teenage childbearing, with profoundly adverse costs to teenage girls' lives and futures.

A. *Teenage Pregnancy Is Almost Always Unintended*

Teenage girls do not get pregnant by design. Eight out of ten of the 1.1 million teenage pregnancies in the United States each year are unintended.[16] Most teenagers do not use contraceptives or use them inconsistently, especially in the early months of sexual activity, whether due to ignorance or ambivalence about contraception, or ambivalence about sexuality, or both.[17] Thus, among unmarried teenagers who become pregnant, *fifty percent* of pregnancies occur within

[15] Studies show that the restrictions on the availability of abortion caused by parental notification and consent laws did not reduce teen pregnancy. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). The most effective way to reduce teen pregnancy is not to restrict or deny access to abortion but to increase sex education and the availability of contraception. A study comparing teenage pregnancy in the United States with that of other industrialized countries found sexual activity in the United States was comparable to that in other countries, but that teenage pregnancy and childbirth rates were lower in other countries because of greater availability of sex education, contraceptives and abortion services. Jones, *et al.*, *supra*, n. 3, at 234-35.

[16] *Jones, et al., supra* n. 3. 92% of pregnancies to unwed teenage girls are unintended and 51% of pregnancies to married teens are unintended. Altogether, approximately 84% of all teenage pregnancies are unintended, since the vast majority of teen pregnancies (almost 80%) occur out-of-wedlock. *Id.*

[17] AGI, *Teenage Pregnancy*, *supra* n. 2, at 14-16; Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230, 236, Table 8 (1980); Zabin and Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983). Zabin's study reports that teens tend to delay almost a year (median of 11.5 months) after becoming sexually active before going to a family planning clinic. Moreover, nearly two thirds of unmarried teenage

the first six months of becoming sexually active; *twenty percent* occur within the first month.[18] Forty-two percent of all teenage girls (married or unmarried) choose to resolve their unwanted pregnancies through abortion.[19] These statistics, which reflect the relatively low impact of current contraceptive availability and education on the teenage pregnancy rate, demonstrate that the vast majority of teenage girls do not focus on the issue of whether to bear a child and how childbearing will affect their future until an unintended pregnancy forces them to do so.

At this critical juncture in teenage girls' lives, abortion becomes an especially important—and in many cases life-saving—reality. Common sense, as well as the results of abortion restrictions directed specifically at minors,[20] teaches that removing the right to choose abortion will not reduce teenage sexual activity and pregnancy; it will simply increase unwanted childbearing.

B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear*

Adolescent pregnancies carried to term, and resulting childbearing, are usually very detrimental physically and psychologically for teenage girls, as well as for the infants they bear. During pregnancy, teenagers are at a much higher risk

girls reported that they never used contraceptives or did so inconsistently. AGI, *Teenage Pregnancy*, *supra* n. 2, at 14. The reasons for failure to use contraceptives vary, including those who thought they could not become pregnant, those who did not expect to have sexual intercourse, those who "couldn't [use them] under the circumstances," and those who did not know how to get contraceptives. *Id.*

[18] Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II, at 64 (Hofferth & Hayes eds. 1988) [*Risking* Vol. II] AGI, *Teenage Pregnancy*, *supra* n. 2, at 16, 19.

[19] AGI, *Data on Teenage Pregnancies*, *supra* n. 2.

[20] Cartoof & Klerman, *supra* n. 15, at 400.

of suffering from serious medical complications, including iron-deficiency anemia, pregnancy-induced hypertension ("toxemia", which is a leading cause of mortality), complications from small pelvises, and cervical immaturity resulting in premature births.[21] Mortality rates from continued pregnancy and childbearing are much higher for teenage girls than for women aged 20-24.[22] Teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first-trimester abortion,[23] and the dangers are considerably higher for girls under age 15.[24] By contrast, for all women, but especially for teenage girls, abortion is one of the safest surgical procedures doctors perform.[25] At no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery.[26] The same is true for rates of morbidity—serious illness or injury with lasting effects—related to childbirth when compared to abortion.[27]

[21] Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990s*, at 134 & n. 15 (Cohen & Taub eds. 1989); National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality*, Appendix at 103 (1988). Inadequate prenatal care, a problem especially common for teenage girls, is associated with excessive weight gain, premature labor, prolonged labor, vaginal infections and vaginal lacerations. Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985).

[22] Ory, *supra* n. 8, at 59. Calculations by CPO from cited data.

[23] *Id.*

[24] Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* 107, 127 (Stuart & Wells, eds. 1982).

[25] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* 155, 177 (Hodgson, ed. 1981). "Complications following induced abortion are generally lower among adolescents than among older women, regardless of the gestation at which the abortion is performed or the method used." *Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I, at 125 (Hayes ed. 1986) [Risking Vol. I]; *see also*, Cates, *Adolescent Abortions in the United States* 1 J. Adolescent Health Care 18, 19-22 (1980) [Cates]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New England J. of Medicine 621 (1983).

[26] Tietze & Henshaw, *Induced Abortion: A World Review 1986*, at 110, 111 (1986).

[27] Cates, *supra* n. 25, at 20; Cates and Grimes, *supra* n. 25.

A major reason why the health risks of pregnancy and childbearing are greater for teenage girls than for adult women is that teenagers delay seeking prenatal care if they seek it at all.[28] In New York City, more than one third of pregnant teenage girls received no prenatal care or only last-trimester care, compared to eighteen percent for women as a whole.[29]

Teenage pregnancy, exacerbated by inadequate prenatal care, also leads to premature births and low birth weight,[30] which in turn are leading causes of infant morbidity and mortality. Low birth-weight infants are at increased risk of neurodevelopmental problems, especially cerebral palsy, seizure disorders and mental retardation.[31] Children of teenage mothers are twice as likely to die in infancy than those born to women in their 20s, and are also more likely to die than children of women in their 40s, whose children are also a high-risk group.[32] Low birth weight is also associated with

[28] *Mackinson, supra* n. 21, at 134. Teens tend to seek prenatal care later than adult women because of its cost, ambivalence or denial concerning their pregnancy, a desire for secrecy and confidentiality, difficulty in scheduling appointments, and/or lack of knowledge about the health care system. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 78, 101 (Brown ed. 1988) [Inst. of Medicine, *Prenatal Care*].

[29] Hunter, *supra* n.21, at 134, citing to *New York City Dep't of Public Health, Summary of Vital Statistics* 16, 17 (1986). Nationally, 13 percent of teens receive late or no prenatal care whereas only 5 percent of women as a whole receive late or no prenatal care. National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 37:3 Table 30 (1988) [NCHS].

[30] AGI, *Teenage Pregnancy, supra* n. 2, at 29; NCHS, *supra* n. 29, Table 15.

[31] Institute of Medicine, *Preventing Low Birthweight* 26-29, 32-33, 37 (1985); *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Fam. Plan. Persp. 91-92 (1984).

[32] AGI, *Teenage Pregnancy, supra* n. 2, at 29. Studies show that other factors such as the mother's socioeconomic status, health care and nutritional habits and education also contribute to health and developmental problems of low birth-weight babies. Teenage mothers are at a high risk of experiencing these characteristics. Mackinson, *supra* n. 21, at 137-38; *Death Before Life, supra* n. 21, at 103; *Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight*, 15 Fam. Plan. Persp. 142-43 (1984).

longer-term problems, including a greater frequency of illness, and developmental problems such as lack of success in school.[33]

An *unwanted pregnancy* is a serious and emotionally traumatic event in a teenager's life. Before abortions were legal and accessible to minors in a confidential manner, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant.[34] Few teenagers have adverse psychological reactions to abortion, and most are relieved to have terminated an unwanted pregnancy:[35] "[t]here is no research evidence to support" the assumption that "adolescents are especially vulnerable to serious psychological harm as a result of having an abortion."[36] To the contrary, pregnancy continuation poses "far greater psychological, physical, and economic risks to the adolescent than does abortion."[37]

C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely To Lose Educational and Economic Opportunities and To Be Dependent Upon Public Support*

Childbearing irrevocably alters the life of a teenage girl. When a woman or a teen is ready to bear a child, motherhood is one of the most rewarding and fulfilling of life's experiences.

[33] Inst. of Medicine, *supra* n. 31, at 32-33.

[34] Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129, 136 (Schoolar ed. 1973).

[35] Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986).

[36] American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (1987) [APA].

[37] Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84, 87 (1987); *see also* Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological and Legal Issues* 96-115 (Melton ed. 1986); Adler & Dolcini, *supra* n. 35, at 90; Cates, *supra* n. 25, at 22.

But unwanted motherhood is devastating, especially for a teenage girl. The cost of too-early childbearing is borne not just by the teenage girl, whose future is suddenly restricted, but by the child she bears and by society as a whole. These costs exist today—in a world in which teenager girls *have* a right of abortion choice. The elimination or constriction of that choice could only make these costs vastly higher.

Pregnancy is the leading reason teenage girls drop out of school. One in four teenage mothers drops out of high school and only one in fifty graduates from college. By comparison, one in five women who put off childbearing until their mid-20s graduates from college.[38] Teenage mothers' family responsibilities and lack of education lead them into lower-paying, lower-status jobs, where they accumulate less work experience and earn lower annual wages than women who postpone childbearing.[39]

Children born to teenagers from an unwanted pregnancy will be disadvantaged educationally, socially, and psychologically.[40] They tend to have lower I.Q. and achievement scores, and less success in school.[41] According to expert testimony before Congress on behalf of the American Public Health Association, children born of unwanted pregnancies experienced lower scholastic achievement, had less job satisfaction, fewer and less satisfying relations with friends, lovers and spouses, and began sexual activity earlier than

[38] CPO, *Teenage Childbearing*, *supra* n. 9; *Risking*, Vol. II, *supra* n. 18, at 125-28. Teenage fathers are also more likely to drop out of high school than their counterparts who remained childless throughout their teens. The lower high school completion rate for teenage fathers restricts their financial ability to support their partner and child. Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 241, 247, 249 (1987).

[39] CPO, *Teenage Childbearing*, *supra* n. 9; *Risking*, Vol. I, *supra* n. 25, at 130-32.

[40] *See generally*, Marecek, *supra* n. 37.

[41] Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34, 37 (1980); *Adolescent Pregnancy and Childbearing—Rates, Trends and Research Findings From the CPR, NICHD* 10-11 (1988) [*Adolescent Pregnancy and Childbearing*].

children born of accepted pregnancies.[42] "In the aggregate, unwantedness in early pregnancy and involuntary childbearing have a detrimental effect on the subsequent psychosocial development of the child with socially undesirable longer term implications."[43] That these children could be both unwanted, and forced upon a teenage girl by the state, is doubly tragic.

Teenage motherhood also imposes enormous costs on society. Teenage mothers, whose educational and economic achievement is severely restricted, are more likely to become dependent on public support. In 1985, fifty-three percent of the $15.69 billion in AFDC payments went to families that began when the mother was a teenager.[44] In 1987 alone, the federal government spent $19.27 billion in AFDC, Medicaid and Food Stamp benefits on families in which the mother first gave birth as a teenager.[45] It is estimated that over the next twenty years, the federal government will spend $5.7 billion in welfare payments to all babies born in 1987 to teenage girls.[46] Moreover, children of teenage parents are more likely to become teenage parents themselves, thus perpetuating the cycle of poverty begun by a teenage birth.[47]

[42] David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives*, at 6 (Mar. 1989).

[43] *Id.*

[44] Burt, *Estimates of Public Costs for Teenage Childbearing* 28 (CPO Sept. 1986).

[45] CPO, *1988 Report*, *supra* n. 10, at 2. In 1975, 64 percent of AFDC mothers under age 30 had been teenage mothers compared to 24 percent of American women as a whole between age 20 and 30. *Adolescent Pregnancy and Childbearing*, *supra* n. 41, at 12.

[46] CPO, *1988 Report*, *supra* n. 10, at 3.

[47] CPO, *Teenage Childbearing*, *supra* n. 9; *Risking*, Vol. I, *supra* n. 25, at 134; *Adolescent Pregnancy and Childbearing*, *supra* n. 41, at 11.

Teenage pregnancy is already a serious public health problem. Taking away the right to choose abortion will reverse the recent success in reducing the teenage birth rate,[48] and will only make a tragic situation worse.

D. *Restricted Access to Abortion Would Harm Pregnant Teenage Girls By Delaying Their Abortion Choice.*

Assuming *Roe* v. *Wade* is not overruled, *amici* note that *constricting* the right to choose abortion would also harm teenage girls disproportionately by delaying their abortion choice. Delay is always harmful. For various reasons, "[t]eenagers are less likely than women in their twenties to obtain abortions during the safer, earlier weeks of gestation."[49] One reason for delay is limited access to abortion services, particularly in rural areas, due to difficulties in travel (especially in states with great distances between clinics) and expense. In addition, many teenagers, particularly the very young, fail to recognize the early signs of pregnancy. This may be due to ignorance or because many adolescent girls ordinarily experience menstrual irregularities and therefore do not distinguish them from early signs of pregnancy.[50] Thus, despite efforts that can be made to assist young girls to make decisions earlier in their pregnancies (for either pre-natal care or abortion), they will always experience higher rates of delay than older women.

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[48] AGI, *Data on Teenage Pregnancies*, *supra* n. 2.

[49] *Risking*, Vol. I, *supra* note 25, at 114. A national survey found that only 34% of abortions obtained by girls ages 15 and younger are performed during the first eight weeks of gestation, compared with 41% of abortions obtained by girls ages 15-19, and 51% of those obtained by women ages 20-24. AGI, *Teenage Pregnancy*, *supra* n. 2, at 55. Adolescents (19 and under) are twice as likely as older women to obtain abortions after twelve weeks. Cates, *supra* n. 22, at 20.

[50] *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* n. 2, at 55; *Risking*, Vol. I, *supra* note 25, at 114; Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40, 57 (Melton ed. 1986); Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am. J. of Obstetrics and Gynecology 1008-1019 (1975).

While abortion at any stage of pregnancy is safer for teenage girls than childbirth, delay in seeking and obtaining an abortion already has the largest single effect on the risk to teenage girls of complications and death from abortion.[51] Because teenagers, as noted above, already tend to seek abortions later in pregnancies than do adults,[52] further delays due to abortion restrictions necessarily increase the medical risks associated with the abortion procedure to a significant degree. Even short delays could heighten a patient's emotional tension, increase the costs of the procedure, and push a teenage girl into the second trimester of a pregnancy, when the abortion procedure entails significantly greater costs and medical risk.[53] To the extent restrictions on abortion, such as elaborate and expensive testing requirements, were upheld by this Court, the one certain result would be delayed abortion and greater harm to teenage girls.

II. For Teenage Girls, The Right To Choose Is A "Deeply Rooted" Fundamental Right, And Is "Essential To The Orderly Pursuit Of Happiness"

Part I of this brief demonstrated the central role that the right to choose abortion plays in the "liberty" of teenage girls to shape virtually the entirety of their adult lives and, cor-

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[51] *See* detailed facts concerning teenage minors found in *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 765 (D. Minn. 1986), *reversed on legal grounds*, 853 F.2d 1452 (8th Cir. 1988)(en banc), *petitions for cert. filed*, 57 U.S.L.W. 3488 (U.S. Jan. 4, 1989) (No. 88-1125) and 57 U.S.L.W. 3522 (U.S. Feb. 3, 1989) (No. 88-1309).

[52] Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 Am. Psychologist 79, 80 (1987); *see also*, Russo, *supra* n. 50, at 56-57.

[53] *Hodgson*, 648 F. Supp. at 762-763.

relatively, the terrible human and social cost that would be triggered by the obstruction or curtailment of that right. Part II will show that the right of abortion choice, grounded in long-established constitutional notions of privacy, has become deeply rooted in our nation and in the lives of teenage girls in particular, and is properly viewed as essential to their orderly pursuit of happiness. It should continue to be upheld; it must exist alongside a right to contraception; and it should not be restricted.

A. *The Compelling Need of Teenage Girls to Maintain the Option of Abortion Dramatically Illustrates Why That Option Rests on Well-Developed Constitutional Notions of Privacy*

In a long line of cases preceding *Roe* v. *Wade*, this Court had recognized a constitutionally protected zone of privacy in matters affecting family life.[54] The liberty interests protected within this zone of private, family life all facilitate the liberty of the individual to shape his or her own destiny: the freedom to choose *whom* to marry, *whether* to bring children into the world, and *how* to rear them. Among the most personal, intimate and far-reaching of those privacy interests is the decision whether and when to bear a child.[55] As shown in Part I of this brief, this decision for a teenage girl profoundly influences

[54] The privacy right recognized in *Roe* has its antecedents in constitutionally protected liberty to decide whether and whom to marry, *Loving* v. *Virginia*, 388 U.S. 1 (1967), how to raise and educate one's children, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and whether to conceive or bear a child, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). Appellees and other *amici* will demonstrate in detail the historical bases of the privacy right. *Amici* here simply note such bases and then emphasize the profound importance of the privacy right for teenage girls.

[55] *See Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.").

her destiny and her opportunities for self-determination over her entire adult life. "[T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."[56] A teenage girl, whose desire and need for confidentiality exceeds that of an adult woman,[57] requires the protection that the Constitution affords to begin her adult life as she, and not the government, chooses.[58]

This Court has expressed great solicitude for protecting the ability of teenage girls to make choices, especially younger minors.[59] And in the abortion context, this Court translated that solicitude into a preference for "a family rather than a judicial [*or governmental*] resolution of a minor's abortion decision." *Bellotti II*, at 648. State-mandated childbearing and motherhood, overriding such a "family . . . resolution", reflects not solicitude but complete disregard for a minor's decision making with respect to abortion; it denies her the power to make any decision at all, even one her parents fully support. Yet this Court has claimed for itself in the abortion and

[56] *Bellotti II*, 443 U.S. 622, 642 (1979).

[57] Unmarried teenage girls are especially concerned to keep confidential the existence of a pregnancy and their decision as to whether to terminate it. For example, one study found that a desire to keep the pregnancy secret and a need for confidentiality in obtaining prenatal health care services led many teens to seek late prenatal care and influenced their choice in health care providers. Institute of Medicine, *Prenatal Care*, *supra* n. 28, at 78. A study of 17 deaths following post-*Roe* illegal abortions concluded that a desire for secrecy was the primary reason two teenagers who died had self aborted. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982); *see also*, *Bellotti II*, 443 U.S. at 644 (requiring "anonymity" for minors' judicial consent for abortion proceedings).

[58] *See Kent* v. *Dulles*, 357 U.S. 116, 126 (1958) (recognizing that "'[o]ur nation . . . has thrived on the principle that, outside of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.'"). As long ago as 1928, Justice Brandeis characterized the right of privacy as the right "to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

[59] *See Bellotti II*, 443 U.S. at 634-636.

other contexts a long-standing "concern for the vulnerability of children."[60] None is more vulnerable than the unmarried, very young teenage or pre-teenage girl who unexpectedly finds herself pregnant and who, supported by her parents, wants an abortion. State-enforced childbearing and motherhood bespeak a savage, indeed, punitive disregard for her health, safety and future.[61]

B. *For Teenage Girls, The Right to Choose Abortion Is a Fundamental Liberty That Is "Deeply Rooted" In Our Nation, and "Essential to the Orderly Pursuit of Happiness"*

For a teenage girl especially, the right to choose abortion is properly seen as "deeply rooted in this Nation's history and tradition,"[62] and "essential to the orderly pursuit of [her] happiness."[63]

The right to choose is, by definition, rooted in the institution of the family, from which the concept of "deeply rooted" derives.[64] To become "deeply rooted" in our history and tradition, a right need not have existed for generations or centuries. Just nine years after this Court decided *Brown* v. *Board of Education*,[65] the Court characterized the rights recognized in *Brown* as "long-declared and well-established individual rights."[66] Within a short period of time, through desegrega-

[60] *Id.* at 634.

[61] Ironically, state-mandated childbearing would undoubtedly fall hardest of all on the "immature minor", for whom this Court has expressed special concern. *Id.* at 648. No intelligible principle could dictate forcing childbirth on the girl who is so young as to be immature, but who does not want a child and who is supported in her decision by her parents.

[62] *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977).

[63] *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967).

[64] *Moore*, 431 U.S. at 503.

[65] 347 U.S. 483 (1954).

[66] *Watson* v. *City of Memphis*, 373 U.S. 526, 533 (1963) (ordering city to proceed without further delay to desegregate its public recreational facilities).

tion efforts all over our country, the rights recognized in *Brown* became "deeply rooted" in our nation's history and tradition.

So, too, the abortion right has become "deeply rooted" in this nation through its exercise by women, and through its acculturation and assimilation into their lives and our society. The right has been exercised by approximately 20 million women, including five million teenage girls. Every year, 42 percent of the 1.1 million teenagers who become pregnant choose to end their pregnancies through abortion.[67]

Millions of girls and women today—those aged approximately 13 to 29—have never known childbearing life without this fundamental right. By definition, this includes all teenage girls today, and all women who became teenagers since 1973. To overrule *Roe* v. *Wade* would radically alter the lives of a generation of women and girls who have grown up with the liberty to shape their own future by choosing whether and when to bear children.

That the abortion right now has deep roots is not refuted by statutory restrictions once placed upon abortion commencing in the late nineteenth century. Current advances in medical procedures for abortion have vitiated the primary purpose of the nineteenth century laws—the protection of the woman's life and health.[68] As *amici* have shown, abortion at any stage of gestation is safer today than childbearing, particularly for teenage girls, who are more than twenty-four times more likely to die from childbearing than from first-trimester abortion.[69] The one-time prevalence of now out-dated statutes cannot justify contemporary denial of constitutional rights.[70]

[67] Henshaw, *supra* n. 5, at 5; Ventura, Taffel & Mosher, *supra* n. 2, at 508, Table 3.

[68] *See Roe*, 410 U.S. at 148-49.

[69] Ory, *supra* n. 8.

[70] *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.").

Moreover, the right to choose abortion also properly falls within the class of rights "essential to the orderly pursuit of happiness."[71] This class of rights consists of those liberty interests which concern intimate, familial matters. For example, the long-standing existence in parts of this country of laws prohibiting inter-racial marriage in 1967 did not prevent this Court from recognizing that "the freedom of choice to marry" had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[72] The right to bear a child, recognized long ago as a "basic civil right[,]"[73] cannot be exercised under conditions favorable to the "orderly pursuit of happiness," unless the individual has the liberty to determine whether and when to bear a child. Forcing upon a woman, particularly a teenage girl, continuation of an unwanted pregnancy and unwanted childbearing, together with its grave consequences, is contrary to any concept of the orderly pursuit of happiness.

A right exercised so much, and whose exercise demonstrates its importance, its liberating force, and its empowering role for women, has become "deeply rooted" in our tradition. It is self-evidently "essential to the orderly pursuit of [women's] happiness."

C. *The Compelling Need of Teenage Girls to Maintain the Option of Abortion Confirms That* Roe *v.* Wade *Should Continue to Be Upheld*

For sound reasons, the right to choose abortion has been constitutionally protected for over sixteen years, and this Court has previously reviewed at length those reasons in continuing to apply the rule of *stare decisis* in the abortion

[71] *See, e.g., Loving*, 388 U.S. at 12; *Meyer*, 262 U.S. at 399.

[72] *Loving*, 388 U.S. at 12.

[73] *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

area.[74] Appellee and other *amicus* briefs will discuss at length the reasons why this rule should continue to apply. It suffices here to say, by way of summary, that *stare decisis* requires upholding a settled principle of constitutional interpretation absent compelling reasons to depart from it. The facts *amici* have put before the Court concerning teenage girls dramatically illustrate that there are compelling, indeed, overwhelming reasons *not* to depart from the rule of *stare decisis* in this case, but to continue to protect the right to choose abortion.

It is illogical to compare *Roe* v. *Wade*, which established a constitutional protection on which teenage girls have particularly relied, with other decisions of this Court, long since overruled, which limited constitutional protections. *Roe* v. *Wade*, while controversial, is hardly a case like *Plessy* v. *Ferguson*,[75] which was patently repugnant to the principles of equality guaranteed by the Fourteenth Amendment, and which the overwhelming majority of legal and political scholars and the clear majority of the American public had long repudiated. It was overruled by a decision that sought to extend civil rights to all Americans.[76] In contrast, this case threatens to take away a life-shaping civil right from more

[74] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 419-420 (1983) [*Akron*]; *see also*, *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 780-81 (1986) (Stevens, J., concurring) ("There is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication."); *United States* v. *Maine*, 420 U.S. 515, 527 (1975) ("the doctrine of *stare decisis* is still a powerful force in our jurisprudence"). In *United States* v. *Maine*, the Court refused to overturn a case decided 30 years before concerning the ownership of the lands underlying the marginal sea, which had resulted in a great deal of public and private business activity. The Court explained, "We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question at this date, the constitutional premise of prior decisions." 420 U.S. at 528. Overruling *Roe* v. *Wade* would disturb rights of far greater value than those commercial rights that stayed the Court's hand in *Maine*.

[75] 163 U.S. 537 (1896).

[76] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

than half of all Americans: women.[77] And within that class, none is more at risk from losing the option of abortion, yet none has less political influence in federal and state legislatures than a teenage girl. To leave her to the mercies of state legislatures, as has been suggested (*Akron*, 462 U.S. at 465 [O'Connor, J.], is to abandon her. A teenage girl, more than anyone else, requires the *Constitution's* continued protection of abortion, lest her rights, life, and future be irreparably damaged.[78]

D. *For Teenage Girls, Their Fundamental Right to Decide Whether to Bear a Child Cannot Be Limited to Contraception But Must Include Abortion*

For teenage girls in particular, whose knowledge and successful use of contraception is lower than that of other women,[79] their well-established constitutional right to decide whether to bear a child[80] necessarily requires a right to choose abortion. To concede to these girls a right to contracept but not to abort is, in effect, substantially to deny them the right to decide whether to bear a child.

[77] This Court should not wish to be remembered as the first to take away a fundamental constitutional right from anyone, much less women. Whatever were Chief Justice Taney's achievements in solidifying the work of the Marshall court, he is judged by history for having written that black Americans had long been regarded as "beings of an inferior order; and altogether unfit to associate with the white race". *Scott* v. *Sandford*, 60 U.S. 393, 407 (1857). Justices of this Court will not write their own historical verdict, as this very case could demonstrate.

[78] If ever there were a "discrete and insular minorit[y]" whom the "political processes" cannot and should not be relied upon to protect, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), it is the pregnant teenage girl.

[79] Zelnick & Kantner, *supra* n. 17. Fifty percent of teenagers who had a premarital first pregnancy never used contraceptives. *Id.* at 236 and Table 9.

[80] *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (Part III of plurality opinion by J. Brennan, joined in by JJ. White, Marshall, Blackmun, Stevens) ("the underlying premise of [*Griswold* and *Eisenstadt* is] that the Constitution protects 'the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child") (quoting *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972)).

In our society, the plain facts are that teenage girls—eighty percent of whose pregnancies are unintended, and half of whose pregnancies occur within six months of becoming sexually active—generally focus on the decision whether to bear a child only after conception and an unintended pregnancy force them to do so. To take away the abortion right effectively would eliminate for many teens the element of choice in childbearing.[81] By eliminating the right to choose abortion, the state would force unwanted childbearing and motherhood on those thousands of teenage girls who simply do not consider in a mature way the potentially grave and life-altering consequences of their sexual activity. Wishing them more mature will not make them so. And this Court has long since rejected the notion of using unwanted childbearing as a punishment to deter sexual activity.[82]

E. *The Missouri Statute's Mandatory Viability Tests and Counseling Prohibitions Unduly Burden Teenage Girls' Fundamental Right to Choose Abortion*

Amici wish to draw to the Court's attention that the Missouri statute's viability tests and counseling prohibitions, Mo. Rev. Stat. §§188.029, 188.205, 188.210, 188.215 (1986), would have a disproportionately adverse impact on teenage girls' exercise of their fundamental right to choose abortion.

1. *Statutory Requirements That Impose Added Delay or Added Costs for Abortion Fall Heaviest on Teenage Girls*

The Missouri statute requires a physician who has "reason to believe" that a patient requesting an abortion is twenty or

[81] Choice is essential to the exercise of constitutionally protected rights. The forced sterilization found unconstitutional in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), would have been no less repugnant had Skinner declared an intention of having no more children; it is the State's denial of his *choice* to conceive children that is repugnant.

[82] *Eisenstadt* v. *Baird*, 405 U.S. at 448.

more weeks pregnant to conduct such "tests as are necessary to make a finding of the gestational age, weight, and lung maturity" of the fetus.[83] These tests, which appellee and other *amici* will show to be medically inappropriate or irrational, inevitably would increase the cost and delay the performance of the abortion.[84] The burden from delay imposed by these tests will fall heaviest on teenage girls who, though they obtain approximately one quarter of all abortions, obtain forty-three percent of abortions performed after twenty weeks.[85] Moreover, the increased expense associated with the tests, the delay in performance of the abortion, which requires increased skill on the part of the physician, and the need to travel to facilities that perform later abortions can push the cost of obtaining a post-twenty week abortion into the thousands of dollars.[86] For many teenage girls, who are more likely to seek abortions after twenty weeks, such prohibitive costs will effectively foreclose their ability to obtain an abortion, thus denying them their fundamental right to choose.

[83] Mo. Rev. Stat. 188.029 (1986).

[84] Evidence at trial showed that tests to determine fetal weight cost approximately $125 to $250, and amniocentesis, the only test to determine lung maturity costs approximately $200 to $250 and will delay the abortion due to a usual two-week delay in scheduling the amniocentesis. *See Reproductive Health Servs.* v. *Webster*, 662 F. Supp. 407, 422 & nn. 40-41 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 851 F.2d 1071 (8th Cir. 1988).

[85] Hunter, *supra* n. 21, at 133. Teens tend to delay seeking an abortion for the same reasons they delay seeking prenatal care: low income, failure to recognize the symptoms of pregnancy, self-denial of the pregnancy, irregular menses, ambivalence about abortion, and impeded access. *Id.*; APA, *supra* n. 36, at 73-74.

[86] In *Hodgson* v. *Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), the District Court found that "[t]he cost of an abortion increases with gestational age because the procedure becomes more difficult and requires more skill on the part of the doctor." *Id.* at 761. The fee schedule of one clinic cited by the Court showed that abortions performed at the clinic at 19-21 weeks cost $650, but after 21 weeks patients are referred either to a hospital in St. Paul where abortions at 22 weeks cost $1600-1800, or to a hospital in Kansas where abortions up to 24 weeks cost $2000 in cash. None of these figures includes the costs of travel. *Id.*

2. *The Restrictions on "Encouraging or Counseling" Not Only Violate Teenagers' and Their Physicians' First Amendment Rights, But Also Fall Heaviest on Teenage Girls*

The Missouri statute prohibits speech by public employees in public facilities and the use of public funds for the purpose of "encouraging or counseling a woman to have an abortion not necessary to save her life."[87] As appellee and other *amici* will demonstrate at length, any prohibition on the content of speech between a physician and his or her patient violates First Amendment rights of the physician and First and Fourteenth Amendment rights of the patient, which this Court has held protect the right of the pregnant woman to receive unimpeded advice and counsel from her physician in order to make an informed, independent choice.[88] The "encouraging or counseling" prohibition will fall especially heavily on teenage girls, whose lack of experience and knowledge of their own health requirements places them in greater need of independent professional guidance in making an informed, reasoned decision whether to continue a pregnancy. To exercise their established right to reproductive choice, teenagers need access to unbiased information about childbearing and abortion from trained counselors and physicians so that they may ultimately make the decision that is best for themselves. If this Court is truly concerned with the quality of abortion decision making by teenagers, especially the very young,[89] the last thing it should uphold is incomplete and inaccurate counseling to a pregnant teenager concerning her options.

[87] Mo. Rev. Stat. §§ 188.205, 188.210, 188.215 (1986).

[88] *Thornburgh*, 476 U.S. at 762-763; *Akron*, 462 U.S. at 443-445, 447; *Roe*, 410 U.S. at 163.

[89] *Bellotti II*, 443 U.S. at 635-36, 640-41.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

The National Coalition Against Domestic Violence will address the following question:

Whether *Roe v. Wade*, 410 U.S. 113 (1973), should be reconsidered and, upon reconsideration, overruled.

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Schlesinger v. Ballard, 419 U.S. 498 (1975) 13
Schweiker v. Wilson, 450 U.S. 221 (1981) 12
Skinner v. Oklahoma, 316 U.S. 535 (1942) 14
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Zablocki v. Redhail, 434 U.S. 374 (1978) 14

ARTICLES:

Cates, Legalized Abortion: Effect on National Trends of Maternal and Abortion-Related Mortality, American Journal of Obstetrics and Gynecology 213 (1976) 19-20
Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Family Planning Perspectives 2 (1976) 20
Center for Disease Control, Abortion Surveillance: Preliminary Analysis—United States, 1982-1983, 35 Morbidity & Mortality Weekly Report (1986).. 18
Farber, The Facts on Abortion, 5 Const. Commentary 285 (1988) 18
Fox, Abortion-Related Deaths, American Journal of Obstetrics and Gynecology 652 (1967) 17
Gelles, Violence and Pregnancy, The Family Coordinator 81 (Jan. 1975) 22
Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375 (1985) 2, 5, 6
Henshaw, Forrest, & VanVort, Abortion Services in the United States, 1984 and 1985, 19 Family Planning Services 63 (1987) 18
Kaplan, Abortion as a Vice Crime, 51 Law & Contemp. Problems, 151 (1988) 18, 20
Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977) 6
Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984) 6, 11
Luker, Abortion and the Meaning of Life, in Abortion: Understanding Differences 25 (S. Callahan & D. Callahan eds. 1984) 24
Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985) 6

TABLE OF AUTHORITIES—Continued

	Page
Tietze, Abortion as Cause of Death, in Fertility Regulation and the Public Health 274 (S. Tietze ed. 1987)	19
Tietze & Lewit, Epidemiology of Induced Abortion, in Abortion and Sterilization 56 (J. Hodgson ed. 1981)	20
Torres & Forrest, Why Do Women Have Abortions?, 20 Family Planning Perspectives 169 (1988)	18, 21
Whittemore, The Availability of Non-Hospital Abortions, in Abortion in a Changing World (P. Hall ed. 1970)	17
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
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Pregnancy Discrimination Act of 1978, 92 Stat. 2076, amending 42 U.S.C. 2000e	11
Cal. Penal Code Ann. 261.5 (West Supp. 1981)	9
BOOKS:	
S. Estrich, Real Rape (1987)	21
R. Goldstein, Mother-Love and Abortion (1988)	5
L. Gordon, Women's Body, Women's Right: A Social History of Birth Control in America (1976)	24
L. Lader, Abortion (1966)	17, 19, 21
N. Lee, The Search for An Abortionist (1969)	17
K. Luker, Abortion and the Politics of Motherhood (1984)	15, 24
C. MacKinnon, Feminism Unmodified (1987)	6
E. Messer & K. May, Back Rooms (1988)	19, 21
J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 (1978)	23-24
H. Morgentaler, Abortion and Contraception (1982)	19

TABLE OF AUTHORITIES—Continued

	Page
H. Rodman, B. Sarvis, & J. Bonar, The Abortion Question (1987)	17, 18
R. Schwarz, Septic Abortion (1968)	17, 19
E. Schur, Crimes Without Victims, Deviant Behavior, and Public Policy 25 (1965)	17
L. Tribe, American Constitutional Law (2d ed. 1988)	5
J. van der Tak, Abortion, Fertility, and Changing Legislation: An International Review (1974)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE *AMICUS CURIAE*

The National Coalition Against Domestic Violence (NCADV) is an organization dedicated to sheltering battered women and their children and to eliminating family violence against women and children. NCADV represents a network of more than 1,200 domestic violence shelters and counseling programs. It is the only nationwide organization of shelters and support services for battered women and their children.

It is not uncommon for battered women to become pregnant as the result of sexual assault and coercion in domestic situations. For a number of reasons—marital exemptions in rape laws; difficulties of proof; and, most important, the fear of further violence—it is often impossible to show that these pregnancies are the result of rape or abuse. At the same time, a battered woman who is required to bear a child is forced into a position of greater economic dependence on the perpetrator of violence, and the child is brought into an abusive situation where he or she is also likely to become a victim of violence. For many battered women, the right to an abortion means the difference between being trapped permanently in a violent and abusive situation that victimizes herself and her children, and having a chance to begin a new life.

In this case appellants and the federal government have asked the Court to overrule *Roe v. Wade*. Because the National Coalition Against Domestic Violence believes that such an action would seriously harm the interests of battered women, we offer this brief to assist the Court in its deliberations.*

SUMMARY OF ARGUMENT

Roe v. Wade was decided on the basis of the Due Process Clause of the Fourteenth Amendment. Since *Roe* was decided, however, a substantial body of scholarly opinion has developed suggesting that the Equal Protection Clause would also support the holding of *Roe*. See, *e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985). The Court should not overrule a precedent of the significance of *Roe* without considering all the substantial arguments that can be made on its behalf.

* Letters from the parties consenting to the filing of this brief have been lodged with the Clerk.

The existence of an Equal Protection Clause argument, which is more than substantial, at the very least counsels against reconsidering *Roe* in this case.

A. Restrictions on abortion constitute gender-based classifications. The direct impact of such restrictions falls exclusively on women. A law disabling "all women" from obtaining abortions would unquestionably be based on gender; a measure that simply forbids abortions is exactly equivalent, and should be treated no differently. Indeed, the capacity to become pregnant, and therefore to undergo an abortion, is a biological correlate of being female. The fact that men cannot become pregnant does not mean that restrictions on abortion are gender-neutral: when a statute is targeted at women alone, the fact that men and women are not similarly situated is relevant to the question of justification, not to the question whether the statute classifies on the basis of gender.

It is true that many laws forbidding abortion outlaw only the performance of an abortion and do not apply to the woman who undergoes the abortion. But this does not alter the conclusion that such measures are based on gender. A statute that forbade women from working in certain occupations would be a clear gender-based classification even if it imposed criminal sanctions only on the employer.

B. Because a prohibition against abortion is a gender-based classification and burdens the fundamental interest in reproductive freedom, it may be sustained against Equal Protection attack only if it can survive the most searching form of judicial review, closely linking the particular means to a compelling governmental objective. Even a cursory examination of the data shows that there is only an attenuated connection between the means of prohibiting abortion and the ends that such prohibitions are alleged to secure.

Before *Roe*, between 20% and 30% of all pregnancies in the United States ended in abortions. Since *Roe*, the rate has been between 27% and 30%. Prohibitions against abortion have therefore been essentially ineffective in achieving the interest advanced in their support—the protection of fetal life.

The principal effect of prohibitions against abortion is to cause women who seek abortions to obtain them illegally. The evidence is clear that illegal abortions are vastly more dangerous to women. Before *Roe*, as many as 5,000 to 10,000 women died each year as a result of illegal abortions. A significant percentage—perhaps one-third—of illegal abortions produced injuries severe enough to require hospitalization. Since *Roe*, abortion-related deaths have dropped by 90%.

Finally, there is substantial reason to believe that the impetus behind restrictions on abortion is the same as that behind other gender-based restrictions that the Court has invalidated—" 'the role-typing society has long imposed' on women" (*Califano v. Webster*, 430 U.S. 313, 317 (1977), quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)). Antiabortion laws were principally the product of a period in the late nineteenth century when gender stereotyping was at its height. There is evidence that support for restrictions on abortion is rooted in a desire to prevent women from adopting roles different from the traditional ones centered on the bearing and rearing of children.

ARGUMENT

ROE v. WADE SHOULD NOT BE OVERRULED BECAUSE MEASURES FORBIDDING ABORTION ARE INCONSISTENT WITH THE EQUAL PROTECTION CLAUSE

A series of decisions beginning with *Reed v. Reed*, 404 U.S. 71 (1971), has established that measures classifying on the basis of gender are unconstitutional unless the party supporting the measure can "carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982), quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). But in 1973, when *Roe v. Wade*, 410 U.S. 113, was decided, this body of law was in its earliest stages. At that time, *Reed v. Reed* was the only decision suggesting that gender-based classifications might be subject to something other than the most highly deferential review (see, *e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961)). Moreover, *Reed* was not decided until six months after the Court noted probable jurisdiction in *Roe v. Wade* (see 402 U.S. 941 (May 3, 1971)). And *Reed* did not clearly adumbrate the heightened scrutiny approach that the Court subsequently adopted: *Reed* used the language of "rational relationship" review. See 404 U.S. at 76.

It is therefore not surprising that the Court has never considered whether laws forbidding abortion constitute impermissible discrimination on the basis of gender in violation of the Equal Protection Clause. But in the years since *Roe* was decided, a substantial body of scholarly opinion has developed in support of the position that measures forbidding abortion are unconstitutional for this reason. See, *e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375 (1985); Laurence Tribe, American Constitutional Law 1353-56 (2d ed. 1988); Robert Goldstein, Mother-Love and Abortion (1988);

Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 431-32 n.83 (1985); Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 53-59 (1977); Catharine MacKinnon, Feminism Unmodified ch. 8 (1987); Sylvia Law, *Rethinking Sex and The Constitution*, 132 U. Pa. L. Rev. 955 (1984).

Indeed, some have suggested that the holding in *Roe* could be more satisfactorily supported on Equal Protection grounds. Judge Ginsburg, for example, concluded that *Roe* "is weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective." R.B. Ginsburg, *supra*, at 386.

We recognize that no Equal Protection Clause argument was passed upon in the lower courts in this case. For that reason, we do not urge it as the basis for the Court's decision on the specific Missouri statutory provisions at issue here. But appellant and the government have asked the Court to overrule *Roe*. It would be improvident for the Court to overrule a precedent of such significance before considering all of the substantial arguments that can be advanced in its support. As we demonstrate below, the Equal Protection Clause argument advanced by Judge Ginsburg and many others is more than substantial.

A. Measures Restricting Abortion Constitute Gender-Based Classifications

When a measure is challenged on the ground that it constitutes impermissible gender discrimination, the Court undertakes a two-step process. First, the Court determines whether the measure in fact classifies on the basis of gender or should otherwise be treated as a gender-based classification. See, *e.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256, 274-75 (1979). If the measure is to be treated as a gender-based classification, the second step is to determine whether it can survive

under the applicable standard of review. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

In our view, there is no question that measures restricting abortion must be treated as gender-based classifications. Whether such measures can be sufficiently justified is a question of greater complexity. But that question, which we address below, should not be confused with the straightforward issue of whether such measures must be treated as gender-based classifications. See *Mississippi University for Women*, 458 U.S. at 724 n.9 ("[T]he analysis and level of scrutiny applied to determine the validity of [a] classification do not vary simply because the objective [sought by the classification] appears acceptable").

1. The direct impact of a measure restricting abortion falls on a class of people that consists exclusively of women. See *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 473 (1981) (plurality opinion) ("[V]irtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female"). Only women can undergo abortions. Only women will bear children if abortions are prohibited. A statute that provided that "no woman" may obtain an abortion (or that no abortion may be provided to "any woman") would obviously be based on gender; a statute that prohibits abortion without using the words "woman" or "female" is exactly equivalent to such a measure and should be treated no differently.

The fact that some statutes outlawing abortion forbade only the performance of an abortion, and did not make it a crime to undergo an abortion, does not affect this conclusion. Laws prohibiting women from working more than a certain number of hours each day in certain business establishments (see, *e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908))—or barring women from certain forms

of employment entirely (see, *e.g.*, *Goesart v. Cleary*, 335 U.S. 464 (1948))—are classic examples of gender-based classifications, even if only the employer, and not the female employee, could be prosecuted for a violation.[1] See *Mississippi University for Women*, 458 U.S. at 725 n.10. Indeed, *Muller* was a prosecution brought against a male employer, not against a woman. Such laws are gender-based because they necessarily disable women alone from performing certain work. Similarly, a prohibition against abortion, however phrased, necessarily and indeed as a matter of biology disables women alone from obtaining abortions.

For similar reasons, the fact that men will often be indirectly affected by the availability of abortions does not alter the gender-based character of measures restricting abortion. Gender-based classifications often have an indirect effect on men. The restrictions on employment at issue in *Muller* and *Goesart* affected men who were members of the same family as women who sought that form of employment, or who were otherwise economically dependent on such women. See also *Michael M. v. Sonoma County*, *supra* (treating a statutory rape law as a gender-based classification disadvantaging men even though women could be prosecuted for aiding and abetting (see 450 U.S. at 477 & n.5 (Stewart, J., concurring)).

2. Measures restricting abortion differ from the usual form of gender-based classification because they do not always contain such words as "female" or "woman." But the phrasing of a prohibition cannot be the decisive factor in determining whether it is to be treated as gender-based. As a matter of biology, only women possess the capacity to undergo an abortion. Indeed, the capacity to

[1] Similarly, a measure requiring racial segregation would not escape strict scrutiny even if it were enforced only against whites who sought to bring about integration. Cf. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

become pregnant is a defining characteristic of being a woman. If a measure classifies on the basis of a trait that, as a matter of biology, only one gender possesses, that measure must be treated as gender-based.

Michael M. v. Sonoma County Superior Court, *supra*, establishes this proposition. In *Michael M.*, the Court unhesitatingly treated a statutory rape law as a "gender-based classification[]" (450 U.S. at 468 (plurality opinion); see *id.* at 483 (Blackmun, J., concurring)) that affected "men alone" (*id.* at 466 (plurality opinion)). But the statute at issue in *Michael M.* did not literally refer to "men" or "males." It prohibited "sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Cal. Penal Code Ann. S 261.5 (West Supp. 1981), quoted at 450 U.S. at 466. Because only men can "accomplish" "sexual intercourse . . . with a female," the Court treated the statute as a gender-based measure. Similarly, because only women can undergo an abortion, a restriction on abortion is gender-based, even if the statute imposing such a restriction does not explicitly refer to "women."

Indeed, it would be mischievous to permit a measure to evade searching scrutiny simply by avoiding any mention of the words "women" or "men" and classifying instead on the basis of a defining characteristic of one or the other sex. Such an approach would create troubling possibilities of abuse and pretext in the context of both sex and race, since it would not be difficult for a state that wished covertly to classify on the basis of sex or race to identfy biological correlates of either of those traits. A measure based on the defining characteristics of gender should receive the same treatment as a measure based on gender itself; for constitutional purposes, the two measures are one and the same thing.

3. It would be erroneous to suggest that because men and women are not "similarly situated" with respect to

the objectives of abortion laws—that is, because men cannot become pregnant—restrictions on abortion are not gender-based. As the Court has made clear, the claim that men and women are not "similarly situated" in some respect (biological or otherwise) may provide a possible justification for a measure that classifies men and women differently. See, *e.g.*, *Michael M.*, *supra*, 450 U.S. at 469 (citing cases). But such a claim is not relevant to the question whether a measure targeted at women alone should be treated as gender-based, and therefore subject to heightened scrutiny, in the first place.

Similarly, the fact that some women are not burdened by measures outlawing abortion is immaterial. A law that burdens some but not all women—for example, all women over the age of thirty—is gender-based even though many women are unaffected. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977).

Finally, because restrictions on abortion classify on the basis of a biological correlate and a defining characteristic of gender, they are not comparable to facially neutral laws like the veterans' preference upheld in *Personnel Administrator v. Feeney*, *supra*. The measure at issue in *Feeney* disadvantaged a class that was not defined by gender (or any biological correlate) and that, while consisting disproportionately of women, contained a large number of men as well (see 442 U.S. at 275; *id.* at 281 (Stevens, J., concurring)). A measure restricting abortion not only directly affects a class consisting exclusively of women but also classifies on the basis of a characteristic that is biologically linked to one gender alone. *Feeney* upheld the veterans' preference because it was not discriminatory on its face and had not been shown to be impermissibly motivated. But where, as here, a measure is gender-based, the Court's decisions make clear that there is no requirement of "a particularized inquiry into motivation." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982); see also *Feeney*, 442 U.S. at 271-74.

4. This reasoning is not inconsistent with the holding of *Geduldig v. Aiello*, 417 U.S. 484 (1974). *Geduldig* sustained the constitutionality of a state disability insurance program that excluded from coverage certain disabilities resulting from pregnancy. Most of the opinion in *Geduldig* is devoted to the justification for excluding pregnancy from insurance coverage, not to the question whether the classification should be viewed as based on gender. The discussion of the latter issue is confined to a cursory footnote (417 U.S. at 496 n.20), presumably because *Geduldig*, too, was decided at a time when the current Equal Protection law governing gender discrimination was in its early stages. Because the Court in *Geduldig* found ample justification for the classification at issue in that case, the holding of *Geduldig* is not inconsistent with the conclusion that a restriction on abortion constitutes gender-based legislation.[2]

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[2] The view that measures classifying on the basis of pregnancy are not gender-based was specifically rejected by Congress in connection with Title VII. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, amending 42 U.S.C. 2000e. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (Pregnancy Discrimination Act "unambiguously expressed [Congress's] disapproval of both the holding and the reasoning of the Court in . . . [*General Electric Co. v.*] *Gilbert*", 429 U.S. 125 (1976), which followed the logic of *Geduldig*). Both *Gilbert* and *Geduldig* were widely criticized by commentators. See the collection of several dozen citations in Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 984 nn. 107-09 (1984).

In *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), the Court did not confront the question whether a prohibition of abortion amounted to discrimination on the basis of gender. Instead the Court concluded that "financial need alone [does not] identif[y] a suspect class" (*Maher*, 432 U.S. at 471) and that the Constitution does not require a governmental subsidy for abortions (*Harris*, 448 U.S. at 316-17), noting in the process that "teenage women desiring medically necessary abortions" should not be considered a suspect class in light of the fact that the statute under attack was "facially neutral as to age." *Harris*, 448 U.S. at 323-24 n.26.

In addition, the Court in *Geduldig* emphasized that it was reviewing a "social welfare program[]" (417 U.S. at 495) that is subject to only the most lenient scrutiny (*ibid.*). By contrast, a prohibition against abortion is a direct coercive measure; such measures have not historically received the degree of deference given to complex social welfare schemes. See *Schweiker v. Wilson*, 450 U.S. 221, 238-39 (1981). For that reason, the appropriate precedent for restrictions on abortion may be not *Geduldig* but *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974). *LaFleur* invalidated a school board regulation that required pregnant school teachers to take unpaid maternity leave five months before childbirth. *LaFleur* relied on the Due Process Clause, holding that the regulations rested on "unwarranted conclusive presumptions" (*id.* at 651). But Justice Powell noted in a concurring opinion that the decision could more soundly be rested on the Equal Protection Clause. See *id.* at 652. And in *Craig v. Boren*, 429 U.S. 190 (1976), the Court analogized *LaFleur* to the cases establishing that gender-based classifications receive heightened scrutiny. See 429 U.S. at 199. Moreover, *Geduldig*, unlike *LaFleur*, involved a "noncontractual claim to receive funds from the public treasury." See *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975).

A restriction on abortion resembles the measure invalidated in *LaFleur* far more closely than it resembles the insurance scheme of *Geduldig*. A restriction on abortion, like the regulations invalidated in *LaFleur*, subjects pregnant women to a direct disadvantage that men do not suffer. By contrast, the Court in *Geduldig* emphasized that the "aggregate risk protection" received by women was not less than that received by men. 417 U.S. at 496-97. It is inconceivable, for example, that the Court would apply deferential review to a law that forbade "pregnant persons" from holding gainful employment, or, to give a more extreme example, from appearing in public, whether or not such measures might survive deferential review.

B. A Prohibition Against Abortion Is Not Supported By A Sufficiently Persuasive Justification

1. *Introduction*

a. In the ordinary case, a gender-based classification is unconstitutional unless its proponents "carry the burden of showing an 'exceedingly persuasive justification'" (*Mississippi University for Women*, 458 U.S. at 724, quoting *Kirchberg*, 450 U.S. at 461). In assessing the justifications offered for gender-based measures, the Court undertakes a "searching analysis" (*Mississippi University for Women*, 458 U.S. at 728) of whether the restriction is, in fact, "substantially related to the statutory objective" (*Craig v. Boren*, 429 U.S. 190, 204 (1976)).

As the Court has explained, a "searching analysis" is required because gender-based measures are often the product not of "reasoned analysis" (*Mississippi University for Women*, 458 U.S. at 726) and careful investigation of the relevant facts and considerations. Rather, measures that single out one gender for special disadvantages often reflect the "mechanical application" (*ibid.*) of "'old notions' and 'archaic and overbroad' generalizations." *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977) (plurality opinion), quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

For a statute prohibiting abortion, the appropriate standard of review under the Equal Protection Clause is the careful scrutiny adopted in *Roe* itself. Legislation prohibiting abortion represents a form of gender discrimination that intrudes on basic interests in bodily integrity; self-management and self-direction during and after pregnancy; health; and sometimes life itself. When challenged on Equal Protection grounds, gender-based leg-

islation classifying in the area of such interests may be upheld only if it survives the most searching kind of review. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (applying strict scrutiny under Equal Protection Clause to compulsory sterilization law); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying strict scrutiny under Equal Protection Clause to law forbidding marriage).

b. Appellant and the government seek to have *Roe v. Wade* overruled on the ground that it does not give the states sufficient latitude to "reach an accommodation" between "a woman's interest in procreative choice" and "the State's interest in protecting the life of an unborn child and promoting respect for life generally." U.S. Am. Br. 16; see, *e.g.*, Appellant's Br. 18.

The state's asserted interest in protecting fetal life is itself problematic in many ways. There is deep disagreement in society about the moral status of fetal life; the claim (enacted into law by Missouri in this case) that life begins at conception has highly theological overtones; and as we explain below, there is an inextricable connection between that claim and constitutionally illegitimate stereotypes about women's appropriate role. In light of these considerations, a decision to accord substantial weight to that interest risks running afoul of Justice Harlan's admonition: "[T]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes." *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (dissenting opinion).

Even more important, however, the notion that a state law prohibiting abortions would constitute a reasonable accommodation of these interests rests not "reasoned analysis" but on precisely the kind of "simplistic, outdated assumption[s]" (*Mississippi University for Women*,

458 U.S. at 726) that the Court has consistently disapproved in this area. Specifically, as we explain below, the principal fallacy of appellants' argument for overruling *Roe* lies in the proposition that the constitutional controversy presents a stark choice—to be resolved in the abstract—between the state's interest in fetal life and the reproductive freedom of pregnant women. In this case, it is unnecessary to decide any such question.[3] Even a cursory review of the relevant data reveals that a prohibition against abortion, far from "promoting respect for life generally," would in all likelihood fail to promote the state's interest in protecting fetal life. Instead of significantly reducing the number of abortions, such legislation would cause women to undergo abortions in circumstances that are far more threatening to their lives and well-being. Moreover, overruling *Roe v. Wade* would produce intolerable intrusions into the lives of women who become pregnant as the result of rape, incest, and other forms of abuse.

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[3] Several aspects of laws forbidding abortion combine to undermine the claim that abortion laws are based on the concern for fetal life. Cf. *Mississippi University for Women*, 458 U.S. at 730. Often prohibitions against abortion were enacted to protect women, not the fetus; and in any case they did not make criminal the conduct of the women who obtained the abortion. See *Roe*, 410 U.S. at 151. Prohibitions against abortion often contain exceptions for medical need—a highly discretionary standard that places the physician in a crucial position (see K. Luker, Abortion and the Politics of Motherhood 32-35 (1984))—and for pregnancies that result from, for example, rape or incest.

While such exemptions may be desirable, they are inconsistent with the claim that the state places fetal life on a par with human life. They thus undermine the most dramatic interest asserted by appellant as a basis for prohibiting abortion. The pattern of half-hearted, inconsistent, or ineffectual enforcement revealed by the pre-*Roe* abortion statistics further suggests that the interests that in fact prompt restrictions on abortion are different from the interests that states assert, and that such restrictions are in fact the product of a desire to maintain traditional or stereotyped roles.

c. There is no indication in the briefs of appellant and the government that either has attempted to come to grips with these difficulties. Although we have not undertaken a systematic search, we are not aware that any legislature that has enacted a statute attempting to restrict aborions has addressed these concerns. Rather, the effort to overrule *Roe*, like many other measures uniquely disadvantaging women that the Court has invalidated, rests on "casual assumptions" (*Califano v. Webster*, 430 U.S. 313, 317 (1977))—in this case, the casual and simplistic assumption that a restriction on abortion reflects a simple choice in favor of fetal life. A gender-based measure that rests on such mechanical and reflexive thinking, and that shows so fragile a connection between statutory means and ends, should not be upheld.

When fundamental rights or classifications requiring exacting scrutiny are involved, there is no requirement that the Court accept at face value a state's assertion that a measure will have the deterrent effect that the state intends. The state must show that statutory means will in fact promote statutory ends. See, *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (plurality opinion of Powell, J.); *Carey v. Population Services International*, 431 U.S. 678, 695-96 (1977) (plurality opinion); *Griswold v. Connecticut*, 381 U.S. 479, 505-06 (1965); cf. *Craig v. Boren*, 429 U.S. 190, 199-204 (1977). Unless the Court undertakes a "searching analysis" (*Mississippi University for Women*, 458 U.S. at 728) of the actual evidence, a state will be free to invoke worthy objectives to justify a measure that actually reflects outmoded or impermissible conceptions. This danger is particularly acute in the case of a prohibition against abortion—a gender-based measure that may reflect not a genuine, informed concern with the interests of both pregnant women and potential life but

rather a reflexive or symbolic effort to confirm the status of women as people whose primary role is to bear children.

2. *Laws Prohibiting Abortion Are Ineffective In Preventing Abortion.*

The effect of *Roe v. Wade* on the number of abortions in the United States is far less than might casually be thought. There is good reason to believe that in the early 1960s, there were between 1.0 and 1.5 million abortions in the United States each year. That is, at least 20% and perhaps as many as 30% of all pregnancies ended in abortion. See, *e.g.*, L. Lader, Abortion 2 (1966) (referring to the "recent" estimate of 1.5 million); J. van der Tak, Abortion, Fertility, and Changing Legislation: An International Review 72-73 (1974) (referring to "the wide acceptance of a round figure of 1 million induced abortions per year (for which only an estimated 8,000 were legal), corresponding to . . . an abortion ratio of almost 30 per 100 live births"); Whittemore, *The Availability of Non-Hospital Abortions*, in Abortion in a Changing World 217 (P. Hall ed. 1970) ("the oft-quoted figure of one million criminal abortions in the United States is a fairly reasonable estimate"); R. Schwarz, Septic Abortion 7 (1968) (in the late 1960s, over 20% of pregnancies terminated in illegal abortions, resulting in approximately 1.2 million unlawful abortions per year); see also H. Rodman, B. Sarvis, & J. Bonar, The Abortion Question (1987); Fox, *Abortion Related Deaths*, in American Journal of Obstetrics and Gynecology 652 (1967) (approximately 100,000 women annually had unlawful abortions in California alone during this period). Police reports reveal that in 1960, illegal abortion was the third largest illegal enterprise in the United States, after gambling and narcotics. See E. Schur, Crimes Without Victims, Deviant Behavior and Public Policy 25 (1965); see also N. Lee, The Search for An Abortionist (1969).

Currently, between 27% and 30% of all pregnancies in the United States end in abortion, producing a total of between 1.5 and 1.6 million. This rate has remained about the same since the late 1970s. See H. Rodman, B. Sarvis, & J. Bonar, The Abortion Question 1 (1987) ("[m]ore than one pregnancy out of four is being terminated by induced abortion"); S. Henshaw, J. Forrest, & J. VanVort, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Perspectives 63 (1987); Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 169 (1988). See also Center for Disease Control, Abortion Surveillance: Preliminary Analysis—United States, 1982-1983, 35 Morbidity & Mortality Weekly Report (1986).

This difference—before *Roe*, the abortion rate was at least 20% and perhaps as high as 30%; since *Roe*, it is 27-30%—is strikingly small. The Court has said that even "a disparity [that] is not trivial in a statistical sense . . . hardly can form the basis for the employment of a gender line" (*Craig v. Boren*, 429 U.S. at 201). Cf. *Carey v. Population Services Int'l*, 431 U.S. 678, 702 (1977) (White, J.) ("the State has not demonstrated that the prohibition . . . measurably contributes to the deterrent purposes which the State advances as justifications for the restriction"). In view of the various factors that complicate the comparison between the pre- and post-Roe statistics—changing demographics; new medical technology making it easier to perform an abortion; altered social mores;[4] and the ease of underestimating the frequency of illegal conduct—the difference between the abortion rates in the two periods may approach insignificance.[5]

[4] See Kaplan, *Abortion as a Vice Crime*, 51 Law & Contemp. Probs. 151 (1988).

[5] "The reality is that overruling *Roe* would have only a marginal effect on the number of abortions." Farber, *The Facts on Abortion*, 5 Constitutional Commentary 285, 286 (1988).

For this reason, the claim that restricting abortion promotes the asserted state interest in protecting fetal life has not been made out. "At most the broad ban is of marginal utility to the declared objective." *Griswold*, 381 U.S. at 507 (White, J., concurring).

3. *Restrictions on Abortion Increase the Mortality and Morbidity Rates of Pregnant Women.*

There is evidence suggesting that before 1973, as many as 5,000 to 10,000 women per year died as a result of unlawful abortions. See L. Lader, Abortion 3 (1967); R. Schwarz, Septic Abortion 7 (1968); see also H. Morgentaler, Abortion and Contraception 110 (1982).[6]

The available evidence indicates that morbidity (disease) rates from illegal abortions were also very high. For example, in 1960 about 33% of illegal abortions required women to stay in a hospital; according to one study, no fewer than 42% of all emergency admissions into hospitals during that year consisted of women attempting to recover from illegal abortions. See H. Morgentaler, Abortion and Contraception 111 (1982). Among the conditions caused by illegal abortions were permanent infertility, severe bleeding, gangrene, infection, and cervical wounds. See generally E. Messer & K. May, Back Rooms: Voices from the Illegal Abortion Era (1988).

Since *Roe*, abortion-related deaths have dropped by no less 90%; in the year after *Roe* alone, abortion-related deaths dropped by over 40%. See 7 Family Planning Perspectives 54 (1975). See also Cates, *Legalized Abortion: Effect on National Trends of Maternal and Abortion-*

[6] Almost 80% of the deceased were women from minority groups. See L. Lader at 66. See also C. Tietze, Abortion as Cause of Death, in Fertility Regulation and the Public Health 274 (S. Tietze ed. 1987).

Related Mortality, American Journal of Obstetrics and Gynecology 213 (1976) (describing the "increasing availability of legal abortion" as one of the "most likely explanations for th[e] decline in abortion mortality ratio."); C. Tietze & S. Lewit, *Epidemiology of Induced Abortion*, in Abortion and Sterilization 56 (J. Hodgson ed. 1981) (principally because of the "replacement of illegal by legal abortions," abortion "is no longer an important cause of death" in the United States); Cates & Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Family Planning Perspectives 2 (1976) (illegal abortion death-to-case rate "is approximately eight times greater than the death-to-case rate for legal abortion").

In sum, available evidence indicates that prohibiting abortion is likely not to have a substantial effect on the number of abortions but may well endanger the lives and health of pregnant women. The probable effect of overruling *Roe* would be not to protect fetal life but to bring about a dramatic increase in illegal and dangerous abortions.[7] The contention that a prohibition against abortion protects fetal life or represents a reasonable accommodation of the interests of fetal life and the pregnant woman rests not on an evaluation of the facts but on simplistic and uninformed assumptions.

4. ***A prohibition against abortion would create intolerable difficulties in the case of pregnancies resulting from coercion and abuse.***

As we have shown, a prohibition against abortion is a gender-based measure. When a state enacts such a measure, it must do so on the basis of a careful assessment of the relevant facts and considerations, not on the basis of "simplistic" and "inaccurate[] assumptions." *Mississippi University for Women*, 458 U.S. at 726. The reason for this requirement is the concern that a gender-based measure will not reflect a sufficiently well-informed and reflective assessment of the interests of the disfavored group.

[7] Indeed, in view of technological changes since the 1960s, making abortions easier to perform, modern legislation might well be even less effective than legislation in the days preceding *Roe*. See Kaplan, *Abortion as a Vice Crime*, 51 Law & Contemp. Probs. 151, 168-170 (1988).

Prohibitions against abortion not only fail to come to grips with the available data on the rate of pre-*Roe* abortions and the effects of illegal abortions on women. They also do not recognize the frequency with which abortions are sought to terminate pregnancies that resulted from coercion or abuse, and the difficulty of administering a system of restrictions on abortion that would take account of this problem.

Existing data suggest that at least 15,000 women per year have abortions after a pregnancy resulting from rape or incest. See Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169 (1988). There is no doubt that this figure substantially understates the problem. Disclosure of victimization produces social stigma; various forms of "non-stranger" rape are often considered, by prosecutors and victims alike, not to be rape at all; rape and incest are notoriously underreported crimes. See S. Estrich, Real Rape 8-26 (1987). Before *Roe*, the use of illegal abortion after pregnancies produced by acts of violence has been well-documented. See L. Lader, Abortion (1966); E. Messer & K. May, Back Rooms (1988).

If *Roe* were overruled, women who became pregnant as a result of rape or incest would frequently be required to bring the child to term, even in states that provided exceptions to a prohibition on abortion in such circumstances. For victims, rape and incest are difficult enough to allege and prove in a criminal prosecution. A requirement of particularized proof, by pregnant women, of rape or incest in abortion proceedings would lead to enormous difficulties—often, as a practical matter, making

abortion impossible to obtain. The legal determination whether pregnancy is a result of rape or incest is an extraordinarily intrusive procedure.

Moreover, provable rape or incest is not the heart of the problem. Even an exemption for rape or incest does not recognize the coercive nature of the environment in which, for example, battered women live. A woman may submit to sexual intercourse because of fear of violence and then be threatened with further violence if she alleges that the resulting pregnancy is the result of coercion. A battered woman who becomes pregnant is less able, economically and otherwise, to leave the batterer, and her economic dependence on the batterer will only increase if she is forced to bear the child. The incidence of battery increases during and as a result of pregnancy. See R. Gelles, *Violence and Pregnancy*, The Family Coordinator 81 (January, 1975). The incidence of sexual assault and rape by formerly intimate partners also increases as women leave those partners. Violence of this sort serves as a means of continuing the power and control inherent in battering situations, and it often leads to pregnancy. Prohibitions on abortion simply do not recognize the extraordinary difficulty of these situations; instead, in this area as well, they rest on simplistic and ill-informed assumptions.

In many cases, the Court has invalidated gender-based laws because they reflected factual assumptions about men and women that were inaccurate and overly broad in light of the actual differences between the sexes. In this case, by contrast, the factual assumptions are inaccurate not because men and women are in fact substantially the same—with respect to the capacity to become pregnant, they are not—but instead because laws prohibiting abortion are largely ineffective and will produce serious adverse effects on the lives and health of many women. But this distinction does not warrant a different

outcome here. The reason for heightened scrutiny of gender-based measures is not the concern that governments will act maliciously toward women but rather that the interests of women will be overridden too cavalierly, without adequate reflection or investigation, on the basis of "simplistic" and "inaccurate[] assumptions." *Mississippi University for Women*, 458 U.S. at 726. That danger arises whenever a legislature acts against one sex alone and on the basis of superficial investigation rather than careful consideration of the relevant concerns.

5. *Restrictions on abortion often rest on stereotyped and outmoded notions of women's proper role.*

There is considerable reason to believe that prohibitions against abortion have reflected, and continue to reflect, "'the role-typing society has long imposed' on women." *Califano v. Webster*, 430 U.S. 313, 317 (1977), quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975). As the government acknowledges (U.S. Am. Br. 13 n.10), legislation prohibiting abortion is for the most part a product of the period from 1860 to 1880. This was precisely the period when gender stereotyping was at its height. To cite only the most notorious example, in *Bradwell v. Illinois*, 16 Wall. 130, 142 (1873), Justice Bradley, joined by Justices Swayne and Field, concurring in a decision upholding a law that prohibited women from practicing law, reasoned as follows:

> [T]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Historical work has revealed that the abortion restrictions of this period grew in large part out of precisely these ideas. See, *e.g.*, J. Mohr, Abortion in America:

The Origins and Evolution of National Policy, 1800-1900 at 168-172 (1978).[8]

Modern studies also suggest that support for laws banning abortion is often an outgrowth of stereotypical notions about women's proper role, and indeed a reaction to the increasing number of women who have assumed responsibility for work outside of the home. See generally K. Luker, Abortion and the Politics of Motherhood 192-215 (1984); Luker, *Abortion and the Meaning of Life*, in Abortion: Understanding Differences 25 (S. Callahan & D. Callahan eds. 1984).[9]

Thus the impetus for prohibiting abortion does not only rest on inaccurate and simplistic assumptions about

[8] This study explains that the physicians largely responsible for bringing about abortion restrictions "were among the most defensive groups in the country on the subject of changing traditional sex roles. . . . To many doctors the chief purpose of women was to produce children; anything that interfered with that purpose, or allowed women to 'indulge' themselves in less important activities, threatened . . . the future of society itself. Abortion was a supreme example of such an interference for these physicians." Mohr at 168-69. See also *id.* at 105 (quoting a nineteenth century doctor complaining that "the tendency to force women into men's places" was creating insidious "new ideas of women's duties" and including among such ideas the notion "that her ministrations . . . as a mother should be abandoned for the sterner rights of voting and law making"); see also L. Gordon, Women's Body, Women's Right: A Social History of Birth Control in America (1976); K. Luker, *supra*, at 11-39.

[9] See, *e.g.*, Luker, Abortion and the Meaning of Life at 31: Those involved in anti-abortion activities "concur that men and women, as a result of . . . intrinsic differences, have different roles to play: Men are best suited to the public world of work, whereas women are best suited to rearing children, managing homes, and loving and caring for husbands. . . . Mothering, in their view, is itself a full-time job, and any woman who cannot commit herself fully to mothering should eschew it entirely. In short, working and mothering are either-or choices; one can do one or the other, but not both." These sentiments closely resemble the now-unacceptable views expressed by Justice Bradley in *Bradwell*.

the connection between statutory means and ends; it may reflect outmoded and archaic role-typing of women. Indeed, the casual acceptance of inaccurate and simplistic assumptions about the real-world effects of restricting abortion—which is in itself sufficient ground for invalidating a prohibition against abortion—may be a " 'by-product of a traditional way of thinking about females' " (*Califano v. Webster*, 430 U.S. at 320 (citation omitted)). The Court has time and again invoked the Equal Protection Clause in order to disapprove such an approach.

CONCLUSION

Insofar as reversal of the judgment of the court of appeals would require reconsideration of *Roe v. Wade*, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

No. 88-605.

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

WILLIAM L. WEBSTER, ET AL.,
APPELLANTS,

v.

REPRODUCTIVE HEALTH SERVICES, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Brief Amicus Curiae for American Jewish Congress, Board of Homeland Ministries — United Church of Christ, National Jewish Community Relations Advisory Council, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and thirty other religious groups.

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Question Presented.

Did the Court of Appeals for the Eighth Circuit properly apply this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973) in protecting the privacy and freedom of conscience and religion of pregnant women?

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McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980) 11n, 12, 14, 15
Meyer v. Nebraska, 262 U.S. 390 (1923) 8n
Moore v. East Cleveland, 431 U.S. 494 (1977) 9
Paul v. Davis, 424 U.S. 693 (1976) 8n
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 8, 10
Prince v. Massachusetts, 321 U.S. 158 (1944) 9, 18n
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 8n
Roe v. Wade, 410 U.S. 113 (1973) i, 3, 7, 10, 16 et seq
Sherbert v. Verner, 374 U.S. 398 (1963) 19

Thomas v. Collins, 323 U.S. 516 (1945) 18n
Thomas v. Review Board of the Indiana Employment Sec. Division, 450 U.S. 707 (1981) 19
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 7, 10
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United States v. Seeger, 380 U.S. 163 (1965) 19
Wallace v. Jaffree, 472 U.S. 38 (1985) 22
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 18, 20, 21, 22
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Missouri Law
Sections 1.205.1(1), 188.025, 188.029, 188.039, 188.205, 188.210 and 188.215 7n

MISCELLANEOUS.

Baum, Abortion: An Ecumenical Dilemma, Commonweal 231 (Nov. 30, 1973) 11n

Bial, M., Liberal Judaism at Home: The Practices of Modern Reform Judaism 12-13 (Rev. ed. 1971) 16

Bleich, J.D., Abortion in Halachic Literature, in F. Rosner and J.D. Bleich, Jewish Bioethics 134 (1979) 16

Covenant and Creation: Theological Reflections on Contraception and Abortion, adopted by the 195th General Assembly of the Presbyterian Church (1983) 13, 14

Donin, Rabbi Hayim Halevy, To Be a Jew: A Guide to Jewish Observance in Contemporary Life Selected and Compiled from the Shulhan Arukh and Responsa Literature and Providing a Rationale for the Laws and Traditions 140-141 (1972) 15

Feldman, D., Marital Relations, Birth Control, and Abortion in Jewish Law 271-284 (1974) 15

Jacobovits, I., Jewish Views of Abortion in F. Rosner and J.D. Bleich, Jewish Bioethics 118 (1979) 15, 16

Jacquet, Constant (ed.), Yearbook of American and Canadian Churches 238 (1984) 11n

Pfeffer, L., Religion, State, and the Burger Court 240-241 (1984) 11n

Rosner, F., Modern Medicine and Jewish Ethics (1986) 16

Rotmem & Folsom, Recent Restraints on Religious Liberty, 36 Am. Pol. Sci. Rev. 1053 (1942) 21n

Segers, Abortion and the Culture, in Abortion 229 (S. Callahan & D. Callahan, eds., 1984) 11n

Testimony of Rabbi Balfour Brickner, Statement of the Religious Coalition for Abortion Rights Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives (March 24, 1976) 16

The Declaration on Abortion of the Sacred Congregation for the Doctrine of Faith (1974) 11n

United Church of Christ, Abortion: A Resolution of the 12th General Synod of the United Church of Christ 1979 (Public Policy Pamphet 12GS-12) 13

Zwerin, R. and R. Shapiro, Judaism & Abortion 1-4 (1987) 15

No. 88-605.

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WILLIAM L. WEBSTER, ET AL.,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
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Brief Amicus Curiae for Albuquerque Monthly Meeting of Religious Society of Friends, American Friends Service Committee, American Humanist Association, American Jewish Committee, American Jewish Congress, Americans for Religious Liberty, Anti-Defamation League of B'nai B'rith, B'nai B'rith Women, Board of Homeland Ministries — United Church of Christ, Commission on Social Action of Reformed Judaism, The Episcopal Diocese of Massachusetts — Women in Crisis Committee, The Episcopal Diocese of New York, Episcopal Women's Caucus, Federation of Reconstructionist Congregations and Havurot, General Board of Church and Society — The United Methodist

Church, Institute of Women Today, Jewish Labor Committee, NA'MAT, National Assembly of Religious Women, National Council of Jewish Women, National Federation of Temple Sisterhoods, National Jewish Community Relations Advisory Council, North American Federation of Temple Youth, The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, Union of American Hebrew Congregations, Unitarian Universalist Association, Unitarian Universalist Women's Federation, United Church of Christ Coordinating Center for Women, United Church of Christ Office of Church in Society, Washington Ethical Action Center of the America Ethical Union, Women in Ministry — Garrett Evangelical Seminary, Women in Mission and Ministry — Episcopal Church U.S.A., Women's League for Conservative Judaism, The Right Reverend Bill Burrill, Bishop of the Episcopal Church of Rochester; The Right Reverend Barbara C. Harris, Suffragan Bishop of the Episcopal Church of Massachusetts; The Right Reverend Edward W. Jones, Bishop of the Episcopal Church of Indianapolis; The Right Reverend David E. Johnson, Bishop of the Episcopal Church of Massachusetts; The Right Reverend Coleman McGehee, Bishop of the Episcopal Church of Michigan; The Right Reverend John S. Spong, Bishop of the Episcopal Church of Newark; The Right Reverend John T. Walker, Bishop of the Episcopal Church of Washington, D.C., and The Right Reverend O'Kelley Whitaker, Bishop of the Episcopal Church of Central New York, as Amicus Curiae Supporting Appellees.

Interest of Amici Curiae.

Amici are religious organizations and representatives of religious groups dedicated to preserving religious freedom for

all persons, and to protecting a woman's right to terminate her pregnancy in consultation with her religious conscience. Associated with a variety of religions, amici are organizations including the American Friends Service Committee, the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith, the Episcopal Diocese of New York, the Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, the Religious Coalition for Abortion Rights, and the St. Louis Catholics for Choice. The thoughtful statements of interests provided by individual organizations, included here as Appendix A at 1a, demonstrate their unique and contrasting perspectives on the issues of religious conscience and abortion, and their shared commitment to the Constitution's removal of these issues from gov ernmental control. A full listing of the amici curiae signing this brief in support of respondents appears as Appendix B at 14a. Amici received leave to file this brief from the parties in this action.

As organizations representing a variety of sincere religious perspectives, the amici object to any governmental attempts to interfere in the exercise of individual religious conscience with regard to procreative choice. Because the amici recognize the many divergent theological answers to the questions raised by abortion, the amici agree that each woman should be free to consult with her religious convictions, as well as her best medical advice, without governmental coercion or constraint when exercising religious and personal conscience in making a decision whether to terminate her pregnancy. The amici therefore object to Missouri's attempts to regulate a woman's decision whether to obtain an abortion, and support the reaffirmation of *Roe* v. *Wade*, 410 U.S. 113 (1973), as a necessary means of protecting each person's ability to exercise freedom of religion and conscience.

Statement of the Case.

Amici adopt the Statement of the Case set forth by the appellees.

Summary of Argument.

Abortion is undoubtedly one of the most hotly debated issues in this country. The debate reveals profound religious disagreement. Views range from the belief that abortion is a sin forbidden by divine authority to the view that abortion may be a religious obligation if needed to preserve the life or well-being of the pregnant woman. Even a brief examination of the religious beliefs of the Roman Catholic Church, the Baptist Churches, the Episcopal Church (USA), the United Church of Christ, the Presbyterian Church, the United Methodist Church, and the Orthodox, Conservative, Reform, and Reconstructionist traditions of Judaism reveals the immensely varied and intensely sincere religious differences about this important issue of procreative judgment.

Given the dramatically contrasting religious views about whether and when abortion is permitted or required, state statutes drastically curtailing access to abortion unacceptably interfere with constitutionally protected religious and private conscience. Missouri's ban against abortion in public facilities, its ban against counseling about abortion by public employees, and its pronouncement that life begins at conception impermissibly invade religious liberty and freedom of conscience. Even though the Missouri law makes no mention of religion, it violates the Free Exercise Clause of the First Amendment. Especially in this sensitive area of great religious concern, public orthodoxy must be restrained and private conscience must be protected.

The Court of Appeals for the Eighth Circuit properly concluded that the Missouri statutes restricting abortion violated the constitutional injunction to place certain kinds of governmental activities out of bounds. This constitutional injunction relies on the First Amendment's guarantees of religious freedom as well as the right to privacy founded in the Fourteenth Amendment. The Missouri statutes thus are doubly defective: they abridge the right to privacy and also the doctrines preserving freedom of conscience and religion.

Both the right of individual privacy and the right of religious liberty protect critical decisions about whether to marry or divorce, and whether to conceive and bear a child. The Constitution has long provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

If this Court were now to overturn its consistent position and to invite state legislation constraining or prohibiting abortion, the result would be extensive and disturbing government embroilment with matters of private religious conscience. Religiously-inspired proponents on all sides of this issue would besiege state legislators. State law-makers would be consumed by the enormous divisions between and even within religious groups on the issue of abortion. Public spaces would be occupied by religious controversies likely to erupt in acts of intolerance and violence. It is just these dangers that the Free Exercise Clause meant to avoid.

This Court's vigilant protection of the privacy of pregnant women is not a decision to favor or even approve abortion, but instead a commitment to preserve individual autonomy. That, of course, must be the lodestar in a country as diverse and as committed to freedom as ours. The Court's role in preserving the space for the free exercise of personal and religious conscience is never more crucial than where there is

massive public turmoil surrounding the subject. Otherwise, majorities, and even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those they do not like. The amici joining in this brief attest to the profound, prayerful commitments of extraordinarily diverse religious groups to this vision of tolerance enacted in our Constitution. It is this nation's strength that our Constitution can elicit the trust of peoples across diverse and clashing faiths. In the face of so complex and inescapably private a matter as the decision to terminate or continue a pregnancy, this Court should not now betray the people's trust by allowing a state to undermine the mandated respect for religious liberty and personal conscience.

Argument.

I. The Missouri Statute Impermissibly Intrudes upon Individual Decisions Protected by the Right to Privacy and by the Free Exercise Clause of the First Amendment.

Decisions about family life are of such pre-eminent, foundational importance in our nation that this Court has afforded the double protection of precedents under the rights of both personal privacy and religious liberty. Both lines of precedent assure not only a limited government, but also a sphere of private pursuits informed by each individual's religious traditions and personal conscience. Missouri's regulation of abortion impermissibly constrains private decision-making over basic family choices accorded protection by this Court. This

Court therefore should affirm the decision by the Eighth Circuit Court of Appeals.[1]

A. *Private Decisions over Family Life Are Doubly Protected by the Constitution's Respect for Individual Privacy and the Constitution's Commitment to Religious Liberty.*

The constitutional commitment to protect personal privacy is part of the larger constitutional scheme that places certain kinds of governmental activities out of bounds. That larger scheme significantly relies on the First Amendment's guarantees of religious freedom as well as the right to privacy founded in the Fourteenth Amendment. The subjects of procreation, contraception, and abortion are private in two major respects: they involve the fundamental privacy of each individual and the importantly private enclaves of religious and community groups. The constitutional challenges to the Missouri law carry the double force of doctrines developed under the right of privacy and doctrines preserving freedom of conscience and religion.

Thus, the Eighth Circuit Court of Appeals reached a conclusion compelled not only by this Court's decisions in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Roe* v. *Wade*, 410 U.S. 113 (1973).

[1] The Court of Appeals rejected sections of the Missouri law that banned the use of public funds for encouraging or counseling a woman to have an abortion not necessary to save her life, requiring doctors to perform viability tests, forbidding any public employee from encouraging or counseling a woman to have an abortion not necessary to save her life, forbidding the use of any public facilities for that purpose, and declaring that life begins at conception. Sections 1.205.1(1), 188.025, 188.029, 188.039, 188.205, 188.210, and 188.215 of the Missouri law, which appear in the Jurisdictional Statement Appendix at A87-A91, will hereinafter be described in this brief as "the Missouri law."

In addition, the constitutional right to privacy enforced in these decisions is underscored and bolstered by the command of the Free Exercise Clause of the First Amendment. Together, the right of privacy and the right to religious liberty exclude the state from personal decisions about the critical issues of family life, reproduction, and child-rearing. See *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976) (privacy); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (privacy); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (privacy and equality); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (privacy); and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (free exercise). Missouri's law impermissibly secularizes these choices. The state law constrains critical, private choices about child-bearing and thereby burdens the free exercise of religion and its crucial component, protection of individual conscience.

It is not by accident that this Court's historic protections for families draw on both notions of individual privacy and notions of religious liberty.[2] Deciding whether to marry or divorce, and whether to conceive and bear a child are simultaneously matters of individual choice and religious significance. The Constitution has provided, and must continue to assure, protection against governmental arrogation of crucial decisions which require the guidance of religious teachings and individual conscience.

[2] Whatever its specific sources in the Constitution, the privacy right accords with a conception that family decisions should be free from state control. "'[M]arriage, procreation, contraception, family relationships, and child rearing and education' . . . 'while defying categorical description,' identify certain zones of privacy in which personal relationships or decisions are protected from government interference." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring) (citing *Paul* v. *Davis*, 424 U.S. 693, 713 (1976)); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty guaranteed in the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.")

Under the Constitution, this Court consistently has guarded family decisions from invasive state regulations. The Court has guaranteed parents the right to select private, religious schools for instructing their children, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) and the right to an exemption from compulsory schooling laws where those laws contradicted a particular religious way of life, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Similarly, the Court has rejected state efforts to burden access to divorce, *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), and also rejected state burdens on access to marriage even when pursued to enforce previously incurred child support obligations, *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). Deference to the special, even sacred, realm of the family guides the Court's guarantees of private choice about marriage, procreation and contraception. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965): "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.* at 486. Similarly, this Court has long "'respected the private realm of family life which the state cannot enter,'" see *id.* at 495 (Goldberg, J.) (quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944)). See also *Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (city's zoning restrictions cannot prevent family members' choice to live together). The Court's vigilant protection of family privacy properly and necessarily allocates to private individuals the decision to proceed with or to terminate a pregnancy before the state's interest in potential life develops sufficient strength to overcome the state's interest in preserving the health, welfare, and choice of the woman. This Court has properly respected the demand for particularized decisions made in the context of any individual woman's life, personal autonomy, religion, and medical advice. No generalized legislative decision, removed from the

particular family context, could protect the private realm nor acknowledge the critical role for individual religious belief and conscience in what may be a most difficult moment.

The Court's position on this issue is not a decision to favor or even approve abortion, but instead a commitment to preserve the privacy and autonomy of a pregnant woman. Her decision, made in the context of her unique family and community situation, is a matter of her own conscience. This explains *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Roe* v. *Wade*, 410 U.S. 113 (1973). Any contrary course would permit — indeed, elicit — state encroachment into this constitutionally protected subject. It would inject secular authority where only religious and private conscience belong. That is precisely what both the right to privacy and the Free Exercise Clause of the First Amendment prohibit. State regulations of abortion like the Missouri statute not only violate the sanctity of individual decisions about family life, but also intrude upon intense religious controversies over matters reserved by the Constitution to private individuals.

B. *By Restricting Abortion, the Missouri Statute Unconstitutionally Invades Private Religious Freedoms Assured Protection for Individuals by the Free Exercise Clause and Demanded by the Variety of Religious Views About Abortion.*

Abortion is undoubtedly one of the most hotly debated issues in this country; the debate reveals profound religious disagreement. Views range from the belief that abortion is a sin forbidden by divine authority to the view that abortion may be a religious obligation if needed to preserve the life or well-being

of the pregnant woman. Still another view maintains that promotion of responsible parenthood and preservation of the health and well-being of existing, living persons rank among the highest, religiously commanded obligations. The issue of abortion obviously raises fundamental questions of sincere religious belief and intense religious differences.

Over 200 diverse religious groups in the United States[3] espouse starkly different and mutually inconsistent views about abortion.[4] For example, the official doctrine of the Roman Catholic church declares abortion to be immoral and asserts that life must be safeguarded from conception.[5] Some Roman Catholics, however, have explored and advocated religious views that tolerate abortion under some circumstances.[6]

Among the Baptist Churches, denominational pronouncements reflect the views and guidance of elected representatives, but are non-binding in matters of conscience. Historically, abortion has been treated generally as a matter for individual conscience in keeping with the religion's foundation in indi-

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[3] See Constant Jacquet, ed., Yearbook of American and Canadian Churches 238 (1984) (describing 219 religious bodies in the United States).

[4] This summary draws in part on testimony relied on by the district court in *McRae* v. *Califano*, 491 F. Supp. 630, 697-698 (E.D.N.Y. 1980). Although this Court reversed the decision in that case, and upheld the Hyde Amendment forbidding the use of federal Medicaid funds for abortion except where the woman's life would be endangered, the Court relied on a defect in party standing and did not pass on the free exercise claim for which the district court's opinion is cited here. This Court has also indicated that a special concern for burdens on free exercise of religion are raised where government funds are conditioned upon restrictions on abortion. *Maher* v. *Roe*, 432 U.S. 464, 474 n.8 (1977).

[5] The Declaration on Abortion of the Sacred Congregation for the Doctrine of Faith (1974), cited in *McRae* v. *Califano*, 491 F. Supp. 630, 693 (E.D.N.Y. 1980).

[6] See, e.g., Baum, Abortion: An Ecumenical Dilemma, Commonweal 231 (Nov. 30, 1973); Segers, Abortion and the Culture, in Abortion 229 (S. Callahan & D. Callahan, eds., 1984). See also L. Pfeffer, Religion, State, and the Burger Court 240-241 (1984) (describing Catholic groups for private choice over abortion).

vidual voluntary baptism and commitment to responsible families and parenthood. See *McRae* v. *Califano*, 491 F. Supp. 630, 697-698 (E.D.N.Y. 1980) (citing testimony of Dr. James Wood, Executive Director of the Baptist Joint Committee on Public Affairs). In 1967, the American Baptist Churches, USA, adopted a resolution to support legalization of abortion to protect the physical and mental health of the mother, to provide choices for women whose pregnancies resulted from rape, incest, or failed contraception or other unwanted circumstances. *Id*. at 699. The General Board of American Baptist Churches, USA, opposed the efforts of the National Conference of Catholic Bishops to use secular law to prohibit abortion, and resolved that ". . . we believe that the present effort of the National Conference of Catholic Bishops in the U.S.A. to coerce the conscience and personal freedom of our citizens through the power of public law in matters of human reproduction constitutes a serious threat to that moral and religious liberty so highly prized by Baptists." *Id*. at 699. Some Baptists have dissented from this view and organized religious groups against abortion. The denomination's stand was changed in 1988 to reflect the diversity of theological beliefs about abortion present within its membership.

The Episcopal Church USA reaffirmed in its 1988 General Convention its support for women's rights over their own bodies through a resolution first passed in 1967. That resolution states: "Resolved: The position of this Church, stated at the 62nd General Convention of the Church in Seattle in 1967, which declared support for the 'termination of pregnancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that the child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest' is reaffirmed. Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office

of the Presiding Bishop and the Executive Council of the General Convention, The Episcopal Church Center (March 6, 1989). Authorities for the Church note that this position has been consistent and unchanging, and that the Church stands firm in its resolve both to be pastorally supportive of women in their choices and to work to maintain a society where they do indeed have constitutionally guaranteed choices.

Similarly, the General Synod of the United Church of Christ resolved in 1979 to reaffirm full freedom of choice for the persons concerned in making decisions regarding pregnancy, to affirm "the fact that, since life is less than perfect and the choices that people have to make are difficult, abortion may sometimes be considered," and to affirm that "God calls us when making choices, especially as these relate to abortion, to act faithfully." United Church of Christ, Abortion: A Resolution of the 12th General Synod of the United Church of Christ, 1979 (Public Policy Pamphlet 12GS-12).

Some organized religious groups adhere to basic respect for individual conscience about abortion precisely because of the variety of views held by members of those groups. Thus, the policy statement contained in Covenant and Creation: Theological Reflections on Contraception and Abortion, adopted by the 195th General Assembly of the Presbyterian Church (1983), states that "The Presbyterian Church exists within a very pluralistic environment. Its own members hold a variety of views. It is exactly this plurality of beliefs that leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, free from governmental interference." Just as the decision to become a parent requires a responsible exercise of stewardship, reflecting moral and religious concerns, so does the decision to not become a parent. Moreover, this Presbyterian approach emphasizes that God alone is Lord of the conscience, and that God gives each indi-

vidual faced with a moral choice arising from sexual activity the power and the freedom to make moral choices regarding even the most serious questions. *Id.* at 49.

In addition, through its General Assembly, the Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly has stated that any decision concerning an abortion should be made as early as possible, generally within the first trimester of pregnancy, for reasons of a woman's health and safety. It affirms, however, that abortions should not be used as a method of birth control; it also maintains that abortions later in pregnancy should be an option, particularly in the case of women of menopausal age who do not discover they are pregnant until the second trimester, women who discover through fetal diagnosis that they are carrying a fetus with a grave genetic disorder, or women who did not seek or have access to medical care during the first trimester. This Presbyterian statement adds that at the point of fetal viability, abortions should be available only in the rarest of instances involving, for example, the late diagnosis of grievous genetic disorders.

Other Protestant Churches have declared their support for a woman's choice regarding abortion because of potential risks to the life or physical or mental health of the mother, because of concerns about the social situation in which the infant might be born, and because of instances of severe deformity of the fetus. *McRae* v. *Califano*, 491 F. Supp. 630, 700 (E.D.N.Y. 1980) (citing testimony of Reverend John Wogaman, United Methodist minister). As a matter of religious belief, many Protestant theologians maintain that "human personhood . . . does not exist in the earlier phases of pregnancy." *Id.* at 701 (testimony of Reverend John Wogaman). The United Methodist Church, for example, resolved in 1976 to affirm the " 'principle of responsible parenthood' and the right and duty of married persons prayerfully and responsibly to control conception according to their circumstances." *Id.* at 701. In contrast, repre-

sentatives of the Lutheran Church-Missouri Synod testified before a Senate subcommittee that in their religion, human life begins with fertilization, but any threat to the life of the pregnant woman must be resolved in her favor. *Id.* at 695. That Church also supports private decisions to terminate pregnancies under some other circumstances. *Id.* at 696.

Within the Jewish tradition, there is considerable agreement that the fetus is not a person before birth and that abortion therefore is not murder, and may be permitted, and indeed required in situations where the life of the mother is threatened. D. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 271-284 (1974); R. Zwerin and R. Shapiro, Judaism & Abortion 1-4 (1987). See also Rabbi Hayim Halevy Donin, To Be a Jew: A Guide to Jewish Observance in Contemporary Life Selected and Compiled from the Shulhan Arukh and Responsa Literature and Providing a Rationale for the Laws and Traditions 140-141 (1972) ("All halakhic scholars agree that therapeutic abortions — namely, abortions performed in order to preserve the life of the mother — are not only permissible but mandatory.") Beyond these points of virtual consensus, however, different branches of Judaism, and different groups within each branch, hold divergent views about the legal and moral status of abortion and about the circumstances under which it is permitted.

Within the different strands of Orthodox Judaism, for example, there is vehement disagreement as to whether a non-therapeutic abortion is akin to homicide, whether avoiding severe mental anguish of the mother is an adequate basis for permitting an abortion of a fetus with severe defects, and whether it is permissible to include in the choice of an abortion consideration of the potential suffering of a severely disabled fetus carried to term. See D. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 284-294 (1974); I. Jacobovits, Jewish Views of Abortion in F. Rosner and J.D.

Bleich, Jewish Bioethics 118 (1979); J.D. Bleich, Abortion in Halachic Literature, in F. Rosner and J.D. Bleich, Jewish Bioethics 134 (1979). See generally F. Rosner, Modern Medicine and Jewish Ethics (1986). It is hardly surprising that there is vigorous disagreement among contemporary Orthodox rabbis, since the great sages such as Maimonides and Rashi expressed contrasting fundamental assumptions concerning abortion.

Conservative, Reform, and Reconstructionist branches of Judaism — and some orthodox groups — share a more liberal approach to abortion in contrast to most Orthodox views, and have endorsed the existing rules set forth in *Roe* v. *Wade* in order to assure that individual women may treat an abortion decision in light of their own religious and moral views. See Statement of Interest of National Jewish Community Relations Advisory Council (Appendix A). Even in these branches, however, authorities differ considerably about the circumstances under which abortion is permitted or required. Many consider abortion to be a religious duty, a duty resembling obligations to observe religious rituals, when a pregnancy threatens a woman's life or health. Some would protect a woman's choice to abort simply as a matter of her entitlement to control her own destiny. M. Bial, Liberal Judaism at Home: The Practices of Modern Reform Judaism 12-13 (Rev. ed. 1971). See also Testimony of Rabbi Balfour Brickner, Statement of the Religious Coalition for Abortion Rights Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives (March 24, 1976). Others emphasize the risks to a woman's physical, psychological, and emotional well-being that may be presented by a pregnancy as critical reasons for permitting abortion. The different positions taken in the debates about the Jewish position on abortion reflect not personal preferences, but instead the divergent religious sources, for rabbinic *responsa* — the

answers written by leading rabbis to disputes about observance since the tenth century — permit multiple, conflicting interpretations of the Jewish position on abortion.

Given the contrasting views about abortion within and across religious groups, it is obvious that many strongly held religious beliefs directly clash with the Missouri law.[7] That law interferes with the religious lives of those who are adherents to these beliefs, just as interference with religious beliefs would arise if a state were to adopt a law mandating abortion under specified circumstances. Adjudicating among diverse religious beliefs is precisely what the government must not do under the constitution. Political contests animated by the contrasting views of religious groups over religious practices are precisely what the Free Exercise Clause sought to seal off from governmental purview. The government must not intervene to try to settle the critically important, vociferous, multi-sided religious argument. As this Court announced in *United States* v. *Ballard*, 322 U.S. 78, 87 (1944): "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack any one religious creed on which all men would agree. They

[7] This is not a claim, under the Establishment Clause, that the government may not adopt one religious view over others if, as this Court decided *Harris* v. *McRae*, that the law happens to coincide with the religious views of some. 448 U.S. 297, 319-320 (1980). Instead, the objection here is that certain topics require protection against state regulation if the free exercise of religion is to mean anything. Basic decisions about procreation and termination of pregnancies epitomize such topics, in light of the massive and deep disagreement among religions over these issues. We do not argue here for religious exemptions to Missouri's law not only because that would be impracticable, given the large numbers of people whose religious beliefs are burdened by the law. Even more importantly, any process providing for exemptions would be insufficient protection of religious freedom, given the intrusion any process for considering exemption would itself place on the individuals facing intimate decisions involving procreation and termination of pregnancy. This Court's rulings on the dangers of government entanglement with religion would apply in any case-by-case evaluation of religious beliefs about abortion. See *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

fashioned a charter of government which envisaged the widest possible toleration of conflicting views."[8]

For vast numbers of people, abortion raises issues of religious belief and individual conscience. Regulation of abortion by the states — regulations like Missouri's ban against abortion in public facilities, and its ban against counseling about abortion by public employees, invade religious liberty and freedom of conscience.[9] That people disagree intensely over abortion is no reason for this Court to fail to protect religious liberty here. As this Court announced in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943), the Free Exercise Clause most importantly protects views over which people vehemently disagree: "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

Nor can the Missouri statute avoid challenge because it makes no mention of religion or because organized religious groups themselves disagree about abortion. This Court has held, time and time again, that a facially neutral statute may

[8] The opinion continued, "Man's relation to God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views," *id.*, and, given the presence of Edna Ballard as one of the respondents in that case, "man" here was obviously meant to include women whose religious views and private decisions are of prime significance in this case.

[9] For some people, decisions about procreation and abortion are fundamentally matters of personal conscience. For them, no less than for those who cite religious belief, the First Amendment guarantees protection. Religious freedom belongs with freedom of speech together in the First Amendment because "[t]he First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). See also *Prince* v. *Massachusetts*, 321 U.S. 158, 164-165 (1944). Both for pregnant women contemplating abortion and for governmental health care professionals who deal with pregnant patients, Missouri's statute presents untenable restrictions on the mere discussion of the possibility of terminating a pregnancy.

offend the Free Exercise Clause, *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972). See also *Bowen* v. *Roy*, 476 U.S. 693, 728-732 (1986) (O'Connor, J., concurring in part and dissenting in part) (rejecting argument that any facially neutral and uniformly applied governmental requirement can withstand challenge under the Free Exercise Clause if it is a reasonable means of promoting a legitimate public interest). A person's religious beliefs that diverge from views held by others within a given faith have long been, and must be protected by the Free Exercise Clause, for it to be a guarantee of *individual* religious liberty. See *Thomas* v. *Review Board of the Indiana Employment Sec. Division*, 450 U.S. 707, 715 (1981). Cf. *United States* v. *Seeger*, 380 U.S. 163, 176 (1965) (interpreting statutory exemption from military draft to encompass not only religious belief in a Higher Being but also "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption").

The Free Exercise Clause of the First Amendment should control this case. Missouri cannot claim that the Free Exercise Clause guarantees only people's freedom to hold pro-choice views, but not their freedom to obtain an abortion in any public facility, to discuss the matter with any public employee, or to act contrary to a state law declaring that human life begins at conception. The Free Exercise Clause guards much religiously inspired conduct, not just religious views. *Wisconsin* v. *Yoder*, 406 U.S. 205, 219-220 (1972); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). In the context of religious freedoms, this constitutional protection applies where the government withholds a benefit as much as when it imposes a penalty. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Bowen* v. *Roy*, 476 U.S. 693, 726-733 (1986) (O'Connor, J., concurring in part and dissenting in part). Finally, Missouri cannot justify

the burdens on religious belief imposed by its law by referring to its preamble, deeming the fertilized egg a human life, as the kind of compelling state interest required by this Court to overcome the demands of the Free Exercise clause. This Court rejected the idea that "when life begins" can be treated as a factual question, *Roe* v. *Wade*, 410 U.S. 113 (1973). As a matter of faith, the question thus falls within the sphere guarded from public orthodoxy by the Free Exercise Clause.[10]

II. The Free Exercise Clause Withdraws Subjects of Religious Conscience from the Vicissitudes of Political Controversy and Is Never More Important than when Heated and Hostile Political Debate Endangers Religious Freedom.

If this Court were now to overturn its consistent position and to invite state legislation like Missouri's statute, or even more punitive prohibitions of abortion, the result would be extensive and disturbing governmental entanglement with matters of private religious conscience. Religiously-inspired proponents on all sides of this issue would besiege state legislators. State legislatures, in turn, will unavoidably become embroiled in the enormous divisions between and even within religious groups on the issue of abortion. It is just these dangers that the Free Exercise Clause was meant to avoid.

This Court's vital statement is especially apt at this time: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court's role in preserving space for the free exercise of religion is never more crucial than when there is massive public turmoil surrounding the subject. Otherwise, majorities, or even effectively mobilized minorities, can invoke the power of the state to curb the religious freedoms of those they do not like; otherwise, we risk escalating intolerance not only toward isolated groups on specific issues, but toward anyone who does not abide by the religiously inspired views pursuing the instruments of state power. History tells us that such intolerance often simmers just beneath the surface; the destruction of the churches of Jehovah's Witnesses who declined to salute the flag[11] and contemporary public violence at abortion clinics provide vivid examples. Vehement public ferment on the subject of abortion is bound to emerge if this Court allows the interference with free exercise represented by the Missouri statute.[12]

The Free Exercise Clause of the First Amendment makes explicit a courageous and unparalleled American vision of tolerance for differences which includes, by necessity, gov-

[10] The Missouri law's preamble bears no resemblance to a plausible recognition that changing technology and medical science may alter the timing of viability. Instead, the definition of human life at conception raises the spectre of state regulation of contraception as an alleged interference with human life.

[11] Rotmem & Folsom, Recent Restraints on Religious Liberty, 36 Am. Pol. Sci. Rev. 1053, 1061-62 (1942).

[12] Withdrawing abortion from the hot lights of politics would not prevent anyone from working for political solutions to the desperate need many women find for a solution to a pregnancy they cannot manage. Efforts to promote contraception, and adoption, to control rape and incest, to enable women to say no to unwanted sexual encounters, and to provide economic security to permit women to bear and raise children would all remain available and potentially effective measures. Giving women choices not to become pregnant before they already are or means to protect the child after birth would reduce, if not eliminate, the place of abortion in private decision-making.

ernmental restraint. " 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' " *Wallace* v. *Jaffree*, 472 U.S. 38, 55 (1985) (quoting *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 642). This Court has long been the eloquent defender and enforcer of this vision, and adherence to that role has never been more important than at this time.

Conclusion.

For the foregoing reasons, the decision for the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Many of the amici specifically wanted to include in this brief their own individual statements of interests. These statements are printed here in demonstration of the diversity of groups, expressing varied religious positions on abortion, who joined together in this brief to express a shared commitment to the Constitution's guarantee of free exercise of conscience and religion.

Statement of Interest of The American Friends Service Committee

The American Friends Service Committee (AFSC) has a vital interest in this litigation because of Friends' belief in the infinite worth of each human being and the equality of all human beings in the sight of God. Because of this testimony the AFSC has worked since 1917 as a social justice arm of the Religious Society of Friends to root out the causes of violence in our society which lie in poverty, exclusion and denial of equal opportunity and rights and to support rights of conscience. For two decades the AFSC has taken a consistent position supporting a woman's right to follow her own conscience concerning child-bearing, abortion and sterilization, free of coercion, including the coercion of poverty, racial discrimination and unavailability of services to those who cannot pay.

Statement of Interest of The American Jewish Committee

The American Jewish Committee (AJC) is a national organization founded in 1906 for the purpose of protecting the civil

and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans. The AJC supports access to abortion on a voluntary basis as an important component of comprehensive and effective health care and as part of its traditional concern for individual liberty, privacy and free choice.

Statement of Interest of
The American Jewish Congress

The American Jewish Congress, an organization of American Jews founded in 1918 is dedicated to the protection of the civil liberties and civil rights of Jews and of all Americans and the promotion of the principles of constitutional democracy.

Among the many activities directed to these ends, the American Jewish Congress has in the past filed *amicus curiae* briefs in many of the reproductive freedom cases before this Court.

The American Jewish Congress believes that, in the face of the great moral and religious diversity in American society over abortion and in the light of Jewish traditions which in some cases command abortion, and in many others, permit it, the existing constitutional rules, set down in *Roe* v. *Wade*, should be maintained so that the different traditions may advocate their respective views and the decision left to the individual woman, answering to God and to her conscience.

Statement of Interest of
The Anti-Defamation League of B'nai B'rith

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among

Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League believes these principles are best served through the protection of the right to individual conscience and the free exercise of religion. In support of its position, ADL has previously filed as a friend-of-the-court in numerous cases dealing with issues of privacy and religious conscience, see, e.g., *Frazee* v. *Department of Employment Security, appeal pending*, No. 87-1945 (U.S. S.Ct. 1989); *Bowen* v. *Kendrick*, 108 S.Ct. 2562 (1988); *New York State Club Ass'n* v. *New York*, 108 S.Ct. 2225 (1988); and *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' rights of individual conscience.

Statement of Interest of B'nai B'rith Women

B'nai B'rith Women is an organization of 120,000 Jewish women dedicated to promoting social advancement through education, service and action. Since 1968 the organization has held that women should have the right to choose for themselves on matters of reproduction. The organization has reaffirmed that right many times by reiterating its opposition to any legislation that restricts a woman's freedom to choose whether, when or if to bear children.

Statement of Interest of General Board of
Church and Society of the United Methodist Church

The United Methodist Church's General Board of Church and Society, a program agency of The United Methodist Church,

which has 9.5 million members, has a strong commitment to women and to the right of women to make decisions such as abortion decisions involved in *Webster* v. *Reproductive Health Services*. The Church's position affirms that Supreme Court decision in *Roe* v. *Wade*, believing that abortion should be a safe and legal procedure, and that a decision about abortion should be made by a woman after prayerful consideration with the assistance of persons she may choose. We believe that abortion should not be used for birth control nor gender selection, but recognize "tragic conflicts of life with life that may justify abortion, and in such cases support the legal option of abortion under proper medical procedures."

Statement of Interest of
National Assembly of Religious Women

The National Assembly of Religious Women (NARW) is a 20-year-old national organization of Catholic feminist women committed to working and acting collectively to build a world of peace with justice. NARW's agenda emphasizes the "participation of people in the decisions which affect their lives" and calls upon its members to use their organized power to effect a just society. NARW affirms the equal access of all women to the law, and opposes efforts to make abortion a crime. NARW believes that its position is based on gospel values of respect for life, respect for persons' self-determination, fidelity to conscience, and the right to due process of law.

Statement of Interest of
National Council of Jewish Women

Founded in 1893, the National Council of Jewish Women (NCJW) is the oldest Jewish women's volunteer organization

in America. NCJW's 100,000 members in more than 200 Sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our National Resolutions which include working for "the protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom," we join this brief.

Statement of Interest of
The National Federation of Temple Sisterhoods

The National Federation of Temple Sisterhoods represents the women of Reform Judaism. It is the women's affiliate of the Union of American Hebrew Congregations, and comprises more than 100,000 members among its affiliate Sisterhoods. We believe that the right of choice on the question of abortion is a personal decision based on religious, ethical or cultural beliefs and values. This right should not be determined for women based on the convictions of any special interest group. For government to legislate in the matter of abortion violates a woman's fundamental rights to privacy and choice, and is an impermissible derogation from the separation of Church and State. We therefore reaffirm our support of the Supreme Court decision of 1973 relating to abortions.

Statement of Interest of
National Jewish Community Relations Advisory Council

The National Jewish Community Relations Advisory Council (NJCRAC) is the umbrella planning and coordinating body

for the field of Jewish community relations in the United States. It is composed of 113 community member agencies representing all major Jewish communities in the United States and the following national agencies: The American Jewish Committee, American Jewish Congress, B'nai B'rith, Anti-Defamation League of B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Inc., Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism and Women's American ORT, Inc. The 106 community member agencies can be found in the appendix to the brief in *County of Allegheny* v. *American Civil Liberties Union*, Nos. 87-2050, 88-90 and 88-96 filed December 1988. The Jewish community, through the actions of NJCRAC's member agencies, have long sought to insure the protections afforded by the Constitution and the Bill of Rights.

The Jewish community shares with others the reverence for life, on the one hand, and the pluralistic society's concern for individual rights and religious liberty. Within the Jewish community itself there is a spectrum of positions on the matter of abortion. For this reason, NJCRAC believes that the Supreme Court should retain the existing rules set forth in *Roe* v. *Wade* so that the abortion decision can be made by individual women in accordance with their own religious and moral views consulting with their physicians and their spiritual advisors.

Statement of Interest of The Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly

The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all 50 states. Through its antecedent religious bodies, it has existed as an organized religious

denomination within the current boundaries of the United States since 1706. It has approximately 3.1 million active members and approximately 11,600 congregations organized into 172 presbyteries and 16 synods. From a theological perspective, biblical faith depicts individuals as stewards of life, heirs who are responsible for the care of God's world. Through its General Assembly, as its highest governing body, the Presbyterian Church (U.S.A.) has stated that the morality of abortion is a question of stewardship of life and abortion can, therefore, be considered a responsible choice within a Christian ethical framework when, for example, serious genetic problems arise or when resources are inadequate to care for a child appropriately.

The Presbyterian Church (U.S.A.) exists within a very pluralistic environment. Its own members hold a variety of views regarding abortion. Because of this pluralism of beliefs, the General Assembly has repeatedly affirmed that, although abortion should not be used as a method of birth control, the abortion decision must remain with the individual, must be made on the basis of conscience and personal religious principles, and must remain free from governmental interference. Thus, the legal right to have an abortion is a necessary prerequisite to the exercise of conscience in abortion decision. Further, the General Assembly has repeatedly urged Presbyterian congregations and their individual members to provide a supportive community in which a decision concerning the termination of pregnancy can be made in a setting of care and concern, to affirm a woman's ability to make responsible decisions, whether the choice be to abort or to carry the pregnancy to term, to protect the privacy of individuals involved in the abortion decision and to oppose attempts to limit access to abortion through legislation which has the effect of harassing women who are contemplating abortion.

Statement of Interest of Religious Coalition for Abortion Rights And Statements of Its State And Regional Members

The Religious Coalition for Abortion Rights is composed of 30 national religious organizations — Protestant, Jewish and other faith groups. We hold in high respect the value of potential human life; we do not take the question of choice lightly.

Because each denomination and faith group represented among us approaches the issue of choice from the unique perspective of its own theology, members hold widely varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads us to the convictions that the abortion decision must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference.

Therefore we reaffirm the Supreme Court ruling of 1973, *Roe* v. *Wade*, which permits a woman to make a decision regarding abortion based on her own conscience and religious beliefs. We oppose efforts to enact into secular law one particular religious doctrine on abortion or the beginning of human life.

Statement of Interest of Religious Coalition for Abortion Rights-Maryland

The Maryland Religious Coalition for Abortion Rights is a statewide organization representing nineteen religious groups in Maryland that support and work to protect religious freedom.

In a pluralistic society each denomination's beliefs must be respected, protected, and free from government intervention.

Because personhood of the fetus from the moment of conception is a religious teaching of some particular religious denominations, the government must not be for or against abortion.

Statement of Interest of Religious Coalition for Abortion Rights--Missouri

The Missouri Religious Coalition for Abortion Rights favors the reaffirmation of *Roe* v. *Wade* as that decision has been viewed by the Supreme Court in the past. As people of faith we hold in high respect the value of potential human life and do not take the question of abortion lightly. At the same time, we see the moral dimension of human life, which unborn human life lacks, as qualifying women for constitutional protection whenever a choice must be made between a woman's "life, liberty and pursuit of happiness" and the continued existence of any unborn life she might be carrying. Abortion is ultimately a religious issue. We believe that every woman must have the freedom to make decisions concerning abortion based on her own conscience and religious beliefs.

Religious Coalition for Abortion Rights of New York State

Religious Coalition for Abortion Rights of New York State (RCAR/NYS), affiliated with RCAR/USA, is an alliance of diverse religious groups. RCAR/NYS works to educate religious groups and the public about the diversity of religious views on human sexuality, reproduction and abortion. RCAR/NYS provides education concerning threats to religious freedom posed by legislation and activities designed to restrict sexual and reproductive choices. RCAR/NYS supports the right of individual women and families to make the choice of whether and when to bear children, based on individual conscience and personal faith. RCAR/NYS opposes any legislation or action that would make services inaccessible to any group of women.

Statement of Interest of Religious Coalition for Abortion Rights of Northern California

We believe in the sanctity of human life but also that there are situations in which abortion may be a moral alternative for the woman who faces a problem pregnancy. In defending a woman's right to choose, over the rights of a developing fetus, society allows her choice to be in accord with her own conscience and religious beliefs.

Statement of Interest, St. Louis Catholics for Choice

We, St. Louis Catholics for Choice, request the Supreme Court to reject the petition of *Webster* v. *Reproductive Health Services*. We see decisions about reproduction as a very important aspect of our moral lives and separate from our decisions about our sexual lives. We see the availability of safe legal abortions as necessary for practical and humanitarian reasons. We value motherhood too highly to view it merely as a biological process which must not be interrupted once started.

We affirm women as fully human, competent moral agents capable of making responsible choices in matters of reproduction.

Statement of Interest of The Union of American Hebrew Congregations

The Union of American Hebrew Congregations is the national congregational body of Reform Judaism comprising approximately 1.3 million members from over 830 Reform synagogues throughout the United States and Canada. To deal with issues of public policy, the UAHC maintains a Commis-

sion on Social Action in cooperation with the Central Conference of American Rabbis, the National Federation of Temple Sisterhoods, and all other arms of Reform Judaism. The highest policy-making body of the UAHC is the General Assembly. At its 1975 biennial convention, delegates voted overwhelmingly to support the constitutional right of a woman to obtain a legal abortion if she freely chooses to do so, as determined by the Supreme Court in the 1973 landmark decisions of *Roe* v. *Wade* and *Doe* v. *Bolton*. In 1981, at the 56th General Assembly of the UAHC the delegates reaffirmed this position declaring that women must be free to exercise their moral and religious conscience regarding abortion.

Statement of Interest of Unitarian Universalist Association

The Unitarian Universalist Association is a voluntary religious association of 1,000 congregations in the United States and abroad dedicated to the principles of a free faith, the right to an individual conscience and to the promotion of the inherent worth and dignity of every person.

The Unitarian Universalist Association has long advocated the right of every woman to decide whether she should bear a child. We believe that the issue of abortion is morally complex and thus must be decided by each individual and must remain a legal option.

The Unitarian Universalist Association firmly believes that circumscription or prohibition of the right to terminate a pregnancy by qualified medical practitioners is an affront to human life and dignity.

In the last two decades, the Unitarian Universalist Association has repeatedly affirmed its belief that women of any age or marital or economic status have the right to have an abortion upon medical/social consultation of her own choosing.

Statement of Interest of Women in Mission and Ministry, Episcopal Church USA

The Episcopal Church USA is the United States branch of the Anglican Communion and we represent two million Americans. At our last triennially held General Convention in 1988 we reaffirmed our support for women's rights over their own bodies which was first passed in 1967. The resolution states:

"Resolved:

The position of this Church, stated at the 62nd General Convention of the Church in Seattle in 1967, which declared support for the 'termination of pregnancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that the child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest' is reaffirmed. Termination of pregnancy for these reasons is permissible."

The Episcopal Church's position has been consistent and unchanging. We stand firm in our resolve to be pastorally supportive of women in their choices and will work to maintain a society where they do indeed have constitutionally guaranteed choices.

Statement of Interest of Women's League for Conservative Judaism

The Women's League for Conservative Judaism founded in 1918 is an international organization of Jewish women which is associated with the Jewish Theological Seminary and works closely with the United Synagogue of America and the World Council of Synagogues.

It is dedicated to the perpetuation of traditional Judaism in our modern society and the translation of its high ideals into

practice through living Judaism in the home, the Synagogue and the community. Because reverence for life is the cornerstone of the Jewish heritage, it believes that abortion should be "legally available, but ethically restricted."

Statement of Interests of The Right Reverend O'Kelley Whitaker, Episcopal Bishop of Central New York; The Right Reverend Coleman McGehee, Episcopal Bishop of Michigan; The Right Reverend Bill Burrill, Episcopal Bishop of Rochester; The Right Reverend John S. Sprong, Episcopal Bishop of Newark; The Right Reverend David E. Johnson, Episcopal Bishop of Massachusetts; and The Right Reverend Barbara C. Harris, Episcopal Suffragan Bishop of Massachusetts.

As bishops of the Episcopal Church we have several concerns about the Missouri statute. We know that scientists, ethicists, theologians, and other faithful persons differ about the time that life begins, and we worry when states attempt to answer existential questions by statute. Similarly, we recognize the decision to have or not to have an abortion is a profound and personal decision to be made by the moral agent involved (that is to say, by the pregnant woman). We must object to any statute which would deny an individual the information necessary to make an informed decision about her reproductive health or the ability to act upon that decision.

APPENDIX B

Here is a full listing of the organizations joining this brief as amici curiae supporting appellees:

Albuquerque Monthly Meeting of Reiigious Society of Friends

American Friends Service Committee

American Humanist Association

American Jewish Committee

American Jewish Congress

Americans for Religious Liberty

Anti-Defamation League of B'nai B'rith

B'nai B'rith Women

Board of Homeland Ministries — United Church of Christ

Commission on Social Action of Reformed Judaism

The Episcopal Diocese of Massachusetts — Women in Crisis Committee

Episcopal Diocese of New York

Episcopal Women's Caucus

Federation of Reconstructionist Congregations and Havurot

General Board of Church and Society — The United Methodist Church

Institute of Women Today

Jewish Labor Committee

NA'MAT

North American Federation of Temple Youth

National Assembly of Religious Women

National Council of Jewish Women

National Federation of Temple Sisterhoods

National Jewish Community Relations Advisory Council

The Presbyterian Church (U.S.A.)

The Religious Coalition for Abortion Rights (including: Buffalo and Western New York Religious Coalition for Abortion Rights; The Religious Coalition for Abortion Rights in Kansas; Maryland Religious Coalition for Abortion Rights; Missouri Religious Coalition for Abortion Rights; New Jersey Religious Coalition for Abortion Rights; New Mexico Religious Coalition for Abortion Rights The Religious Coalition for Abortion Rights of New York State; and The Religious Coalition for Abortion Rights of Northern California)

St. Louis Catholics for Choice

Union of American Hebrew Congregations

Unitarian Universalist Association

Unitarian Universalist Women's Federation

United Church of Christ Coordinating Center for Women

United Church of Christ Office of Church in Society

Washington Ethical Action Center of the American Ethical Union

Women in Ministry — Garrett Evangelical Seminary

Women in Mission and Ministry — Episcopal Church U.S.A.

Women's League for Conservative Judaism

The Right Reverend Bill Burrill, Bishop of the Episcopal Church of Rochester, The Right Reverend Barbara C. Harris, Suffragan Bishop of the Episcopal Church of Massachusetts, The Right Reverend David E. Johnson, Bishop of the Episcopal Church of Massachusetts, The Right Rev-

erend Edward W. Jones, Bishop of the Episcopal Church of Indianapolis, The Right Reverend Coleman McGehee, Bishop of the Episcopal Church of Michigan, The Right Reverend John S. Spong, Bishop of the Episcopal Church of Newark, The Right Reverend John T. Walker, Bishop of the Episcopal Church of Washington, D.C., and The Right Reverend O'Kelley Whitaker, Bishop of the Episcopal Church of Central New York.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR AMERICANS FOR DEMOCRATIC ACTION; COALITION OF LABOR UNION WOMEN; COMMITTEE OF INTERNS AND RESIDENTS; FEDERALLY EMPLOYED WOMEN; PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO AS AMICI CURIAE

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BRIEF FOR
AMERICANS FOR DEMOCRATIC ACTION;
COALITION OF LABOR UNION WOMEN;
COMMITTEE OF INTERNS AND RESIDENTS;
FEDERALLY EMPLOYED WOMEN;
PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO
AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

This brief *amici curiae* is filed with the consent of the parties as provided for in the Rules of this Court.

Amicus Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights leaders, academicians, business people, trade unionists, elected officials, church leaders, professionals, members of Congress, and Americans from many other walks of life. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

Amicus Coalition of Labor Union Women (CLUW) is a national organization of women and men who are members of more than sixty-five national and international unions. CLUW has 45 active chapters throughout the United States and a National Executive Board composed of the female leadership of national labor organizations. Many members of CLUW are professional public employees who object to governmental interference in the communication between themselves and their clients or patients.

Amicus Committee of Interns and Residents (CIR), founded in 1957, is the oldest and largest union of salaried doctors in the United States. CIR currently has collective bargaining agreements which cover 5,000 salaried doctors in New York, New Jersey, and Washington, D.C. Many members of CIR are employed by public entities and believe that, as publicly-employed physicians, they

have the same obligation to provide their patients with well-considered professional advice and expertise as physicians in the private sector.

Amicus Federally Employed Women (FEW) is a nonprofit, membership organization that represents over 800,000 women employed by the federal government. FEW's purpose is to eliminate sex discrimination and promote the advancement of women in the federal workplace.

Amicus Public Employee Department, AFL-CIO, is an organization of thirty-three national and international labor organizations with a total membership of 4,500,000 men and women working, for the most part, in governmental employment. Many of the public employee members of Public Employee Department unions are health care and other professional employees deeply concerned with providing their patients and clients with professional services of the highest quality. Those members are concerned with the First Amendment issues involved in this case because they do not believe that the government should be able to prevent them from fulfilling their professional responsibility to provide their clients and patients with their best professional information and advice regarding matters within their realm of expertise.

SUMMARY OF ARGUMENT

I. Of the questions presented for review in this case, this brief *amici curiae* addresses only the First Amendment issue: May health care professionals who are public employees be required, as a condition of employment, to refrain from providing their patients or clients with truthful information and medically appropriate advice that it is their professional duty to communicate? Before addressing this issue, however, we first consider whether the question is fairly presented by this case in its current posture.

1. Of the three different provisions of the Missouri statute here in question that place limits upon "encouraging or counseling a woman to have an abortion", only one—the proscription on the expenditure of public funds for that purpose (hereafter the "public funds provision") —is now contended by the state to be consistent with the First Amendment. Missouri represents to this Court, albeit less than wholeheartedly, that the public funds provision neither restricts the expenditure of funds for providing information about abortion (as opposed to affirmative advice to procure an abortion), nor prevents public employees from providing information *and* advice to procure an abortion as an incidental part of their broad professional consultation duties.

2. The first limiting construction suggested by Missouri—that the public funds provision reaches advocacy but not nondirective counseling regarding abortions—is one this Court need not address. For, as this Court had reason to explain in *Thomas v. Collins*, 323 U.S. 516 (1945), a statute which purports to permit objective or abstract discussion but not advocacy will necessarily restrain the former as well as the latter, given the inherent difficulties of distinguishing between the two. Consequently, the public funds provision must be considered, for First Amendment purposes, as identical to a statute that in terms restricts nondirective health care counseling.

3. On the other hand, Missouri's second suggestion regarding the limited intent of the public funds provision is one that this Court should in fact entertain. If, as Missouri in its brief at some points (but not others) indicates, the public funds provision will have no adverse effect upon the ability of health care professionals employed by the state to provide abortion counseling as part of their broader professional responsibilities, then there would be no case or controversy in this case concerning any First Amendment issue. And declining to determine the proffered First Amendment issue would be consistent with this Court's general policy of adjudicating constitutional issues, particularly novel and difficult ones, only when strictly necessary.

4. This Court cannot, however, simply accept Missouri's representations as to the limited reach of the public funds provision. For one thing, those representations are so "opaque" that it would be unwise to base a constitutional adjudication on the state's litigating position. Indeed, this Court recognizes that it is unfair to litigants to simply accept the construction of state statutes alleged to chill First Amendment rights proffered by attorneys for the state but not accepted as authoritative by any agency or court, state or federal.

Instead, this Court has developed a variety of mechanisms for determining whether a limiting construction of a state statute under constitutional attack is appropriate. Of those devices, abstention is generally disfavored where First Amendment rights are at issue. Certification to the highest state court, while often proper, is not available here because Missouri law has no provision for certification. The third alternative is for the federal courts to construe the state statute themselves where a limiting construction is reasonably apparent from the statutory scheme.

The importance of the statutory interpretation question here has been altered significantly on appeal to this Court: Because the state now concedes the invalidity of the statutory language that directly limited the counseling activities of professional public employees, a narrowing construction of the public funds provision would avoid the need to decide at all the First Amendment issue the state seeks to adjudicate. For this reason, and because the statutory structure indicates that the public funds provision was not intended to reach abortion counseling provided as part of programs whose larger *purpose* is to provide health care to pregnant women rather than simply to advocate abortions, this Court should itself determine that the public funds provision is so limited. *Frisby v. Schultz*, —— U.S. ——, 108 S. Ct. 2495, 2501 (1988).

II. The relationship between a health care professional and patient or client is one that, under the common law, is confidential, creates a fiduciary obligation on the part of the doctor, and requires that the doctor communicate to the patient both relevant information regarding the patient's medical options and the professional's best judgment regarding the appropriate course to follow. The professional's obligation to provide patients with appropriate information and advice applies without regard to whether the patient or some third party is paying for the consultation. The question in this case is therefore whether Missouri can consistently with the First Amendment require that health care professionals employed by the state forego making communications to their patients that they have a professional obligation to make.

While the First Amendment gives wide berth to the government in communicating its views to the populace, there are nonetheless significant limitations upon the government's authority to control the use of public resources so as to suppress some ideas and promote others. This Court's nonpublic forum cases so illustrate: even as to government-controlled modes of communication where the government may make identity and content distinctions between users, viewpoint proscriptions are impermissible. Certain public employment relationships, including those of professors in public universities and those in which the government employs individuals to enter into traditional professional relationships with lay clients, closely resemble the nonpublic forum situations. Consequently, the same viewpoint distinction proscription should apply to such employment situations. Since the professed purpose of the public funds provision is to foster an official viewpoint concerning abortion, and since only advice favoring and not advice disfavoring abortion is proscribed, the public funds provision as applied to health care professionals employed by the state is unconstitutional.

ARGUMENT

I

This brief *amici curiae* is concerned with whether a state may, consistently with the First Amendment, preclude health care professionals who are employed by the government from providing their patients and clients with confidential information and advice concerning the availability and advisability of perfectly legal medical procedures that similar professionals not employed by the government would be expected to provide as part of their professional services. Although raised here in the emotional abortion context, the question is a generic one, with implications that stretch beyond the health care situation to include other kinds of professional relationships and contexts. Neither the specific First Amendment question raised in this case nor the broader issue of the protection afforded confidential professional communications of public employees generally by the First Amendment is an issue this Court has had occasion previously to address.

Before proceeding to explore briefly the substantive First Amendment issue, however, we consider whether the issue is actually raised in this case as it now stands. The attorneys for Missouri have in the course of this litigation suggested that the state statute, to the extent that it is now contested, may not in fact preclude professional public employees such as the plaintiffs in this case from offering information and advice to their patients concerning the availability of procuring an abortion not necessary to save the mother's life. Instead, appellants indicate, albeit somewhat ambiguously, that the statute as it now stands would permit such employees, without endangering their jobs, to offer their own best professional judgment as to whether an abortion is the appropriate alternative for the particular patient. Because these representations are neither binding upon the officials entrusted with enforcing the Missouri statute here at issue nor sufficiently unambiguous to provide reliable assurance to the affected public employees, however, this Court should directly address, affirm, and clarify the statutory construction suggested by appellant's attorneys, thereby avoiding any need to address the First Amendment issue presented by this case.

1. There are three provisions of the Missouri statutory scheme here at issue that, on their faces, may impact upon the ability of professional public employees to provide their patients with information and advice concerning abortions. The first makes it:

> "unlawful for a doctor, nurse, or other health care professional, a social worker, a counselor, or person of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life." [RSMo. § 188.210 (1986).]

The second provides that no "public facility" may be used "for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life." RSMo. § 188.215 (1986). And the third states that it is "unlawful for any public funds to be expended for the purpose . . . of encouraging or counseling a woman to have an abortion not necessary to save her life." RSMo. § 188.205 (1986).

In the district court, the state maintained, first, that none of these provisions "prevent a physician from informing a woman of 'all options' or the 'pros and cons' of an abortion" (J. St. App. A45), and second, that even if the section that directly prohibits public employees from encouraging and counseling abortions is unconstitutional, the "public funds" section, § 188.205, is valid because it is "*not* directed at any plaintiff, either as a physician or other health care provider, but only at 'state and local officials or legislative bodies responsible for expending public funds.'" J. St. App. A45.

In the course of holding the "encouraging or counseling" provisions of the statute as a whole void for vagueness, the district court, without actually rejecting the proffered interpretations on their merits, refused to rely upon them as affecting the constitutional issues before the court: The first suggestion, said the court, was insufficient, even if accepted as within the legislature's intent, to affect the constitutionality of the statute, given the inherent lack of precision in any line drawn between simply providing information and counseling or encouraging a particular course of action. J. St. App. A44-46.[1] As to the "public funds" provision, the district court did not directly endeavor to determine whether the statute could be readily construed so as to avoid the conclusion that it forbids public employees from providing information and advice regarding abortion in the course of carrying out their ordinary medical consultations. Rather, the court simply stated, in the negative, that it was "unpersuaded that § 188.205, which relates to 'public funds,' could *not* apply to inhibit the free speech of any health care provider." J. St. App. A46 (emphasis supplied). And in addressing the merits of the First Amendment issue, as opposed to the vagueness contention, the district court did not separately consider the "public funds" provision at all. Instead, the court considered the three "encouraging and counseling" provisions together, and concluded that they were unconstitutional because they could deny access to medical information affecting a woman's decision whether to continue a pregnancy even where the patient paid the full cost of the counseling. J. St. A49-50.

[1] In support of this conclusion, the district court cited specific evidence in the record that, to avoid "encouraging or counseling" abortions, health professionals (in at least one instance on the basis of a directive issued by the employing hospital) either were providing no information at all concerning abortions to their patients, or were attempting to "steer their conduct far wider than the lawful zone." J. St. App. 44-45.

On appeal, the court of appeals affirmatively addressed and rejected the state's suggestion that the "encouraging" and "counseling" language as it appeared in the statute should be read as "banning only 'affirmative advocacy.'" J. St. App. A67. The court of appeals believed that such an interpretation would read the term "counseling" as synonomous with "encouraging," thereby violating the "basic principles of statutory construction . . . that a statute should be interpreted so as not to render one part inoperative." J. St. A68. In addition, the court of appeals agreed with the district court that however construed, the term "counseling" "is fraught with ambiguity" and would have the effect of chilling even that objective speech the state contends is outside the intended legislative reach. J. St. App. A68.

Unlike the district court, however, the court of appeals did not mention at all the possibility that the "public funds" provision should be read so as not to overlap with the "public employees" section. Instead, the court of appeals treated the "encouraging or counseling" language of the public employee, public funds, and public facilities sections together, and held all three, without differentiation, both unconstitutionally vague and an "unconstitutional infringement of the right to choose an abortion protected by the fourteenth amendment." J. St. App. 73.[2]

In this Court, Missouri does not seek review of the court of appeals' holding that the public employees and public facilities provisions are unconstitutional insofar as they proscribe "encouraging" or "counseling" women with respect to abortions. *See* J. St. i-ii; *id.*, Question 4 ("Is a state civil statute facially unconstitutional that makes it 'unlawful for any public funds to be expended . . . for the purpose of counseling a woman to have an abortion

[2] Thus, the court of appeals did not address any First Amendment issue, as such, on the merits, although it assumed for purposes of the vagueness analysis that "[t]he prohibition on 'encouraging or counseling' implicates [the] first . . . amendment rights of both physicians and their patients." J. St. App. A67.

not necessary to save her life.'" See RSMo. § 188.205 (1986). And the state maintains, once again, that the "encouraging or counseling" phrase of the statute "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Brief for Appellants ("App. Br.") at 42.

Moreover, the state now expands upon its contention that the public funds section, taken alone (as it now must be, with the unconstitutionality of the public employees section settled), does not impede the ability of health care providers to communicate with their patients concerning abortions:

> Section 188.205 does not forbid speech; it is only concerned with the spending of public money. . . . The language of § 188.205 directs officials not to expend public funds under their control for the purpose of . . . encouraging or counseling a woman to have an abortion not necessary to save her life. . . . Obviously the language of this statute does not forbid any discussion regarding abortion issues. . . .
>
> Section 188.205 is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds. . . . The statute does not forbid *incidental* use of funds for counseling, so long as the expenditure has a legitimate *public purpose*. [App. Br. 38, 39, 43.]

This language suggests, but does not clearly state, that a health care provider employed by the state could, without fear of losing his or her job, provide information and advice concerning abortion in the course of a session with an individual patient or client whose *purpose* is to provide an ordinary medical consultation, and not simply to advocate abortion. There is reason to believe, at the same time, that Missouri has carefully chosen the language in its brief to create the *impression* that public employees may provide abortion information and advice

with impunity under the public funds provisions without fully committing the state to that position. Thus, the state's discussion may leave open the possibility that the funding officials could condition the expenditure of funds upon an assurance that employees paid with the funds will not advise a woman to have an abortion; the public hospital or other entity receiving the funds could then make abiding with that funding provision a condition of employment for affected public employees.[3] Under this scenario, the statute itself directly affects only the funding officials, but the consequences for public employees would be that they endanger their jobs if they provide to patients not paying their own fees their best professional judgment on the question of abortion.

2. In our view, the first statutory construction question raised by Missouri's arguments in this Court—whether the "encouraging or counseling" language used in the public funds provision reaches nondirective counseling to woman concerning the abortion option, or only specific advice from a health care professional to a patient that the best medical course for her would be to procure an abortion—is not one pertinent to the resolution of any First Amendment issue before this Court.

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[3] For example, the state argues that the state may consistently with the First Amendment, "absolutely restrict[]" public employees from encouraging or counseling a woman to have an abortion where the counseling services are paid for with public funds. App. Br. at 39-40. In the first place, including this argument at all is inconsistent with the suggestion that the public fund provision in fact contains no such restriction. And second, read against this argument, the statements that the statute does not forbid discussion of abortion or control the conduct of public health care professionals may simply mean that the statute controls only the counseling services they provide when paid for with public funds, not the services they provide when the patient pays for the counseling services. *See* J. St. App. A49-50 (district court holding that the public employee and public facility provisions are unconstitutional because they limit the counseling activities of publicly-employed health care professionals even when those activities are fully paid for by the patient).

For the two courts below were surely correct in concluding that any constitutional infirmity in Missouri's regulation of abortion-related speech by professional employees could not be cured by differentiating between providing information about abortions and advocating that a particular patient seek an abortion.

This Court addressed in *Thomas v. Collins*, 323 U.S. 516 (1945), a similar attempt to save a speech-restraining statute[4] by arguing that the statute prohibited only advocacy of a specific, lawful course of action by particular individuals (in *Thomas*, "solicitation" of particular workers to join a union) and not speech generally discussing the merits and demerits of that course of action (in *Thomas*, discussing the availability and advantages of labor organizations as a solution to the problems of workers generally). This Court concluded in *Thomas* that because the distinction between advocacy of a specific course of action and merely discussing unionism was an inherently ephmeral one, the statute in question had to be judged on the assumption that it reached the latter as well as the former. This Court's sensitive discussion of why that was the case in *Thomas* has application by analogy here:

> A speaker . . . could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. . . . General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to different [individuals]. How one might "laud unionism" . . . yet . . . not imply an invitation, is hard to conceive.

[4] We are not at this juncture prejudging the question whether any restraint worked by RSMo. § 188.205 upon speech by professional public employees is unconstitutional. Rather, the point made in the text is that the narrowing construction suggested by the state concerning the "encouraging or counseling" abortion language would not, if adopted, make the statute any *more* valid than it would be without the limiting construction.

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clearcut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. *It compels the speaker to hedge and trim.* . . . The vice is not merely that invitation, in the circumstances shown here, is speech. *It is also that its prohibition forbids or restrains discussion which is not or may not be invitation.* The sharp line cannot be drawn surely or securely. [323 U.S. at 534-35 (emphasis supplied).]

So here: The relationship between a doctor and a patient, for example, is necessarily one in which the patient is dependent upon the doctor's expertise, and is seeking from the doctor not only information but also specific advice as to the best course to follow.[5] Even if the doctor refuses to provide such advice in explicit terms, it is quite likely that the patient will nonetheless, expecting the doctor to prescribe a specific course of action, perceive advice to be implicit in the information provided. Thus, no health care professional consulted by a pregnant woman "safely could assume that anything he might say upon the general subject [of

[5] For example, a patient consulting a doctor for an upper respiratory infection expects more than a list of the various medications available to treat such infections; he or she expects as well an indication of which one, in the doctor's expert judgment, is best suited for the patient's circumstances.

abortion] would not be understood by some as [affirmatively advocating to a particular woman that she have an abortion]." *Thomas v. Collins, supra,* 323 U.S. at 535.

Consequently, the prohibition of affirmative advocacy of abortion *necessarily* "forbids or restrains discussion which is not or may not be [advocacy]," (323 U.S. at 535), and must be considered for purposes of constitutional analysis as identical to a rule that explicitly reaches nondirective counseling concerning the abortion option.[6] For that reason, this Court need not address the precise reach of the "encouraging or counseling" language of the public funds provision of the Missouri statute.

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[6] We note that the analysis in the text differs somewhat from the vagueness analysis upon which the district court and the Court of Appeals relied. Both courts held that the "encouraging or counseling abortion" language in the Missouri statute was subject to heightened scrutiny for unconstitutional vagueness because that language would necessarily discourage speech by public employee professionals to their patients simply providing information on the abortion option. *See* J. St. App. at A45-46, A67. But this vagueness approach, *assumes*, without purporting to decide, that health care professional public employees have a First Amendment right to provide at least nondirective counseling regarding medical procedures to their patients, regardless of any policy pronouncements to the contrary by their public employers. While we believe that that position is ultimately correct (*see* Part II, *infra*), we do not believe that the proposition is so self-evident as to support a ruling that the statute is unconstitutionally vague without considering the merits of the First Amendment issue.

On our analysis, however, the import of the observation that the "encouraging or counseling" abortion language will necessarily discourage both nondirective and advice-oriented consultations by health care professionals paid with public funds is not to hold the statute unconstitutionally vague for that reason. Instead, the ephemeral nature of any distinction between providing abortion-related information and advising a woman to procure an abortion is important because it defines the *merits* of the First Amendment issue as necessarily encompassing *any* kind of abortion-related consultation between health care professionals paid with public funds and their patients.

3. In contrast, the second statutory construction issue raised by Missouri in this Court—whether the public funds provision of the statute has any impact upon the right of health professionals who are public employees to counsel their patients regarding abortions as part of their ordinary medical consultations—could be dispositive of any First Amendment issue raised by the "encouraging or counseling" language of the public funds provision. None of the plaintiffs in this case has any controversy with defendants concerning the expenditure of public funds as such. Rather, the organizational plaintiffs are private non-profit organizations that for purposes of this lawsuit are not seeking to use any public funds to support any abortion counseling they may provide. J. St. App. A10. And the individual plaintiffs are health care professional public employees who, while paid with public funds, have no responsibility for dispersing such funds. Rather, for purposes of the "encouraging or counseling abortion" public funds provision, those individuals are concerned only with assuring that they can continue, in the course of their practices, to provide pregnant women patients who consult them as medical professionals with both information and recommendations concerning the advisability of a legal abortion. J. St. App. A10, 48.

The courts below have held that insofar as the Missouri statutes specifically forbid public employees to engage in this conduct, the statutes are invalid. Thus, unless RSMo. § 188.205, the public funds section, overlaps with the now-inoperative public employee provision, the individual plaintiffs are in no danger that their government jobs will in the future be conditioned upon refraining from providing abortion counseling in the course of their professional consultations, and there is no longer any case or controversy between plaintiffs and defendants concerning the constitutionality of the "encouraging or counseling" prohibitions of the public funds aspect of the statute. If that is the case, the appeal, as to that issue

should not be entertained. *See, e.g., Hall v. Beals*, 396 U.S. 45, 48 (1969); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972).

This disposition of the First Amendment issue in this case would have a distinct jurisprudential advantage: As we briefly develop below (*see* Part II, *infra*), the First Amendment issues that would be raised by any governmental interference with the substance of confidential communications within a fiduciary professional-client relationship are substantial and sensitive ones, and remain so whether the professional employee in question is a public employee or not. This Court has long adhered to a "policy of strict necessity in disposing of constitutional issues," (*Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947)), and has applied that policy particularly to cases raising novel and important constitutional questions where, for one of various reasons, those questions are not as sharply presented as they might be. *E.g., Rescue Army v. Municipal Court, supra*, 331 U.S. at 565-68 (refusing to exercise appellate jurisdiction where, *inter alia*, the appropriate construction of the statute in question was "ambiguous" and the record presenting the constitutional question in "highly abstract form"); *Minnick v. California Department of Corrections*, 452 U.S. 105, 127 (1981) (refusing to decide the validity of an affirmative action program "because of significant developments in the law—and perhaps in the facts as well—" since the litigation of the case began); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring) (explaining that the reason for dismissing certiorari was that "this record is too opaque to permit any satisfactory adjudication of [the constitutional] issue proffered"); *Kremens v. Bartley*, 431 U.S. 119, 133-34 (1977). And, in particular, where a constitutional issue can be avoided by interpreting a statute so as to clear up any ambiguities as to the statute's effect upon constitutional rights and at the same time pretermit any constitutional question, this Court has preferred that course. *E.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const., Trades Council*, —— U.S. ——, 108 S. Ct. 1392, 1397 (1988); *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

4. The question then becomes whether the "encouraging or counseling" aspect of the public funds provision in fact reaches, directly or indirectly, the professional consultation function of public employees engaged in medical practice generally, and not in abortion advocacy alone. While Missouri has indicated that RSMo. § 188.205 may not have that reach, the representations of its attorneys concerning the precise reach of that section are, at least, "opaque." *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring). *See* pp. 10-11, *supra*. And, in any event, this Court does not simply accept the representations of a state's attorneys in this Court as to the appropriate construction of a state statute. Since such representations do not bind state courts or state enforcement authorities, blind acceptance of those representations leave the plaintiffs in the position of fearing sanctions should they engage in the conduct they claim to be protected by the First Amendment. *Virginia v. American Booksellers Assoc., Inc.*, —— U.S. ——, 108 S. Ct. 636, 644 (1988); *Frisby v. Schultz*, —— U.S. ——, 108 S. Ct. 2495, 2501 (1988) (first adopting a narrowing construction of the statute in question, and then noting that the interpretation "is *supported* by the representations of counsel for the town at oral argument") (emphasis supplied); *id.* at 2505 (White, J., concurring) (counsel's representations are not "authoritative statements of the law").

Rather, when faced with the need to determine whether a proffered limiting interpretation of a state statute is valid, this Court has chosen from among several options.

One option is to remand to the district court with directions to abstain from deciding the constitutional question while the parties repair to state court to settle the statutory constriction issue. This Court, however, has been "reluctant to abstain in cases involving facial challenges based on the First Amendment." *City of Houston v. Hill*, —— U.S. ——, 107 S. Ct. 2502, 2512 (1987). "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protest." *Zwickler v. Koota*, 389 U.S. 241, 252 (1987), *quoted in City of Houston v. Hill, supra*, 107 S. Ct. at 2513.

Another alternative available to this Court in securing an adjudication of the meaning of a state statute challenged on First Amendment grounds is to certify the statutory question to a state's highest court, while leaving in effect during the certification process any injunction issued by the lower federal courts preventing application of the statute on constitutional grounds. *Virginia v. American Booksellers Assoc. Inc., supra*, 108 S. Ct. at 644-45. In this instance, however, no certification process is available in the Missouri Supreme Court.

Finally, where "a narrowing construction of state statute is . . . reasonable and readily apparent," the federal courts may themselves construe a state statute so as to avoid constitutional difficulties. *Boos v. Barry*, —— U.S. ——, 108 S. Ct. 1157, 1169 (1988); *see also Frisby v. Schultz, supra*, 108 S. Ct. at 2501. And while this Court ordinarily does not adopt such a limiting construction on its own in the first instance, it may do so where "the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz, supra*, 108 S. Ct. at 2501.

The latter alternative is appropriate in this case. The court of appeals did not address at all the question whether the RSMo. § 188.205, the public funds provision,

should be construed so as not to preclude public employees from counseling women regarding their abortion options as part of their ordinary professional consultation services. And while the district court did briefly allude to this question of statutory interpretation, that court, quite properly as the case stood at that juncture, took no account of the policy favoring interpretation of statutes to avoid constitutional difficulties, since the separate public employee provision nonetheless required that the basic First Amendment issue raised by the plaintiffs be addressed.

Because the state now accepts the constitutional invalidity of the "encouraging or counseling" aspect of the public employee provision, the current situation is quite different from that faced by the courts below: By a narrowing construction of the public funds provision as it pertains to the First Amendment issue, this Court can entirely avoid the necessity to decide a novel First Amendment issue. And, with the constitutional invalidity of the public employee section conceded, the propriety of such a limiting construction is "readily apparent." *Boos v. Barry, supra*, 108 S. Ct. at 1169: It is reasonable to assume that the legislature addressed the scope of "encouraging and counseling" in which public employees could engage in the statutory section that expressly addressed that issue, and intended the "public funds" section to address the separate question whether public officials could spend money for programs dedicated to the express and narrow *purpose* of providing abortion counseling. Under that view of the statute, professional public employees could, in the course of providing general health services to pregnant women, proffer both information regarding the availability of abortions and their own best expert judgment concerning whether an abortion is medically indicated. Since that is all that the public employees who are plaintiffs in this case propose to do (*see* J. St. App. A48), such a construction would pretermit any

case or controversy regarding the constitutional issues raised by the public funds provision.[7]

In sum, because Missouri has chosen to accept the constitutional invalidity of the part of the statute that most directly implicates the First Amendment issue the state seeks to adjudicate, this case presents the unusual situation in which a limiting construction by this Court of a state statute in order to avoid constitutional adjudication is appropriate. Such a construction would provide Missouri's professional public employees with the protection they need to pursue their professional responsibility as they see it, and at the same time would adhere to this Court's "policy of strict necessity in disposing of constitutional issues." *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947).

II

Because we regard as compelling the argument that the "public funds" provision should be construed so as to avoid any First Amendment controversy between the parties to this case, we address the First Amendment issue originally raised in this case only briefly.

1. In this case, "[t]here was unchallenged testimony at trial that in such situations [when the mother's *health* may be adversely affected, even if it is not an immediate life-threatening condition] a physician has a professional duty to at least suggest or even to urge the pregnant woman to have an abortion." J. St. App. 48. This finding reflects the basic attributes of the relationship between health care (and other) professionals and their patients or clients that is generally recognized and protected in the common law, and that is at the heart of the First Amendment issue in this case.

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[7] This is not to say, of course, that the public funds provision as thus construed would necessarily be constitutional.

Those basic characteristics are, in essence (1) that the relationship is confidential; (2) that the professional possesses expertise within a certain area of knowledge, and applies that expertise to the particular client's problems within that area; (3) that in applying that expertise, the professional is expected to exercise a special duty of care akin to that of a fiduciary, giving the client his or her best expert judgment without regard to the professional's own self-interest or other external considerations. *See generally* F. Lane, *Medical Litigation Guide* §§ 40.03, 40.06, 40.09, 40.10, 40.17; 61 Am. Jur. 2d ("Physicians, Surgeons, and Other Healers") 290-305, 358-371 (1981).[8] Traditionally, a professional owes that standard of care to any individual whom he or she undertakes to treat or counsel, regardless of whether the fees for the consultation are paid by a third party, or by the government. *National Savings Bank v. Ward*, 100 U.S. 195 (1880); *DuBois v. Decker*, 130 N.Y. 325, 29 N.E. 313 (1891). Thus, professionals paid by the government because their patients cannot themselves afford the usual fees are not exempt from the traditional obligations of their profession when they consult with indigent clients. As a general matter, then,

> [t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. . . . Of course a physician can talk freely and fully with his patient without threat of retalia-

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[8] The professional may decline to provide a particular treatment, or may withdraw altogether from the relationship with the client. In either situation, however, the professional's fiduciary duties persist insofar as he or she has a duty to communicate to the client the need for additional treatment, and to provide necessary medical care until the client secures the services of another professional. *See generally*, 61 Am. Jur.2d at 361-69.

tion by the State. [*Poe v. Ullman*, 367 U.S. 497, 513-14 (1961) (Douglas, J., dissenting).] [9]

The First Amendment question in this case is whether, as Missouri argues, a health care or other professional loses any of the First Amendment's protection for communication that it is his or her professional duty to provide simply because the fees for his or her professional services are paid by the government rather than by the individual to whom the care is provided.

2. Missouri supports the proposition for which it argues by a simple syllogism: Government need not permit public employees, paid with public funds, to participate in performing abortions (or, presumably, any other medical procedure); instead, government may discourage certain activities by refusing to fund those activities. *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). By the same token says the state, government does not have an obligation to "subsidize" or promote speech by private citizens. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Ergo, the government is free, without limitation, to limit speech of any kind, and to forbid the expression of some views but not others, as long as the speech could not occur without use of government resources.[10]

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[9] In *Poe*, Justice Douglas filed a dissenting opinion from the court's refusal on prudential grounds to address the constitutional question presented for review and not from an opinion taking an opposite view on the merits. While this Court has not had occasion to revisit the question of the First Amendment protection accorded communication within the professional-patient relationship, Justice Douglas' general proposition that the First Amendment reaches not only public debate and discourse but every manner of communication among citizens has been repeatedly reaffirmed. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

[10] Missouri puts the argument in terms of the government's right to expend its *funds* in support only of speech that it desires to subsidize, presumably because the statutory provision here at issue relates only to funds. But there is nothing inherent in the use of government money, as opposed to the use of other government resources, that should vary the constitutional results. *See*, making the broad argument that the government can withhold *any* form of support from communicative activity that would promote abortion, Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 Harv. L. Rev. 1895 (1988).

But this Court has not sanctioned this glib equation between the government's right to withhold support from disfavored *conduct* and a government right to censor *speech* that is in some measure dependent upon government support for its continuation. Rather, while it is true that the First Amendment has a restricted role to play where the government is seeking to communicate its views to the citizenry,[11] implicit in this Court's First Amendment jurisprudence are several principles that limit the government's ability to foster an official point of view by conditioning the use of government resources for communicative activity upon abiding by government-imposed restrictions.

First, the primacy of the First Amendment necessarily means that there are situations in which the government can bar use of its resources for noncommunicative purposes, but not for speech activity. For example, the public forum cases in one sense concern the question whether and to what degree government can refuse to subsidize speech by providing a suitable location for communication among citizens; absent access to government-owned locations, citizens are not forbidden to speak to each other, but they may find it much more difficult and expensive to do so. *See, e.g., Schneider v. State*, 308 U.S. 147, 161 (1939); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943). This Court has nonetheless recognized that because of pervasive governmental ownership and control over many of the facilities most appropriate for communication among citizens, the fundamental First Amendment value of promoting the exchange of ideas

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[11] *See generally* M. Yudof, *When Government Speaks* (1988); Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 568-69 (1980).

among the citizenry would be irretrievably compromised by a rule giving government the same degree of control over communicative activity on public property as over non-communicative activity. *E.g., Hague v. C.I.O.*, 397 U.S. 496 (1939); *Frisby v. Schultz, supra.* The result is that a city may ban rollerskating from its parks or skateboarding from its streets because it considers the activities dangerous, but may not forbid supporters of abortion from marching on city streets because it considers their ideas dangerous. *Cf. Frisby v. Schultz*, 108 S. Ct. at 2503.

Secondly, the government's ability to foster a particular point of view by manipulating the distribution and use of government resources is more limited than its authority to dedicate certain resources entirely to non-communicative activity, or to limit the subject matter but not the viewpoint of speech supported with public resources. Again, the cases in which this Court has addressed questions of access to government-controlled property or modes of communication demonstrate that this is the case: While the government may restrict in some instances the use of government owned or controlled systems of communication on the basis of the identity of the speaker or the content of the speech, it may not deny the use of such resources on the basis of the *viewpoint* to be espoused, for the *purpose* of suppressing an idea with which the government disagrees. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 87, 46 (1980) ("the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable *and not an effort to suppress expression merely because public officials oppose the speakers' view*"); *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 811 (1985) ("[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *cf. Board of Education v. Pico*, 457 U.S. 853

(1982); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (the government violates an individual's rights by declining to subsidize their communicative activity if it "discriminate[s] invidiously in such a way as to 'aim at the suppression of dangerous ideas'").

Finally, there is no unitary rule concerning whether this general principle proscribing viewpoint discrimination by the government in the distribution of subsidies for communicative activity applies to individuals employed by the government for the purpose of carrying out some government policy, as opposed to individuals who, although using government resources, are in no sense agents of the government for any purpose. Rather, whether or not public employees may claim the same measure of protection for their job-related communicative activity as other individuals whose speech is aided by the use of public resources, or whether public employees are instead deemed in effect to have contracted to carry out governmental policy at the expense of First Amendment rights, depends in large part upon the nature of their employment.

The Court has suggested that because the function of elementary and high schools is in large part "inculcating fundamental values necessary to the maintenance of a democratic political system" (*Anspach v. Norwick*, 441 U.S. 68, 76-77 (1979)), the government has relatively broad authority to control the communication that goes on between teacher and student in the public school classroom. *Cf. Board of Education v. Pico, supra*, 457 U.S. at 864 (plurality opinion).[12] At the same time, where

[12] One would expect, however, that there are limits even on the right of a school board to control speech by a teacher in the class room (in addition to the express limitation worked by the Establishment Clause of the First Amendment, *see Epperson v. Arkansas*, 393 U.S. 97 (1968)). For example, if a school board dictated that a teacher support in the classroom election of candi-

the nature of the public employment is such that the government is in effect paying the salaries of certain individuals so that they may freely communicate with others, the nature of employment relationship is quite analogous to the relationships in the nonpublic forum context, and similar rules protecting against government suppression of speech because of its point of view apply.

For example, a government operated university is not a new form of human endeavor but the continuation, in a particular form, of a kind of organization with a noble history in the development of civilization whose mission, it has been long understood, depends upon a basic freedom of communication among scholars and between scholars and their students:

> The essentiality of freedom in the community of American universities is almost self-evident. . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and *die*. [*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).]

See also Keyishian v. Board of Regents, 385 U.S. 589, 601-03 (1967); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 292 (1984) (Marshall, J., concurring). Thus, a university administration is in effect

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dates with whom she disagreed, or required that she teach factual information that was indisputably incorrect, the restrictions could not be justified by any legitimate educational purposes of the school board. At that point, we would expect, the basis for concluding that the teacher's free speech rights are subordinate to her obligation to perform the job she had contracted to do would no longer obtain, and the restrictions on speech would be invalid.

conducting a nonpublic forum for the exchange of ideas; while the officials may select the participants in that forum, and prescribe the subject matter to be covered, the nature of the governmental endeavor, as established both by tradition and by the transcendent purpose of the institution, is such that interference with free speech on viewpoint grounds would in the long run undermine the government's reason for subsidizing universities in the first place. For that reason, as the cases just cited show, once the government has made the choice to subsidize a university, it must treat the employees of the university not as instruments for communicating government policy, but as independent professionals whose communicative activity the government has chosen to subsidize.

The same should be true regarding the health care professional-patient relationship involved in this lawsuit. The basic relationship is one that the government did not create; rather, the relationship, as developed in the private sector, depends in large part upon confidence, trust, and upon free communication between the doctor or other professional and the patient or client. *See* p. 21, *supra*. Where such communication is constrained in order to suppress a particular viewpoint,[13] the fundamental nature of the relationship that the government has chosen to subsidize is distorted, and the overall purpose of subsidizing the relationship is undermined. Consequently, government may not choose to subsidize a professional-patient relationship that replicates generally that relationship as it has developed in the society at large and then compromise the communicative freedom that is basic to the success of the relationship.[14] Under that analysis,

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[13] That is indubitably the case here. Missouri concedes that the purpose of the statute is to prevent health care professionals from inducing or persuading women to have abortions, because of the government policy that abortions are undesirable.

[14] It is worth noting that at common law, not every professional consultation gives rise to the fiduciary relationship characteristic of such consultations. For example, where an employer, for its own

the public funds provision of the Missouri statute is unconstitutional to the extent, if any, that the provision has the effect of precluding professional employees from fulfilling their professional responsibility to communicate with patients fully concerning available and advisable medical options.

CONCLUSION

For the reasons stated above, the judgment below with respect to the "encouraging" or "counseling" abortion aspects of the public funds provision should be affirmed on the basis that the state statute permits public employees to engage in such "encouraging" or "counseling" as part of a professional consultation with an individual client.

Respectfully submitted,

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purposes and not to subsidize treatment of the employee, directs that an employee be examined by a physician, no doctor-patient relationship giving rise to a special duty of care is created. *E.g. Hoover v. Williamson*, 236 Md. 250, 203 A.2d 861 (1964).

AMICUS CURIAE

BRIEF

(88)

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-605

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OCTOBER TERM, 1988

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On Appeal From The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICI CURIAE OF THE ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS, ET AL., IN SUPPORT OF APPELLEES

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CASES

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City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) . . . . . passim

Colautti v. Franklin, 439 U.S. 379 (1979) 15, 26, 45

Deaconess Hospital v. Ilester McRoberts, No. 8740017 (Cir. Ct. St. Louis Cty., May 21, 1987) 25

Eisenstadt v. Baird, 405 U.S. 438 (1972) 16, 17

Griswold v. Connecticut, 381 U.S. 479 (1965) 16, 17, 42, 50

In re Pescinski, 67 Wis.2d 4, 226 N.W.2d 180 (1975) 27

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McFall v. Shimp, 10 Pa. D.&C.3d 90 (Allegheny Cty. 1978)	26, 27
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Moore v. East Cleveland, 431 U.S. 494 (1977)	17
Olmstead v. United States, 277 U.S. 438 (1928)	17
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Safley v. Turner, 482 U.S. 78 (1987)	58
Schmerber v. California, 384 U.S. 757 (1966)	28
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)	passim

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West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)	49
Whalen v. Roe, 429 U.S. 589 (1977)	17
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Mo. Rev. Stat. § 1.205.1(1) (1986)	passim
Mo. Rev. Stat. § 1.205.1(2) (1986)	passim
Mo. Rev. Stat. § 188.205 (1986)	passim
Mo. Rev. Stat. § 188.210 (1986)	passim
Mo. Rev. Stat. § 188.215 (1986)	passim

Page

OTHER AUTHORITIES

Adashi, "The Morning After: novel hormonal approaches to postcoital interception," 39 Fertil. & Steril. 267-69 (1983) 33

Alvarez, et al., "New insights on the mode of action of intrauterine contraceptive devices in women," 49 Fertil. & Steril. 768 (1988) 34

American College of Obstetricians and Gynecologists, Department of Professional Liability, Alert: Professional Liability Implications of AFP Tests (May 1985) 59

Brief Amicus Curiae of American Medical Ass'n, et al. 23, 45

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Brody, "The Meaning of Informed Consent," Michigan Medicine 557 (Nov. 1984) 52

Cates, "Abortion Myths and Realities: Who is Misleading Whom," 142 Am. J. Obstet. & Gynec. 954 (1982) 10

Cates, "Legal Abortion: The Public Health Record," 215 Sci. 1586 (1982) 9

Current Opinions of the Council of Ethical and Judicial Affairs of the American Medical Association par. 807 54

Declaration of Helsinki 54

Dorland's Illustrated Medical Dictionary at 296 (26th ed. 1985) 32

Forrest, "The Delivery of Family Planning Services in the United States," 20 Fam. Plan. Persp. 88 (March/April 1988) 48

Forrest, et al., "U.S. Women's Contraceptive Attitudes and Practices: How Have They Changed in the 1980s?" 20 Fam. Plan. Persp. 112 (May/June 1988) 5

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Gentile and Schwarz, "Elective Abortion: Techniques, Risks, and Complications," in Genetic Disorders and the Fetus: Diagnosis, Prevention and Treatment (Milunsky ed. 1986)	60
Glass, "Egg Transport and Fertilization," in Gynecology and Obstetrics, Sciarra, ed. Vol. 5, Ch. 46 (rev. ed. 1985)	31
Hatcher, et al., Conceptive Technology (1988-89 ed.)	passim
Henshaw, et al., "Abortion Services in the United States, 1984 and 1985," 19 Fam. Plan. Persp. 63 (March/April 1987)	62
Hutchings, et al., "The IUD After 20 years: A Review," 17 Fam. Plan. Persp. 244 (Nov/Dec. 1985)	35
Institute of Medicine, Committee to Study the Prevention of Low Birthweight, Preventing Low Birthweight (National Academy Press 1985)	14

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Jones, et al., "Unintended Pregnancy: Contraceptive Practice and Family Planning Services in Developed Countries," 20 Fam. Plan. Persp. 53, 54 (Mar./Apr. 1988)	12
Koonin, et al., "Pregnancy-Associated Deaths due to AIDS in the United States," 261 JAMA 1306 (Mar. 3, 1988)	12, 61
Maine, Family Planning: Its Impact on the Health of Women and Children (Center for Population and Family Health, College of Physicians and Surgeons, Columbia University 1981)	13
Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient Practitioner Relationship (1982)	52, 53
Menken, "The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing," in C. Chilman, ed., Adolescent Pregnancy and Childbearing: Findings From Research, 169 (1980)	8
"Miferistone--Contragestive Agent or Medical Abortifacient?" The Lancet 1308 (1987)	38

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Milby, "The New Biology and the Question of Personhood: Implications for Abortion," 9 Amer. J. Law & Med. 31 (1983) 32

Milunsky, "Genetic Counseling -- Prelude to Prenatal Diagnosis," in Genetic Disorders and the Fetus, Diagnosis, Prevention and Treatment 3 (Milunsky, ed. 1986) 11, 59, 60

Mosher, "Fertility and Family Planning in the United States: Insights from the National Survey of Family Growth," 20 Fam. Plan. Persp. 212 (Sept./Oct. 1988) 11

National Academy of Sciences, Risking The Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol.1, C. Hayes, ed. (1987) 8

Nieman, et al., "The Progesterone Antagonist RU 486: A Potential New Contraceptive Agent," 316 N. Eng. J. Med. 187 (1987) . . . 38

Page

Ory, et al., Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods (Alan Guttmacher Institute 1983) 4, 5, 36, 57

Potts, "Birth Control Methods in the United States," 20 Family Planning Perspectives 288 (Nov./Dec. 1988) 37

"Post Coital Contraception," The Lancet 856 (Apr. 16, 1983) 32

"Pregnancy Prophylaxis: Parenteral Postcoital Estrogen, 67 Obstet. & Gynecol. 331-33 (1986) 33

Pritchard, MacDonald & Gant, Williams Obstetrics (17th ed. 1985) . . . . . passim

Rochat, et al., "Maternal Mortality in the United States: Report from the Maternal Mortality Collective," 72 Obstet. & Gynec. 91 (1988) 9

Rosenberg & Rosenthal, "Reproductive Mortality in the United: Recent Trends and Methodologic Considerations," 77 Am. J. Pub. Health 833 (1987) 13

Page

Shaw, "Medicolegal Aspects of Prenatal Diagnosis," in Genetic Disorders and the Fetus: Diagnosis, Prevention and Treatment at 799 (Milunsky ed. 1986) 59

U.S. Dept. of HHS, "IUDS: Guidelines For Informed Decision-making And Use" (1987) 35

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BRIEF AMICI CURIAE OF THE ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS, et al., IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

Amici[1] are concerned about women's reproductive health care for the following reasons: they provide or supervise reproductive medical care; they teach in medical schools; they provide information and counseling about reproductive health care matters and sexuality; or they provide genetic counseling. Amici submit this brief on

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[1] Amici include the Association of Reproductive Health Professionals, the National Association of Nurse Practitioners in Reproductive Health, the Naticnal Society of Genetic Counselors, the Association of Sex Educators and Therapists, the Sex Information and Education Council of the United States, the Ferre Institute, Inc., the Cedar Rapids Clinic for Women, the Fox Valley Reproductive Health Care Center, Inc., six deans of medical schools, 37 chairpersons of medical school departments of obstetrics and gynecology, and 64 other physicians and individuals. A more complete description of amici is set forth in Appendix A, as are the letters from counsel for appellant and appellees consenting to the filing of this brief, set forth in Appendix B.

behalf of appellees after securing the consent of appellant and appellees.

The sound practice of reproductive health care requires the ready availability of a full range of modern medical services, including contraceptives, genetic screening, counseling, and safe and legal abortion. Amici's professional experience is that obstructing or delaying the availability of abortion will severely impair medical practice and inevitably will result in serious injury or death to many women and their children.

Reproductive health care providers,[2] like their colleagues in other fields of

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[2] These professionals include physicians, surgeons, researchers, medical school teachers and administrators, nurses, nurse practitioners, and counselors. The term "physicians" is used where only physicians are licensed to perform a particular service, such as an abortion.

medicine, have legal and professional obligations to inform each patient of risks and benefits of all relevant treatment alternatives. Amici's professional obligations are shaped by each woman's right to be fully informed on these issues and to receive professional advice regarding her highly personal decisions about pregnancy and childbearing. Health professionals thus necessarily require the freedom to communicate medically pertinent information about health care options without state restrictions and without unworkable distinctions between "counseling" and "advising."

The Missouri statute imposes unconstitutional burdens upon the provision and receipt of essential health care. Restricting the rights long protected by this Court's privacy

decisions, including Roe v. Wade, 410 U.S. 113 (1973), and its progeny -- as urged by the State and the Solicitor General of the United States -- would eviscerate the essential health gains achieved in all areas of modern reproductive medicine.

BACKGROUND STATEMENT

Amici include the primary health care providers of many of the 55 million women of reproductive age in the United States.[3] Each of these women has unique needs and medical conditions which influence her decisions about whether and when to become pregnant or to use contraception and which contraceptive method to use.

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[3] Ory, M.D., et al., Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods 10 (Alan Guttmacher Institute 1983) ("Making Choices").

Legal and medical standards demand that physicians and other professionals offer a wide range of appropriate birth control alternatives to the approximately 36 million women who wish to prevent accidental pregnancy. Although more than 92 per cent of sexually active women use some contraceptive method,[4] even the most efficacious contraceptives are imperfect. Consequently, more than three million women in the United States face an unintended pregnancy every year.[5]

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[4] Forrest, et al., "U.S. Women's Contraceptive Attitudes and Practice: How Have They Changed in the 1980s?" 20 Fam. Plan. Persp. 112, 116 (May/June 1988).

[5] Making Choices at 10. For example, it is estimated that every year several thousand women using oral contraceptives nonetheless become pregnant. Oral contraceptives are the most effective reversible contraceptive method available today, with a typical expected failure rate of 3 per cent. Hatcher, et al., Conceptive Technology 151 (1988-89 ed.). Barrier methods of contraception, such as the diaphragm and

The most effective reversible contraceptive, the "pill," poses potentially serious medical risks for many women,[6] who often choose less reliable, albeit less health threatening, forms of birth control In turn, they have a heightened medical interest in abortion when contraceptives have failed.

The line between contraception and abortion drawn by the Missouri statute is not consistent with modern contraceptive technology and medical practice. Many forms of birth control operate, in whole or in part, to prevent implantation of a fertilized ovum -- which the State defines as protectable life (§§ 1.205.1(1) and 1.205.1(2)) -- into the

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condom, have typical failure rates of 18 and 12 per cent, respectively. Id. The intrauterine device ("IUD") has a typical failure rate of 6 per cent. Id.

6 See Contraceptive Technology at 194, 208-27.

uterine wall. The Missouri statute places under a legal cloud these recognized methods of contraception that are medically preferred for many women, including rape victims. Restricting these methods inevitably will result in higher incidences of morbidity and death.

Health professionals often cannot predict when abortion is absolutely "necessary" to save a pregnant woman's life, as is required by the Missouri statute before the Court (§§ 188.205, 188.210, and 188.215). Nonetheless, they can identify individual women with heightened risks of morbidity or mortality should their pregnancies be continued.

Among those facing the greatest medical risks are the 1.1 million teenagers who become pregnant each year, especially those younger than age 15.

They suffer high incidences of toxemia, anemia, miscarriage, premature labor, and prolonged labor and maternal death. Teenagers also suffer high incidences of premature and low birth weight deliveries, which in turn are leading causes of infant illness and death.[7]

Similarly, women with such medical conditions as coronary artery disease, diabetes, and hypertension -- all of which are common in women of advanced maternal age -- often face substantial risks to their health and lives by

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[7] See Menken, "The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing," in C. Chilman, ed., Adolescent Pregnancy and Childbearing: Findings From Research, 169, 187 (1980). See also National Academy of Sciences, Risking The Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. 1, C. Hayes, ed., 73 (1987). Nearly 40 per cent of teenage pregnancies are terminated by an induced abortion. Id. at 58. See also Brief Amicus Curiae of Center for Population Options, et al., detailing the particular medical hazards posed by teen pregnancy.

continuing a pregnancy.[8] Mentally retarded women unable to understand how they became pregnant also often face elevated health risks. Even for normally healthy women, the risks of morbidity and mortality are elevated if the pregnancy was unintended and the woman is forced to carry the pregnancy to term against her will[9] or to resort in despair to illegal abortion[10] or suicide. In fact, obtaining an abortion always presents lower risks of death and health problems

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[8] See Rochat, et al., "Maternal Mortality in the United States: Report from the Maternal Mortality Collective," 72 Obstet. & Gynec. 91, 93 (1988).

[9] See Cates, "Legal Abortion: The Public Health Record," 215 Sci. 1586 (1982).

[10] Pritchard, MacDonald & Gant, Williams Obstetrics 484 (17th ed. 1985) ("Williams Obstetrics") (detailing risks of severe hemorrhage, sepsis, bacterial shock, and acute renal failure associated frequently with illegal abortion).

for the woman than does continuing the pregnancy to term.[11]

Conversely, for the millions of women who want to conceive and bear a child, the reproductive health professional must offer genetic counseling, testing, and diagnosis. Even using these advanced techniques, the professional can merely predict risks before conception. Only several weeks after conception has occurred can the professional determine whether the pregnancy is doomed to produce a child suffering from a lethal or painfully disabling genetic condition.[12] Prenatal

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[11] Cates, "Abortion Myths and Realities: Who is Misleading Whom," 142 Am. J. Obstet. & Gynec. 954-56 (1982). The Brief Amicus Curiae of the American Public Health Association, et al., details the enhanced morbidity and mortality of childbirth over abortion.

[12] Because of educational and career opportunities, many women start having children at a much older age than

diagnosis also is essential for women who have been exposed to potentially teratogenic substances that cause fetal defects or mutations, such as women on anti-seizure medications or certain cancer therapies.[13]

Some medical difficulties also arise or may be detected only after conception. These include problems caused by the

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did their mothers. Mosher, "Fertility and Family Planning in the United States: Insights from the National Survey of Family Growth," 20 Fam. Plan. Persp. 207, 212 (Sept./Oct. 1988). Advanced maternal age is accompanied by a greater risk of certain genetic conditions (i.e., Down's Syndrome). See Milunsky, "Genetic Counseling: Prelude to Prenatal Diagnosis," in Genetic Disorders and the Fetus, Diagnosis, Prevention and Treatment 4 (Milunsky, ed. 1986) ("Genetic Disorders and the Fetus"). Thus, many women are in greater need of genetic counseling, and the alternative of abortion for genetic indications, than ever before.

[13] See Milunsky, supra n.12, at 4, 20-21. (Women on anti-convulsant medication have two to three times the risk of having a child with a major congenital problem.)

pregnancy itself, such as toxemia or pre-eclampsia -- which may elevate the woman's risk of death or injury if the pregnancy continues -- to diseases such as HIV infection (AIDS), which threatens the life of the woman and any child she may have.[14]

Advances in reproductive medicine, including access to safe, legal abortion services, have produced unquestioned health benefits for women. Contraceptive use has helped women time their childbearing and attain their desired family size.[15] Consequently, the decline

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[14] See Williams Obstetrics at 527-33; Koonin, et al., "Pregnancy-Associated Deaths due to AIDS in the United States," 261 JAMA 1306 (Mar. 3, 1989).

[15] The total fertility rate in the United States averages 1.8 births per woman. Jones, et al., "Unintended Pregnancy: Contraceptive Practice and Family Planning Services in Developed Countries," 20 Fam. Plan. Persp. 53, 54 (Mar./Apr. 1988). By contrast, if a woman lacked access to a contraceptive

in the number of pregnancies and live births per woman, along with better medical care, has helped maternal mortality rates to plummet.[16]

Family planning also helps children. Effective contraceptive use has helped produce a decrease in low birth weight deliveries -- a great cause of infant mortality and morbidity -- by allowing women to increase the intervals between births and by reducing the number of births to women with a variety of high

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method, she could bear up to 16 children during the approximately 35 years during which she is fertile. See Contraceptive Technology at 134-37 (number of fertile years (35) divided by average birth interval of 2.25 years).

[16] See Rosenberg & Rosenthal, "Reproductive Mortality in the United: Recent Trends and Methodologic Considerations," 77 Am. J. Pub. Health 833, 833-36 (1987). See also Maine, Family Planning: Its Impact on the Health of Women and Children (Center for Population and Family Health, College of Physicians and Surgeons, Columbia University 1981).

risk characteristics, such as extreme youth or age, hypertension, and severe heart and kidney disease.[17]

SUMMARY OF THE ARGUMENT

The Missouri statute, by vesting a fetus with legal rights and by restricting abortion services, unquestionably undermines sound medical practice. Presently, the ability of physicians and other reproductive health professionals to individualize their counsel and care entails balancing the many medical, genetic, and emotional factors involved in each woman's pregnancy. If the professional's legal obligations were expanded to mandate absolute protection of the fetus, the health care provider would be forced to

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17 See Institute of Medicine, Committee to Study the Prevention of Low Birthweight, Preventing Low Birthweight 17-20 (National Academy Press 1985).

trade off the life and health of the woman -- a demand inconsistent with the Constitution, medical practice, and professional ethics. Similarly, if the health professional is restricted, out of concern for the fetus, from freely providing information about abortion and from offering it as a medical option -- as the Missouri statute also dictates -- the very core of reproductive health care will be eroded at great cost to the medical rights and lives of women.

ARGUMENT

This Court has "'stressed repeatedly the central role of the physician . . . in consulting with the woman'" about medical decisions involving abortion and contraception. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 447 (1983) (quoting Colautti v. Franklin, 439 U.S. 379, 387 (1979)). The

physician-patient relationship receives constitutional protection because central to any concept of ordered liberty is the right of individuals to make informed decisions about "whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). See also Griswold v. Connecticut, 381 U.S. 479 (1965).

The teaching of Griswold and its progeny "is that the Constitution protects individual decisions in matters of childbearing," Carey v. Population Services International, 431 U.S. 678, 687 (1977) (White, J., concurring in pertinent part and concurring in result), because "such decisions are none of the government's business." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 n.2

(White, J., dissenting).[18] The fundamental liberty interest protected by the Constitution includes not only the right to use contraceptives, but also the right to have an abortion. Thornburgh,

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[18] One of the most valued of our liberties is the "right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Thus, this Court consistently has adhered to the principle that:

> the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. See, e.g., Carey Population Services Intern'l, 431 U.S. 678 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). See also Whalen v. Roe, 429 U.S. 589 (1977). That promise extends to women as well as to men.

Thornburgh, 476 U.S. at 772.

476 U.S. at 776 (Stevens, J., concurring).

Because this right is fundamental, this Court long has recognized that the appropriate test to judge the constitutionality of state restrictions on abortion and contraception is the strict scrutiny test. An individual's right to make such decisions may not be infringed absent a compelling state interest, and even then, only by a statute narrowly tailored to meet that compelling interest:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in Roe -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Thornburgh, 476 U.S. at 772.

The Missouri law disrupts the important relationship between the woman and the medical professional upon whose advice and assistance she relies in making decisions about childbearing, contraception, and abortion. By defining the conceptus as human life, by restricting abortion services based on the State's "value judgment" favoring potential life over the health of the pregnant woman, and by limiting the information, advice, and care medical professionals can provide their patients, the Missouri law unconstitutionally burdens a woman's fundamental right to make these intimate decisions.

I. THE "PREFATORY" PROVISIONS IN THE MISSOURI LAW SUBSTANTIALLY INFRINGE UPON THE CONSTITUTIONAL RIGHT OF WOMEN TO RECEIVE, AND OF HEALTH PROFESSIONALS TO PROVIDE, FULL REPRODUCTIVE HEALTH CARE.

Sections 1.205.1(1) and (2), declaring that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being," plainly contravene this Court's holding that a state may not "by adopting one theory of life . . . override the rights of the pregnant woman that are at stake." Roe, 410 U.S. at 162.[19] The State directly "overrides" the rights of the woman and impairs the health professional's legal and ethical obligations to provide her with a full range of medical advice and care when it

[19] This principle, first laid down in Roe, was reaffirmed in Akron, 462 U.S. 416, and again in Thornburgh, 476 U.S. 747.

adopts a definition of life that is not and cannot be medically established.

A. By Bestowing Legal Rights On The Fetus, Missouri Unconstitutionally Requires Health Care Providers To Sublimate The Woman's Right To Continued Life And Health.

The State claims that neither subsection 1.205.1(1) nor 1.205.1(2) "does anything substantive" (St. Br. at 30).[20] That claim is belied by the State's later proclamation that these provisions represent "'a value judgment favoring childbirth over abortion'" (St. Br. at 30 (citation omitted)), and by its further assertion that these "nonsubstantive" provisions advance its value judgment by bestowing "rights on unborn children . . . in nonabortion

[20] The brief of Appellant, the Attorney General of the State of Missouri, is cited as "St. Br." The brief of the Solicitor General of the United States is cited as "S.G. Br."

situations" (St. Br. at 10), involving "tort, criminal and property law." Reproductive Health Services v. Webster, 851 F.2d 1071, 1076-77 (8th Cir. 1988) (rejecting the State's argument that §§ 1.205.1(1) and (2) have no substantive impact).

It is precisely these intended substantive effects that unconstitutionally burden the health care provider and the primary patient, the woman. As the Solicitor General freely admits, "the declaration that human life begins at conception" places "a burden of uncertain scope on the performance of abortions by supplying a general principle that would fill in whatever interstices may be present in existing abortion precedents." (S.G. Br. at 8 & n.5.) These statutory sections, however, deter not only the performance of abortions, but also a

broad range of reproductive care by unconstitutionally requiring a health professional to shift the principal focus of care from protecting the life and health of the woman to protecting the fetus.

The State itself concedes that these "prefatory" provisions govern the operative sections of the abortion law. (St. Br. at 10.) The State's preference for potential life thus explains the requirement under § 188.029 that a physician administer a battery of tests to a pregnant woman, thereby delaying the abortion and increasing the risk to the woman's own life and health in a futile attempt to preserve the non-viable fetus.[21] Likewise, the statutorily-

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[21] As set forth explicitly in the Brief Amicus Curiae filed by the American Medical Association, et al., the tests demanded by § 188.029 are futile at 20 weeks, a point at which the fetus has

mandated preference for the fetus bars a health professional, operating under the dictates of the funding provisions of § 188.205, from recommending, or under §§ 188.210 and 188.215, from providing or participating in abortions indicated for health reasons, but not strictly "necessary" to preserve the life of the woman.

These statutory sections also distort the delivery of essential medical services to a pregnant woman who has exercised her fundamental right to carry the pregnancy to term. By mandating that the fetus be regarded as a person from "the moment of conception," the State forces reproductive health providers into a professionally unpalatable "straightjacket." Compare Akron, 462

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virtually no chance of survival, and further increase the medical risks to the woman.

U.S. at 445; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 n.8 (1976). For example, a physician may well be obligated to direct that the woman undergo a cesarean section to protect the fetus, despite the competing demands of the woman's own health, and even over her objections. See Deaconess Hospital v. Ilester McRoberts, No. 87 4-00172 (Cir. Ct. St. Louis Cty., May 21, 1987) (citing §§ 1.205.1(1) and (2), judge ordered woman to submit to cesarean section to protect fetus).

By turning on its head the health care provider's obligation to protect in the first instance the health and life of the woman, the State requires a "trade-off" between the woman's health and "additional percentage points of fetal survival." Thornburgh, 476 U.S. at 768-

69, quoting Colautti, 439 U.S. at 400. It is precisely such a medically unworkable "trade-off" that the Constitution forbids. Id.

Indeed, the notion that one person may be required to "trade off" her health to save the life or health of another live-born person -- even a close relative -- is unprecedented in our jurisprudence. For example, in McFall v. Shimp, 10 Pa. D.&C.3d 90 (Allegheny Cty. 1978), the court refused to order a person to donate bone marrow necessary to save the life of his cousin. The court ruled that "one human being is under no legal compulsion to give aid or to take action to save another human being. . .."

Forcing medical procedures upon an unwilling person, even for the laudable purpose of helping another, is the antithesis of our most abiding principles

and would have dire consequences, the judge warned. Indeed:

> [f]or a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.

Id. at 91-92 (emphasis in original). See also In re Pescinski, 67 Wis.2d 4, 226 N.W.2d 180, 182 (1975) (court rejected attempt to force an incompetent man to donate a kidney to his sister, "where the dire need of the transfer [was] established" because of "the absence of real consent" and because there was not a demonstrated benefit to the brother).

Consistent with the constitutional and common law protection afforded the

inviolability of an individual person, this Court has held unconstitutional state mandated instances of bodily intrusion even upon the person of one who the state believes may have committed a crime. Compelling a person to submit to forced medical procedures would violate an individual's "right to be secure in his person guaranteed by the Fourth Amendment." Winston v. Lee, 470 U.S. 753, 755 (1985) (unconstitutional to surgically remove bullet from a suspect's body against his will for use as evidence).[22]

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[22] See also Rochin v. People of California, 342 U.S. 165, 172 (1952) (the forcible pumping of a criminal suspect's stomach was "conduct that shocks the conscience" and violative of the Fourth and Fourteenth Amendment due process rights); compare Schmerber v. California, 384 U.S. 757, 772 (1966) (although the state may, in narrow, limited circumstances, compel an individual to take a blood test, that holding "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions").

Surely, the rights of a pregnant woman should not be subordinate to those of every other member of society; conversely, the rights of the fetus should not be superior to the rights of a live-born person. If a person may not be compelled to sacrifice his or her own life or health for that of another human being, then, a fortiori, the State may not compel such a sacrifice for the benefit of a fetus, which is not a "person" at any stage of development. Roe, 410 U.S. at 157-58 & n.54.

Sections 1.205.1(1) and (2), alone and coupled with other substantive provisions of Missouri law, give rise to the potential for criminal prosecution or tort suits on behalf of the fetus. The reproductive health care provider thus disregards at his or her own peril the

State's proclamation that life begins at conception. A more chilling rule under which to practice medicine scarcely can be imagined.

B. By Incorrectly Defining The Beginning Of Life, The State Unconstitutionally Restricts The Ability Of Health Professionals To Administer Contraceptives And Other Reproductive Health Services To Women.

The State defines life as beginning at conception and, in turn, attempts to define conception as "the fertilization of the ovum of a female by a sperm of a male." § 188.015(3). Here, as in the courts below, the State contends that "one cannot dispute the established biological fact that the life of an individual human being . . . begins at conception." (St. Br. at 26 (emphasis

omitted).)[23] But that conclusion is precisely what this Court eloquently rejected in Roe, 410 U.S. at 159-60, and what is forcefully disputed today by recognized medical authority.

Conception is not a single stage or one-step process. Fertilization of the ovum itself consists of a series of separate, interdependent steps before the first cell division.[24] According to standard medical authorities, conception is not synonymous with fertilization of the ovum. Rather, conception --

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[23] In the Court of Appeals, the state went one additional step, contending: "The United States Supreme Court misspoke when it declared that the question of when life begins could not be resolved." 851 F.2d at 1076 n.7. The Court of Appeals properly replied, "we see no merit in addressing this contention." Id.

[24] Glass, "Egg Transport and Fertilization", in Gynecology and Obstetrics, Sciarra, ed., Vol. 5, Ch. 46 at 1-3 (rev. ed. 1985).

pregnancy -- occurs six to seven days later, when the fertilized egg, now called a blastula or blastocyst, becomes implanted in the uterine wall.[25] Implantation also consists of several steps.

Thus, defining life as beginning at fertilization does not result in a bright line demarcation between contraception, which purportedly is permitted even under the State's view, and abortion, which the State restricts. Faced with the State's definition of when life begins, a reproductive health care provider is left to founder in a sea of legal uncertainty

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25 Williams Obstetrics at 88-91. See also Dorland's Illustrated Medical Dictionary at 296 (26th ed. 1985); Milby, "The New Biology and the Question of Personhood: Implications for Abortion," 9 Amer. J. Law & Med. 31, 35 (1983).

Conception does not occur each time an ovum is fertilized; only 50 per cent of fertilized ova ultimately become implanted. "Post Coital Contraception," The Lancet (Apr. 16, 1983) 856.

when prescribing well-accepted contraceptives that may prevent implantation of the blastocyst should ovulation and fertilization have occurred.

For example, oral contraceptives, such as estrogen, may deliberately be administered in high doses to prevent implantation if fertilization has occurred, especially in treatment for sexual assault victims. Rape is the classic example in which a physician administers a contraceptive after coitus. Such treatment most likely will prevent implantation.[26]

Used in this manner, post-coital contraceptives spare the woman who has suffered sexual assault the agonizing

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26 See "Pregnancy Prophylaxis: Parenteral Postcoital Estrogen," 67 Obstet. & Gynecol. 331-33 (1986); Adashi, "The Morning After: novel hormonal approaches to postcoital interception," 39 Fertil. & Steril. 267-69 (1983).

wait until the onset of the next expected menstrual period to learn whether she is pregnant. She thus is relieved of the need to consider whether to undergo a surgical abortion at that point. Yet, prescribing such contraceptives to victims of sexual assault is precisely what the State's definition and protection of the conceptus prohibits.

The IUD, which long has been accepted as a contraceptive, also is threatened by the State's expansive definition of the conceptus as protectable "life." The most likely working mechanism of an IUD is to prevent fertilization.[27] However, an IUD on occasion is thought to prevent

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[27] Alvarez, et al., "New insights on the mode of action of intrauterine contraceptive devices in women," 49 Fertil. & Steril. 768 (1988).

implantation,[28] particularly when inserted post-coitally.[29] The Missouri statute, however, would forbid post-coital insertion of the IUD. Thus, victims of sexual assault are also denied use of this effective and often prescribed contraceptive method.

Indeed, the Missouri law may threaten these and other medically accepted contraceptive methods by inhibiting physicians from prescribing them at all. Many women now regularly use combined oral contraceptives, which have lower levels of estrogen, because of the perceived health risks of the older,

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[28] Hutchings, et al., "The IUD After 20 years: A Review," 17 Fam. Plan. Persp. 244,245 (Nov/Dec. 1985). See also U.S. Dept. of HHS, "IUDS: Guidelines For Informed Decision-Making And Use" (1987).

[29] Contraceptive Technology at 377.

higher estrogen dose pills.[30] The lower dose oral contraceptives, however, do not suppress ovulation as effectively as the high estrogen oral contraceptives. Nonetheless, the newer combined oral contraceptives frustrate conception in other ways, including affecting the transportation of the fertilized ovum through the fallopian tubes, so as to decrease the likelihood of implantation.[31]

These "prefatory" sections also will restrict research on the development of new contraceptive methods which are thought to inhibit implantation.[32] For

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30 See Contraceptive Technology at 208, 212-15.

31 Making Choices at 5; Contraceptive Technology at 252-53.

32 Restricting access to certain contraceptives appears to be the goal of many of the opponents of legal abortion. See Williams Obstetrics at 478 (opponents of abortion frequently oppose "the

example, the most significant new development in post-coital contraceptive technology, RU 486, is considered to have great potential precisely because it can act during the indeterminate period between contraception and abortion. This drug will induce menses in women who are not pregnant and also will block the working action of progesterone -- the hormone which supports implantation of

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dissemination and application of effective contraceptive techniques"); see also Brief Amicus Curiae of Birthright on behalf of Appellants herein, at 12 ("[E]veryone recognizes that abortion is basically the final step of contraception.").

Restrictive contraceptive laws in the past have had a severe impact on reproductive health care. The two American scientists who developed the first oral contraceptives were barred by state law from performing their clinical trials in the state in which they practiced. They were forced instead to conduct such trials in Puerto Rico. Potts, "Birth Control Methods In the United States," 20 Fam. Plan. Persp. 288, 289 (Nov./Dec. 1988).

the fertilized ovum -- thus preventing pregnancy when implantation has already occurred.[33]

Finally, by defining the fertilized ovum as a person with legal rights, the State inhibits the development of *in vitro* fertilization -- research that advances the State's enunciated goal of fostering childbirth. *In vitro* fertilization often produces an excess of fertilized ova that are not reinserted in

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[33] *Contraceptive Technology* at 393; Nieman, *et al.*, "The Progesterone Antagonist RU 486: A Potential New Contraceptive Agent," 316 *N. Eng. J. Med.* 187 (1987). Recently, RU 486 has been used in France to induce chemical abortions early in pregnancy. It should be noted that RU 486 is a fertility control agent but has the potential for being used in a manner which is not reasonably categorized as either contraception or abortion. Some medical authorities in fact refer to RU 486 as a "contragestive" agent, which indicates the difficulty of describing its working mechanisms with the pre-existing vocabulary. *See* "Miferistone--Contragestive Agent or Medical Abortifacient?" *The Lancet* 1308 (1987).

the woman and that may be discarded subsequently. Fearing prosecution for destruction of fertilized ova, physicians may decline to develop such new reproductive techniques.

By wrongly defining life as beginning at fertilization, the State thus interferes with the constitutional rights of millions of women who must use contraceptive methods that can act after fertilization; it impedes reproductive health professionals by subjecting them to possible criminal and tort law sanctions; and it blocks advances in reproductive medicine that not only often render surgical abortion unnecessary, but also promote the State's interest in healthy, live-born children.

C. The Natural Continuum Of This Court's Privacy Cases From Contraception To Abortion Requires That The Same Constitutional Standard Be Used To Evaluate Proposed Restrictions On Each.

Unquestionably, the aspect of privacy and due process "liberty" at issue in the cases culminating in Roe is "the freedom from unwarranted governmental intrusion into individual decisions in matters of childbearing." Thornburgh, 476 U.S. at 775 (Stevens, J., concurring). Because there is no principled distinction separating the liberty to use contraceptives to avoid childbearing from the liberty to have an abortion, the proposal by the State and the Solicitor General to evaluate state abortion laws under a less rigorous -- or perhaps non-existent -- standard of review, also must fail. See Thornburgh,

476 U.S. at 772-79 (Stevens, J. concurring).[34]

Just as there is no bright physiological line separating contraception from abortion, there is no legal principle by which to segregate the long continuum of cases protecting the individual's right to make decisions about family, marriage, and childbearing. The distinction that the State and the Solicitor General attempts to draw between cases recognizing a constitutional right of privacy protecting the use of contraceptives and cases protecting a constitutional privacy right to an abortion simply does not

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34 ". . . I fail to see how a decision on childbearing becomes less important the day after conception than the day before. Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the post-conception decision that is the more serious." Id. at 776.

exist. (St. Br. at 18-20; S.G. Br. at 11-14.)

As this Court recognized in Griswold, the right to privacy inherent in the right to use contraceptives stems from several constitutional provisions embodied in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Griswold, 381 U.S. at 484-85. Any attempt to place this Court's historical cases from which emanated the right of privacy into simplistic legal pigeonholes and to limit the scope of those cases only to a single constitutional provision (S.G. Br. at 11-13) fails to appreciate the complexity of the constitutional concept of privacy. See Griswold, 381 U.S. at 481-84; Akron, 462 U.S. at 426-27 (rejecting attempt to classify privacy cases).

Similarly, any attempt to distinguish these privacy cases based on the "potentiality" of the life of the fetus also must fail. Although perhaps "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward." Akron, 462 U.S. at 461 (O'Connor, J., dissenting), for that matter, life is no less "potential" at the point at which a man and a woman engage in sexual intercourse. Nor is it any less "potential" at the moment of sexual intercourse than at the point of fertilization. As the above discussion demonstrates, protecting all such "potential" life would eviscerate modern contraceptive practice.

It is not the abstract "potential" for life that the Court in Roe recognized as compelling enough to justify narrow restrictions on post-viability abortions.

Rather, it is the probability of a live-born person that Justice Blackmun's viability determination addressed as the point at which the state's interest in the life of the fetus becomes compelling. Roe, 410 U.S. at 162-65.[35] Unlike fertilization, the determination of whether a fetus is viable is one that the woman's physician has long been medically

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[35] See also Justice Stevens' concurrence in Thornburgh, 476 U.S. at 778:

> I should think it obvious that the state's interest in the protection of an embryo -- even if that interest is defined as "protecting those who will be citizens," ibid. -- increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus -- and pregnancy itself -- are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

equipped to make. Colautti, 439 U.S. at 388-89.[36]

Neither the rational basis test nor the undue burden test proposed by the State and the Solicitor General achieves in any principled manner their purported goal of protecting potential life. Under the Solicitor General's analysis, "the relevant question would be whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking into account all the available options available to her, including abstinence and contraceptives."

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[36] Notwithstanding the medical advances of the past 16 years, viability continues to hover at approximately 24 weeks, as this Court recognized in Roe, 410 U.S. at 160. Even at 24 weeks, the mortality rate of extremely low birthweight infants is approximately 90 per cent, as discussed in the Brief Amicus Curiae of the American Medical Association, et al. Thus, viability has not advanced to a point closer to conception.

(S.G. Br. at 22 n.16.) This test allows abortion but only under the limited circumstances the Solicitor General deems permissible, such as rape and incest. It thus protects only that "potential life" which is not a consequence of forced sexual conduct, without any attempt at explaining why that "potential life" is more deserving of protection.

The ostensible intent of the Solicitor General's analysis is to prohibit abortion as a "form of routine family planning." Id. That erroneous characterization -- coupled with a test that imposes upon a woman and medical science the impossible task of achieving perfect contraception -- demonstrates a philosophical bias that is grounded not in fact but simply in the unexpressed notion that a woman should be punished for participating in sexual intercourse.

This Court rejected that notion first in Eisenstadt, 405 U.S. at 448 ("[i]t would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . ."), and again in Roe, 410 U.S. at 148, and in Carey, 431 U.S. at 694-95.

With more than 92 per cent of sexually-active women using contraceptives, abortion simply is not a "routine form of family planning."[37] And, unfortunately, there is no fail-proof method of contraception. Thus, the Solicitor General's focus upon whether a woman has had a "meaningful opportunity to avoid unwanted pregnancy" imposes upon a woman the use of abstinence, despite the dictates of her conscience and

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[37] See note 4, supra; Williams Obstetrics at 811.

religion and despite the sanctity of marriage. The abstinence that the Solicitor General would impose on all persons thus satisfies his standard only by completely eliminating the need for abortion.

This test is unworkable in practice, given the failure rates of many contraceptive methods and the limited access many women have to contraceptives and to basic reproductive health care.[38] Among the questions left unanswered -- perhaps because they are unanswerable -- under the Solicitor General's approach are: May a woman have an abortion if she more than once has experienced a contraceptive failure? May a woman have an abortion if she once forgets to use a

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38 See Forrest, "The Delivery of Family Planning Services in the United States." 20 Fam. Plan. Persp. 88 (March/April 1988).

contraceptive, but not if she has forgotten more than once? May she have an abortion if she planned the pregnancy but learns that the fetus has a fatal genetic disorder?

Relegating issues that implicate a woman's bodily integrity to the legislative process, as the Solicitor General suggests, is inconsistent with the important role of protecting individual liberty that the framers of the Constitution assigned to this Court. See Thornburgh, 476 U.S. at 781-82 (Stevens, J., concurring) (framers "placed a special premium on the protection of individual liberty" and "recognized that certain values are more important than the will of a transient [legislative] majority"). See also West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Defining the fertilized ovum as a "person" thus not only is contrary to established medical practice but also threatens to restrict the prescription and use of all contraceptive methods. Such restrictions strike at the heart of the fundamental right recognized by all members of this Court who have had occasion to address it. See Griswold, 381 U.S. 617 (1965); Carey, 431 U.S. 678 (1977); Thornburgh 476 U.S. 747, 785 (White, J., dissenting).

II. SECTION 188.205 RESTRICTS NECESSARY COMMUNICATIONS BETWEEN PATIENTS AND HEALTH CARE PROVIDERS AND INFRINGES UPON THE RIGHT OF PATIENTS TO MAKE DECISIONS ABOUT MEDICAL CARE AND CHILDBEARING.

Just as the State's definition of when life begins implicitly impedes the ability of all health professionals to advise women of the full range of constitutionally-protected reproductive

health care options, the State explicitly restricts health professionals and their patients when, in § 188.205, it bars the use public funds to "encourag[e] or counsel[] a woman to have an abortion not necessary to save her life." Although the State now contends that § 188.205 prohibits only "affirmative" counseling, while allowing the provision of information (St. Br. at 42-43),[39] § 188.205 would, whatever its interpretation, severely inhibit the health care professional's ability to provide, and the woman's ability to receive, the information and counseling necessary before the woman can make a

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[39] As noted by Appellee, the new construction of § 188.205, offered for the first time before this Court, was developed by the State only after two lower courts rejected the State's prior construction as plainly unconstitutional.

truly informed decision about such fundamental choices as bearing a child.

As both a legal and ethical imperative, the dialogue which must exist between doctor and patient is embodied in the doctrine of informed consent.[40] Informed decisionmaking is neither a stagnant doctrine nor an abstract goal; it is an ongoing process which serves as a touchstone of ethical medical practice. Informed consent promotes the self-

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40 See Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972). See also Brody, "The Meaning of Informed Consent," Michigan Medicine 557 (Nov. 1984); Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient Practitioner Relationship, (1982) (hereinafter cited as Making Health Care Decisions).

determination of patients, as well as their health.[41]

To help a patient make an informed decision, health care professionals have a legal and professional duty to inform a patient of all relevant health hazards and advantages of each treatment option and to recommend the most appropriate ones. This duty of the professional, and the corresponding right of each woman to obtain such information and advice, is recognized by health care providers in every facet of the biomedical

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41 Recent studies indicate that informed patients "tend toward greater compliance with certain therapeutic regimens, reduced levels of anxiety, faster recovery from surgery, and enhanced ability to protect their own well-being . . .." Second, patients making informed decisions are likely to better advance their own life plan." Making Health Care Decisions at 69-70.

community.[42] By restricting "affirmative" counseling about the very important option of abortion, the Missouri statute eviscerates the possibility of a truly informed decisionmaking by the patient in need of publicly-funded health care counseling.

The bright line the State of Missouri purports to draw in § 188.205,

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42 See, e.g., Current Opinions of the Council of Ethical and Judicial Affairs of the American Medical Association ("AMA Opinions") par. 807.

The Declaration of Helsinki, adopted by the World Medical Assembly, succinctly details the elements of informed consent:

a) explanation of proposed treatment;

b) explanation of inherent risks and benefits;

c) alternatives to proposed treatment;

d) adequate time for patient questions; and

e) option to withdraw.

separating abortion counseling from all other reproductive health care counseling, again simply does not exist. Health care providers presently provide patients desiring contraceptive services with a panoply of options, including: periodic abstinence; barrier methods, such as the condom and the diaphragm; the intrauterine device ("IUD"); and oral contraceptives.[43]

Counseling about abortion must occur as an indispensable component of counseling about contraceptives. A reproductive health professional must provide every woman with the information required to perform a detailed calculus that is indispensable to an informed decision. This calculus requires each woman to weigh the desire to avoid

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43 See Contraceptive Technology at 150-62.

pregnancy, the health risk posed by each method of birth control, and the relative failure rates of each method against the health risk posed by either pregnancy or abortion, and the need to consider whether to carry to term or have an abortion should the contraceptive method actually fail.[44]

For example, women suffering from coronary artery disease, cerebrovascular disorders, benign or malignant liver tumors, or cancer of the breast or reproductive system absolutely should not use oral contraceptives, the most effective reversible method of preventing pregnancy.[45] Many of these medical conditions may also complicate pregnancy and demand that pregnancy be avoided

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[44] Contraceptive Technology at 150-162, 388-89.

[45] Williams Obstetrics 814-17; Contraceptive Technology at 209-10.

altogether.[46] In these situations, a physician may well recommend that the woman use a barrier method of contraception -- with the possibility of an early abortion as a last resort should pregnancy occur -- given the relatively higher failure rate for barrier methods of contraception.[47]

A woman who must avoid both oral contraceptives and pregnancy for health reasons cannot make an informed decision about contraceptive use without being counseled about the option of abortion as a last resort should her method of contraception fail. Yet § 188.205 would restrict such counseling. Thus, by inhibiting the dialogue about abortion that must occur between health care provider and patient, § 188.205

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[46] See Williams Obstetrics at 477.

[47] See Making Choices at 34.

unconstitutionally interferes with the physician's duty to provide medical care and with the patient's right to make a voluntary, knowledgeable decision in choosing the best contraceptive alternative.

Ironically, in its eagerness to prevent women from having abortions through § 188.205, the State also substantially interferes with counseling those patients who seek to exercise their constitutional right to have a child. See Maher v. Roe, 432 U.S. 464, 474 (1977).[48] For patients at risk of transmitting a genetic condition, reproductive autonomy is enhanced by genetic counseling, a process that

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[48] That right of choice is often exercised in the context of the marital relationship, the primacy of which long has been recognized and protected by the Court. See Safley v. Turner, 482 U.S. 78 (1987).

communicates the risk of occurrence or recurrence of a genetic disorder within a family.[49]

Prevailing medical standards, as well as the risk of malpractice liability, dictate that genetic screening and counseling be offered patients at risk.[50] These patients, like contraceptive patients, must be advised of the full range of options, including: the availability of prenatal diagnosis of the disease; the effect of the disease on

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[49] Milunsky, "Genetic Counseling--Prelude to Prenatal Diagnosis," in Genetic Disorders and the Fetus, 3, 4.

[50] See generally Shaw, "Medicolegal Aspects of Prenatal Diagnosis," in Genetic Disorders and the Fetus at 799-817, and cases cited at pp. 815-17. See also American College of Obstetricians and Gynecologists, Department of Professional Liability, Alert: Professional Liability Implications of AFP Tests (May 1985) ("imperative that every prenatal patient be advised of the availability of [alpha-fetoprotein] tests" to screen for neural tube defects).

the fetus should it be born alive; and the opportunity of terminating the pregnancy.[51]

The reproductive health care provider may be professionally obligated to counsel about abortion as an alternative if the genetic condition is a fatal one, such as Tay-Sachs, and one which would subject the child and the family to a great deal of suffering. The health professional has a similar duty to counsel a pregnant woman with AIDS given the risk of transmitting that fatal

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51 Milunsky "Genetic Counseling -- A Prelude to Prenatal Diagnosis," in Genetic Disorders and the Fetus at 5. Given the present state of medical knowledge and technology, pregnancy termination is "the predominant preventative approach" for helping patients avoid transmitting a genetic condition. Thus, a discussion of abortion must be included as a part of the prenatal and pre-pregnancy genetic counseling process. Gentile and Schwarz, "Elective Abortion: Techniques, Risks and Complications," in Genetic Disorders and the Fetus at 723.

disease to her offspring and given the increased risk to her health of carrying the pregnancy to term.[52] Yet, a physician or genetic counselor who engages in such counseling with a patient dependent upon public funding for medical care risks violating § 188.205.

Sections 188.210 and 188.215 of the Missouri statute also burden health care providers and their women patients. These provisions explicitly prevent physicians from performing abortions in public hospitals, even when the patient can pay for such an abortion, and even if the physician provides such services as part of a private, non-governmentally funded practice. These provisions, which compound the restrictions imposed by

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52 Koonin, et al., "Pregnancy-Associated Deaths due to AIDS in the United States," 261 JAMA 1306 (Mar. 3, 1989).

§ 188.205, further prevent all public employees from participating or performing abortions unless the procedure is "necessary to save" the woman's life.

In many communities, physicians maintain both a private practice and staff privileges at the public hospital, which may be the only appropriate facility in which a physician may safely perform an abortion.[53] The health care professional, who must counsel about abortion, which, although indicated for medical reasons, may not be absolutely "necessary" to preserve the life of the

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53 See Henshaw, et al., "Abortion Services in the United States, 1984 and 1985," 19 Fam. Plan. Persp. 63, 67 (March/April 1987).

As set forth in Appellees' brief, "public facilities" is broadly defined to include even a facility leased by the State to a private physician. See § 188.200(2). Thus, these sections prevent even a privately-funded physician from performing an abortion in his or her private office.

woman, faces an insoluble dilemma: the professional is ethically compelled to suggest a medical alternative that is essentially unavailable to the patient if use of the public hospital is barred or if a publicly employed physician is the only available physician to perform the needed procedure. Especially for patients whose medical condition demands a hospital facility to assure a safe procedure, such as a woman terminating a pregnancy for genetic reasons that present late in the second trimester, the barriers that § 188.210 and § 188.215 erect to the effectuation of a constitutionally protected choice are absolute.

In summary, §§ 188.205, 188.210, and 188.215 trap the reproductive health care provider between the competing obligations of Missouri abortion law and

the legal and ethical requirements of all health care professionals. That trap inevitably will prevent health care providers from delivering needed medical care and counseling to patients attempting to exercise their constitutional right of choice.

CONCLUSION

The Missouri statutory scheme is unconstitutional, and the decision of the Court of Appeals should be affirmed.

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Dated: March 30, 1989

Special recognition is given to Mary Mason, Women's Law & Public Policy Fellow, Georgetown University Law Center, for her contributions to this brief.

APPENDIX A

Listing of Amici

Organizational and Institutional Amici

- The Association of Reproductive Health Professionals.
- The Association of Sex Educators and Therapists.
- The National Association of Nurse Practitioners in Reproductive Health.
- The National Society of Genetic Counselors.
- The Sex Information and Education Counsel of the United States (SIECUS).
- The Cedar Rapids Clinic for Women
- The Fox Valley Reproductive Health Care Center, Inc.
- The Ferre Institute, Inc.

Deans of Schools of Medicine

Colin Campbell, M.D.
Laurence Finberg, M.D.
Albert S. Kuperman
Dominick D. Purpura, M.D.
Rudy Schmid, M.D.
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Evan Imber-Black, Ph.D.
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Raymond H. Kaufman, M.D.
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Daniel R. Mishell, M.D.
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Jennifer R. Niebyl, M.D.
Warren N. Otterson, M.D.
Valeri Parisi, M.D., M.P.H.
William K. Rashbaum
Robert Resnik, M.D.
Daniel Riddick, M.D.
Geraldine St. Onge, M.D.
Richard H. Schwartz, M.D.
John J. Sciarra, M.D.
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Donald M. Sherline, M.D.
William N. Spellacy, M.D.
Michael R. Spence, M.D.
Morton A. Stenchever, M.D.
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Gerson Weiss, M.D.
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Physicians and Other Health Professionals

Maxine Antell, Ph.D.
Ricardo H. Asch, M.D.
Geraldine M. Berkman
Dr. Barbara K. Birshtein
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Lucy L. Brown, Ph.D.

Joan R. Cates
Hazel Chambers, M.D.
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Janna C. Collins, M.D.
Robin Panneton Cooper, Ph.D.
Lila G. Croen
Anne Haney Cross, M.D.
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Paul Gennis, M.D.
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Linda M. Hall
Ronnie Halper
E. Jack Harris, M.D.
Rhoda Elison Hirsch, Ph.D.
Ruth B. Hyman
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Jane Wellemeyer, M.D.
M. Henry Williams, M.D.
J. Robert Willson, M.D.
Herbert G. Winston, M.D.
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APPENDIX B

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
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ATTORNEY GENERAL

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March 27, 1989

Colleen K. Connell
Roger Baldwin Foundation of ACLU, Inc.
20 East Jackson Boulevard, Suite 1600
Chicago, Illinois 60604

Re: William L. Webster, et al., v. Reproductive Health Services, et al., No. 88-605, United States Supreme Court

Dear Ms. Connell:

In response to your request, Attorney General William L. Webster and the State of Missouri consent to your filing an amicus curiae brief on behalf of various individuals and organizations who provide reproductive health care service or who provide information and counseling services, including the Association of Reproductive Health Professionals, National Association of Nurse Practitioners in Reproductive Health, National Society of Genetic Counselors, the Association of Sex Educators and Therapists, the Sex Information Council of the United States, the Ferre Institute, Fox Valley Reproductive Health Care Center, Inc., Cedar Rapids Clinic for Women, et al., in support of appellees.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

JERRY L. SHORT
Assistant Attorney General

JLS:j

Planned Parenthood®
Federation of America, Inc.

March 24, 1989

Colleen K. Connell
The Roger Baldwin Foundation of ACLU, Inc.
Suite 1600
20 East Jackson Blvd.
Chicago, IL 60604

Re: Webster v. Reproductive Health Services, 88-605

Dear Ms. Connell:

Appellees hereby consent pursuant to Rule 36.3 to the filing of an amicus curiae brief on behalf of the Association of Reproductive Health Professionals, National Association of Nurse Practitioners in Reproductive Health, National Society of Genetic Counselors, the Association of Sex Educators and Therapists, the Sex Information Council of the United States, the Ferre Institute, Fox Valley Reproductive Health Care Center, Inc., Cedar Rapids Clinic for Women, and numerous obstetricians and gynecologists.

Sincerely yours,

Roger K. Evans
Director of Litigation

RKE/ts

cc: Jerry L. Short
Attorney for appellants

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